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Protecting California's Farmworkers During the Wildlife Crisis: The State's Response and the Need for Reform

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Protecting California's Farmworkers During the Wildlife Crisis: The State's Response and the Need for Reform

MARIA SALINAS*

ABSTRACT

Wildfires are a normal part of California's drought-prone landscape, but in recent years, blazes have become more deadly and destructive than ever before due to climate change, low precipitation, and forest mismanagement.¹ To date, the wildfires in 2020 remain some of the worst in the state's history in terms of acreage lost, loss of life, and structures destroyed.² Experts suggest that "without greater investment in prevention and systematic changes to combat the effects of climate change. . . California almost certainly has more record-setting fire seasons in store."³

This is a very grim reality for all Californians, but particularly for those whose entire livelihood rests on outdoor labor, such as farmworkers. During the peak of the wildfires in 2020, air districts like the Bay Area Air Quality Management District urged people to stay indoors to reduce the risk of inhaling toxic particulate matter,⁴ but farmworkers did not have this option.

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1. Priya Krishnakumar and Swetha Kannan, *The Worst Fire Season Ever. Again*, L.A. TIMES (Sept. 15, 2020), <https://www.latimes.com/projects/california-fires-damage-climate-change-analysis/>.

2. *Stats and Events*, CAL FIRE, <https://www.fire.ca.gov/stats-events/> (explaining that in 2021, there have been 8,367 fires reported, which is more than the 8,258 wildfires reported in 2020. However, in terms of acres destroyed, the 2020 wildfires destroyed 4,332,960 acres, as opposed to 3,083,507 acres in 2021); Julie Cart, *California's 2020 fire siege: wildfires by the numbers*, CALMATTERS (July 30, 2021), <https://calmatters.org/environment/2021/07/california-fires-2020/>; *2019 California Wildfires*, CTR. FOR DISASTER PHILANTHROPY (Oct. 10, 2019), <https://disasterphilanthropy.org/disaster/2019-california-wildfires/>.

3. Krishnakumar and Kannan, *supra* note 1.

4. Joseph Serna, et al., *Bay Area has the world's worst air quality thanks to this week's Northern California fires*, L.A. TIMES (Aug. 20, 2020), <https://www.latimes.com/california/story/2020-08-20/air-quality-danger-san-francisco-wildfire-smoke-ash>.

*They continued working under hazardous air conditions, inhaling toxins that pose devastating, long-term health effects.*⁵

Recognizing the severity of the situation, California's Department of Industrial Relations issued a proposed emergency action in 2019.⁶ The action required employers who conduct their businesses outdoors to issue an N95 particulate respirator when the air quality index (AQI) reached 151 for voluntary use by workers.⁷ But, from its inception, the action was replete with problems and was unenforceable. The Occupational Safety and Health Administration (OSHA) simply did not have the capacity to do site inspections to ensure compliance, and employers did not always provide the N95 masks in the first place.

In this investigation, I argue that despite its many shortcomings, the emergency regulation should be made permanent, at least until our legislators come up with a better solution to protect farmworkers. I further argue that alternative approaches are better suited to help us address the problem. These include changing industry norms, implementing hazard pay provisions on a local level, encouraging employers to be proactive about securing N95 masks, looking to other states that also face inclement weather conditions in the workplace for guidance, and increasing the presence of advocacy organizations.

Part I begins with a threefold background section. First, I explore the multi-billion dollar agribusiness model that exists in California and why it is so lucrative. Then, I address the harsh realities that farmworkers in the State face, and the lack of legal and social protections currently available to them. Lastly, I look at why wildfires are commonplace in California, and how a host of factors has made them much more deadly in recent years. In Part II, I focus on the factors that pushed farmworkers to continue working during the 2019 and 2020 wildfire seasons, despite hazardous air conditions. Some of the factors discussed include financial hardships, inability to qualify for unemployment insurance, and mounting pressure from farmers to pick the crops before they were ruined by the fires and ash.

In Part III, I explore the mobilizing efforts undertaken by three advocacy organizations that were instrumental in petitioning the State to adopt an emergency regulation that would protect outdoor workers. Next, I turn to the State's temporary emergency regulation and analyze its major components. Part IV then explores some of the major criticisms of the regulation, namely

5. Molly Peterson, *State Regulators Move to Protect Workers From Wildfire Smoke*, KQED (July 18, 2019), <https://www.kqed.org/science/1945176/state-regulators-move-to-protect-workers-from-wildfire-smoke>.

6. STATE OF CAL., DEP'T. OF INDUS. RELS., NOTICE OF PROPOSED EMERGENCY ACTION BY THE OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD REGARDING PROPOSED CHANGES TO CALIFORNIA CODE OF REGULATIONS, TITLE 8, NEW SECTION 5141.1 PROTECTION FROM WILDFIRE SMOKE (2019), <https://www.dir.ca.gov/oshsb/documents/noticeJul2019-Protection-from-Wildfire-Smoke-Emergency.pdf> [hereinafter PROPOSED EMERGENCY ACTION].

7. *Id.* at 7.

that it is unenforceable and that it does very little to actually protect farmworkers from the risks posed by wildfires.

Part V explores policy recommendations that can help us approach the situation from a different angle. I argue that local hazard pay provisions, encouraging employers to stockpile N95 masks for future use, greater presence of advocacy organizations, and adopting new value systems in agriculture can better help us to ensure the safety of our farmworkers.

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I. BACKGROUND

A. Agribusiness in California

According to the California Employment Development Department, “the agricultural sector is one of the largest industry sectors in California, and its performance is vital to the economic health of the state.”⁸ California’s agricultural sector is not just vital on a local level, it is also vital on a national and global scale,⁹ and has been praised as the most productive and innovative, often known as the “salad bowl capital of the world”.¹⁰ In fiscal year 2019-2020, California’s agricultural exports totaled \$21.7 billion, representing 16 percent of total U.S. agricultural exports,¹¹ which is an impressive feat for any one state. To put California’s exporting capacity into perspective, “California has remained the top export earnings State since 2000, with Iowa, Illinois, Minnesota, Nebraska, and Texas near the top of the list in any given year.”¹²

California’s agricultural success can be partially attributed to the diversity of its land and climate.¹³ Roughly speaking, the State is divided into seven production regions: the San Joaquin Valley, the Sacramento Valley, the Central Coast, the South Coast, the Desert, the Mountain region, and the North Coast.¹⁴ Out of these seven production regions, the San

8. *Agricultural Employment in California*, STATE OF CAL., EMP. DEV. DEP’T, <https://www.labormarketinfo.edd.ca.gov/data/ca-agriculture.html> (last visited Sept. 29, 2021).

9. CAL. RURAL POL’Y TASK FORCE, GOVERNOR’S OFF. OF PLAN. & RES., CALIFORNIA AGRICULTURE: FEEDING THE FUTURE, at 2 (2003), https://rural.legislature.ca.gov/sites/rural.legislature.ca.gov/files/OPR_report.pdf.

10. Assembly Agriculture Committee Hearing on Wildfire Impacts, CAL. ST. ASSEMBLY MEDIA ARCHIVES, at 25:05 (Nov. 18, 2020), <https://www.assembly.ca.gov/media/assembly-agriculture-committee-20201118/video> (statement of Rep. Robert Rivas).

11. CAL. DEP’T OF FOOD & AGRIC., AGRICULTURAL EXPORTS 2019-2020, at 1 (2020), https://www.cdfa.ca.gov/Statistics/PDFs/2020_Exports_Publication.pdf (explaining that the top ten exporting destinations included the European Union, Canada, China/Hong Kong, Japan, South Korea, Mexico, India, United Arab Emirates, Taiwan, and Turkey).

12. *Annual State Agricultural Exports Interactive Chart*, USDA (Feb. 28, 2020), <https://www.ers.usda.gov/data-products/state-agricultural-trade-data/annual-state-agricultural-exports/>.

13. See CAL. RURAL POL’Y TASK FORCE, *supra* note 9, at 7.

14. U.C. DAVIS AGRIC. ISSUES CTR., THE MEASURE OF CALIFORNIA AGRICULTURE: COUNTY LEVEL PRODUCTION, ch. III.4 at 68 (2000) <https://aic.ucdavis.edu/wp-content/uploads/2019/01/2000-moca-III.4.pdf> (explaining that aside from the productive San Joaquin Valley, the other regions all have their niche commodities. For example, the Sacramento Valley is known for its horticultural and field crops, particularly processed tomatoes and rice. The Central Coast is a major horticultural producer, as it includes the state’s top wine grape and vegetable growing areas. The South Coast also grows a number of horticultural crops, including citrus, and is a major producer of nursery and floriculture products. The Desert region produces winter vegetables, field crops, and horticultural specialties such as dates. The Mountain and North Coast regions hold California’s vast forest and rangeland resources. All of these regions contain some urban influence, but the coastal regions contain California’s major population centers).

Joaquin Valley is the leading production area in the State as it pertains to fruit, vegetables, livestock, tree nuts, and dairy products.¹⁵ The San Joaquin Valley employs a significant percentage of the state's farmworkers.¹⁶

B. The Perilous Work Conditions for Farmworkers

While land and climate diversity contributes to the state's agricultural success, it is equally important to recognize the hardworking men and women who care to and tend the land as a critical part of that success story.¹⁷ Ninety-two percent of California's agricultural workers are Latinx, and the remaining 8 percent include White, Asian American, and African American workers.¹⁸ Farmworkers are disproportionately male at seventy-seven percent, and most are between the ages of 25 and 44.¹⁹

Unfortunately, farmworkers are often undervalued and unappreciated, so their "lived realities stand in stark contrast" to the highly profitable agribusinesses in the State.²⁰ Since its inception, California's agribusiness has employed various mechanisms to ensure that farmworkers remain marginalized, including state intervention in labor relations through immigration and labor policy, creation of a racialized agricultural workforce that is denied livable wages, and continued replacement of existing workers with new (and cheaper) immigrant labor.²¹

Scholars argue that farmworkers exist in a "legal culture of agricultural exceptionalism" because they are "held captive to irregular employment, impoverishment, and inadequate and unsafe housing with attendant health consequences."²² On a national scale, for example, farmworkers have been

15. *Id.*

16. California Agricultural Employment 2019 Annual Average, ST. OF CAL. EMP. DEV. DEP'T (June 2021), <https://www.labormarketinfo.edd.ca.gov/file/agric/ca-ag-employ-map-2019.pdf>.

17. CAL. AGRIC. LAB. REL. BD., THE CALIFORNIA FARM LABOR FORCE: OVERVIEW AND TRENDS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY, at 8 (2005) <https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/CalifFarmLaborForceNAWS.pdf> (explaining that approximately thirty six percent of the nation's farmworkers are employed in California, many of them from Mexico. There are a lot of workers from Central America as well, but I couldn't find reliable statistics that detailed the percentage).

18. CAL. RSCH. BUREAU, FARMWORKERS IN CALIFORNIA: A BRIEF INTRODUCTION, at 1 (2013), <https://latinocaucus.legislature.ca.gov/sites/latinocaucus.legislature.ca.gov/files/CRB%20Report%20on%20Farmworkers%20in%20CA%20S-13-017.pdf>.

19. *Id.*

20. Sandy Brown & Christy Getz, *Farmworker Food Insecurity and the Production of Hunger in California*, CULTIVATING FOOD JUSTICE: RACE, CLASS, AND SUSTAINABILITY 121, 124 (Alison Hope Alkon & Julian Agyeman eds., 2011).

21. *Id.* at 124-25.

22. Guadalupe T. Luna, *The Dominion of Agricultural Sustainability: Invisible Farm Laborers*, WISC. L. REV. 265, 274 (2014).

historically excluded from key federal labor law legislation.²³ California has attempted to fill in the legal gaps stemming from federal exclusionary policies by enacting its own legislation, such as the Agricultural Labor Relations Act of 1975, which aims to protect the right of agricultural employees to full freedom of association and self-organization.²⁴ Despite the supplementary protections at the state level, however, conditions for farmworkers in California remain virtually unchanged since the 1970s.²⁵ California's farmworkers "continue to experience the same low literacy levels, poverty, poor working and housing conditions, dependency on labor contractors for work, undocumented status, and language isolation that limit accessibility."²⁶ As a result of all of these factors, California's farmworkers are often treated as cheap, disposable labor—so it is not surprising that they were forced to continue working during the State's deadly wildfire seasons.

C. Recurring Wildfires

California is a dry and drought-prone state, making wildfires a natural occurrence. But in recent years, the wildfires have become exponentially more destructive and devastating.²⁷ According to Nick Schuler, the acting Deputy Director of Communications for the Department of Forestry, the 2020 wildfires were the most destructive ever recorded in the State's modern history.²⁸ By the end of 2020, nearly 10,000 fires had burned through the State, destroying over 4.2 million acres.²⁹ Several factors contributed to the wildfires, including climate change, nature, factors such as unusual lightning

23. *U.S. Labor Law for Farmworkers*, FARMWORKER JUST., https://www.farmworkerjustice.org/advocacy_program/us-labor-law-for-farmworkers/ (explaining that until 1966, the Fair Labor Standards Act (FLSA) excluded farmworkers. The FLSA now applies the minimum wage and recordkeeping provisions, but the overtime pay provisions of the act are still not applicable to farmworkers. The FLSA also offers far fewer child labor protections to agricultural workers than to all other workers) (last visited Sept. 29, 2021).

24. 3 Witkin, Summary of Cal. Law (11th), Agency § 713.

25. See Brief of Amici Curiae Cal. Rural Legal Assistance, Inc., Cal. Rural Legal Assistance Found., Farmworker Just., And Cal. Cath. Conf. in Support of Respondents at 9, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107) [hereinafter Brief] (supporting the State regulation affording union organizers a limited right to access property on which agricultural employees are working).

26. *Id.*

27. Maanvi Singh, *California's wildfire smoke could be more harmful than vehicle emissions, study says*, THE GUARDIAN (Mar. 6, 2021), https://www.theguardian.com/us-news/2021/mar/06/california-wildfire-smoke-harmful-pollution-study?CMP=Share_iOSApp_Other.

28. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 34:20 (statement of CAL FIRE Chief Acting Deputy Director for Communications Nick Shuler).

29. 2020 *Fire Season*, CAL FIRE, <https://www.fire.ca.gov/incidents/2020/#:~:text=As%20of%20the%20end%20of,gigafire%22%20as%20the%20area%20burned> (last visited Sept. 29, 2021).

strikes, human contribution, fire mismanagement, and wind.³⁰ Moreover, 2020 was an especially hard-hit year: the State relies heavily on prison inmate labor to battle fires, but fewer individuals were on the front lines due to the COVID-19 pandemic.³¹

The impacts caused by the deadly blazes were impossible to escape, and even Californians who were fortunate enough to be out of the fires' immediate vicinity nonetheless experienced the effects of poor air quality.³² For example, in the fall of 2020, the Bay Area made headlines for "having the world's worst air quality."³³ Because the wildfires burned through infrastructures and homes, the resulting smoke was replete with toxic particles from chemicals, household cleaners, metals, and other debris.³⁴ In addition to air toxicity, the size of the particulate matter in the air was also very concerning.³⁵ Fine particulate matter, known as PM2.5, consists of particles that are 2.5 micrometers or less in diameter.³⁶ These particles were of huge concern for public health because they are so small and, when inhaled, enter the lungs, heart, and bloodstream.³⁷ PM2.5 inhalation can trigger a host of health issues, including eye irritation, coughing, wheezing, bronchitis, other respiratory problems, and even death.³⁸

Wildfires won't be going away any time soon, and are likely to intensify as a result of climate change.³⁹ Nonetheless, some experts are optimistic that focus and deliberate action will help us to better coexist with wildfires. They suggest that "identifying and mapping hazard areas, investing in forest health projects, creating green belts around communities, ensuring communities have proper evacuation routes, building homes out of burn-resistant amber, and public education" are key proactive measures that can be undertaken now to ensure that fires become more manageable in the future.⁴⁰

30. Kendra Pierre-Lois and John Schwartz, *Why Does California Have so Many Wildfires?*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/article/why-does-california-have-wildfires.html?>

31. Thomas Fuller, *Coronavirus Limits California's Efforts to Fight Fires with Prison Labor*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/2020/08/22/us/california-wildfires-prisoners.html> (explaining that the COVID 19 pandemic highlighted the state's problematic dependence of exploiting inmates to battle the state's seasonal wildfires).

32. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 36:30 (statement of CAL FIRE Chief Acting Deputy Director for Communications Nick Shuler).

33. See Serna, *supra* note 4.

34. See Singh, *supra* note 27.

35. California Air Resources Board et al., *Wildfire Smoke: A Guide for Public Health Officials* 12 (Aug. 2019), <https://www.airnow.gov/sites/default/files/2021-05/wildfire-smoke-guide-revised-2019.pdf>.

36. *Id.*

37. *Id.*

38. See Serna, *supra* note 4.

39. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 38:48 (statement of CAL FIRE Chief Acting Deputy Director for Communications Nick Shuler).

40. *Id.* at 39:12.

II. FARMWORKERS CONTINUED WORKING, DESPITE THE HAZARDOUS AIR QUALITY

The 2020 wildfires in California were the deadliest and most destructive in the state's history, yet farmworkers continued working in these hazardous conditions. Several factors can account for this grim reality: farmworkers needed to make ends meet, employers had an urgent need to have their crops picked, and the State had few safety nets available for farmworkers.

A. Farmers Continued Working Simply to Make Ends Meet

For the most part, farmworkers continued working during the 2019 and 2020 wildfire seasons, despite detrimental health risks, out of economic necessity. A common sentiment among farmworkers was that “it’s difficult to think about the long-term effects of the fires on one’s health, when you’re just trying to figure out next week.”⁴¹ Farmworkers often face financial hardships stemming from unlivable wages and exploitation by agribusiness.⁴² “The great irony” of the agricultural industry in California is that many farmworkers, who spend their days harvesting our food, are food insecure themselves.⁴³ Thus, farmworkers had no alternative—having a job working through the wildfires is better than not having one at all.

In a phone interview, Horacio Amezcuita, manager at San Jerardo Cooperative in Salinas providing housing for low-income farmworkers and their families, mentioned that during the height of the wildfires in 2020, he noticed no significant pause or disruption in work.⁴⁴ Mr. Amezcuita observed that those who do not typically work, such as children, stayed indoors when the air was particularly smoky, but farmworkers were in the fields every single day no matter the conditions, and he saw no other structural changes to the work day.⁴⁵ Further, Mr. Amezcuita relayed that San Jerardo residents who continued working in the fields during the wildfires mentioned that they “felt fatigued, didn’t have any energy,” and

41. Erika Mahoney, *Farm Workers Face Double Threat: Wildfire Smoke and COVID-19*, NAT’L PUB. RADIO (Sept. 7, 2020) <https://www.npr.org/2020/09/07/909314223/farm-workers-face-double-threat-wildfire-smoke-and-covid-19>.

42. *Id.*

43. See Brown & Getz, *supra* note 20, at 121.

44. Telephone Interview with Horacio Amezcuita, Gen. Manager, San Jerardo Coop., Inc. (Apr. 6, 2021) [hereinafter Amezcuita Interview]. Mr. Amezcuita is the manager at San Jerardo Co-Op in Salinas, a housing cooperative that provides affordable housing to farmworkers and their families. According to Mr. Amezcuita, the co-op houses approximately 250 workers, and 100 children. Mr. Amezcuita has been living there since 1979 and is one of the founding members. Mr. Amezcuita is well connected with the residents, so he provided me with very interesting observations he made during the wildfires, as well as anecdotal evidence from conversations he had with the residents.

45. *Id.*

generally felt very tired.⁴⁶ One worker in particular worked during the wildfires, then caught COVID-19 and fell into a coma.⁴⁷ This “double threat” of wildfire smoke and the rampant COVID-19 virus was commonplace for hundreds of farmworkers in Monterey County, and is a testament to their work ethic as they endured “one hardship after another.”⁴⁸

B. Farmworkers were Ineligible for Unemployment Insurance

Weak government response in light of the wildfires further pushed farmworkers to labor under hazardous air conditions. On August 18, 2020, California Governor Gavin Newsom proclaimed a state of emergency as a result of the wildfires.⁴⁹ In that declaration, Governor Newsom suspended provisions of Unemployment Ins. Code §1253, which imposes a one-week waiting period for unemployment insurance applicants who applied between August 14, 2020 and February 12, 2021 and were otherwise eligible for unemployment insurance.⁵⁰ Unfortunately, farmworkers did not benefit from the suspension of this provision because they do not qualify, as detailed below.

In an interview with Nicole Marquez, an attorney at the National Employment Law Project, Ms. Marquez mentioned that farmworkers were thrust into work because they did not qualify for unemployment benefits.⁵¹ To file a claim for unemployment, a worker must 1) be unemployed, 2) through no fault of their own, 3) be physically able to work, and 4) be ready and willing to accept work immediately.⁵² Most farmworkers did not qualify because they were employed, and if they decided to stay home because of the unhealthy air quality, they wouldn’t satisfy the “ready and willing to accept work” or “through no fault of their own” prongs of the test. As a result, farmworkers had no choice but to keep working.

C. Farmers Needed to Salvage their Crops

On the other hand, farmworkers were made to work because the crops simply could not wait. Farmers across California were racing against time to

46. *Id.*

47. *Id.*

48. *See* Mahoney, *supra* note 41.

49. EXEC. DEP’T., STATE OF CAL., PROCLAMATION OF A STATE EMERGENCY (2020), <https://www.gov.ca.gov/wp-content/uploads/2020/08/8.18.20-Fire-State-of-Emergency-Proclamation-text.pdf>.

50. *Id.*

51. Telephone Interview with Nicole Marquez, Dir. of Soc. Ins., Nat’l Emp. Law Project (Apr. 10, 2021) [hereinafter Marquez Interview]. In her previous role at Worksafe, a labor advocacy organization, Ms. Marquez, along with several other attorneys, were pioneers in petitioning the State to pass the emergency regulation.

52. *Requirements to File an Unemployment Claim*, STATE OF CAL. EMP. DEV. DEP’T, <https://edd.ca.gov/Unemployment/Eligibility.htm> (last visited Oct. 8, 2021).

pick and save their crops before the fires, smoke, and heat damaged them.⁵³ For example, in the North Coast agricultural region, smoke threatened the quality of grapes that were close to harvest, which would have resulted in massive losses for winemakers.⁵⁴ In the Central Coast, the unusually high temperatures and smoke caused berries to excessively soften, which made them susceptible to vinegar flies and pests.⁵⁵ Given this dire urgency to pick the crops, farmers continued their business operations as usual.

In a committee hearing on agriculture, the president of the California Farm Bureau Federation shed light on the plights of small farmers and emphasized that they are hurting.⁵⁶ Many farmers had everything from employee housing, to entire vineyards, harvests, and farm animals burn completely to the ground. During the committee hearing, ranchers recounted horrifying stories of watching and hearing their cattle burn in agony, while farmers spoke of feeling a deep sense of helplessness watching their year long's harvest and livelihood burn into nothing.⁵⁷ All of the farmers who spoke at the hearing felt disheartened knowing that wildfires will continue to threaten their businesses and crops, and further worried that insurers will begin to limit or deny them coverage in the future.⁵⁸

Over the past several years, farmers have experienced profound business losses as a result of the wildfires, but losses vary greatly depending on the type of crops.⁵⁹ For example, the Camp Fire, which burned through Northern California in November 2018, burned about 150,000 acres of mountain and foothill pasture and grazeland.⁶⁰ Agricultural economic losses are estimated at only about \$5 million dollars because most of that pasture recovered its productivity over the coming months.⁶¹ This stands in stark opposition to the Thomas Fire in Ventura and Santa Barbara counties in December 2017. That fire destroyed much less in terms of acreage than the Camp Fire, but it destroyed very high-value crops, including avocados and citrus. The total losses for that fire are estimated at \$70 million.⁶²

As of the time of this writing, experts are unsure of the economic ramifications of the 2019 and 2020 wildfire seasons because “the aggregate assessments for those recent fires remains incomplete,” but they hypothesize

53. Tim Hearnden, *Heat, wildfires threaten California crops*, WESTERN FARM PRESS (Aug. 19, 2020), <https://www.farmprogress.com/disaster/heat-wildfires-threaten-california-crops>.

54. *Id.*

55. *Id.*

56. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 1:00:45 (statement of President of California Farm Bureau Federation Jamie Johansen).

57. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 1:14:55, 1:20:45 (statement of hemp farmer Eddie Campos and cattle rancher Dr. Dave Daley).

58. *Id.*

59. Email from Dan Sumner, Prof. and Dir. of the Ag. Issue Center, U.C. Davis (Apr. 5, 2021).

60. *Id.*

61. *Id.*

62. *Id.*

that the agricultural losses likely exceed those from 2017 and 2018.⁶³ The 2020 wildfires occurred as early as August, which is prime harvest season, so many more crops were lost. The fires in 2020 were also more far-reaching in terms of geography and crops affected, so this also likely translates to a greater financial loss.⁶⁴ This bleak economic reality has been sobering for farmers, so when news of wildfires surfaces, they mobilize their workers to pick and save as much as they can.⁶⁵

III. CALIFORNIA'S RESPONSE TO THE WILDFIRE CRISIS

A. Organizing Efforts Behind the Emergency Mandate

After the 2017 and 2018 wildfire seasons, it became clear that farmworkers were especially vulnerable and that legislative measures to ensure their physical wellbeing were necessary. Three advocacy organizations, Worksafe, the California Labor Foundation, and the California Rural Legal Assistance Foundation (CRLA), were instrumental in petitioning the State's Department of Industrial Relations to pass an emergency regulation protecting people who performed outdoor work—particularly those in construction, landscaping, and farming—from the harmful effects of smoke inhalation.⁶⁶ Attorney Nicole Marquez, then working with *Worksafe*, said that the multi-organization effort arose after hearing countless stories of seasonal laborers in Sonoma County who were deeply affected by the wildfire smoke.⁶⁷ Those laborers were not being provided with personal protective equipment, there were no structural changes made to the workday to allow for more breaks, and farmworkers were being exposed to extremely toxic particulate matter.⁶⁸ Moreover, Ms. Marquez points out that the organizers of the wildfire mask mandate realized that the current regulatory standards were not up to par and that additional protections were merited, which set them on their quest to petition the State.⁶⁹

B. Passage of the Temporary Emergency Mandate

On July 18, 2019, the California Department of Industrial Relations, through the Occupational Safety and Standards Board, proposed changes to

63. *Id.*

64. *Id.*

65. See Hearden, *supra* note 53.

66. See Peterson, *supra* note 5.

67. See Marquez Interview, *supra* note 51.

68. *Id.*

69. *Id.*

the California Code of Regulations to address the wildfire crisis.⁷⁰ The Department cited many reasons for the emergency regulation: fires increasing in frequency, size, and intensity; the risks associated with PM2.5 inhalation; and the need to clarify how employers conducting their businesses outdoors should protect their employees from the harmful effects of smoke.⁷¹ The “Protection from Wildfire Smoke” emergency rule was adopted on July 18, 2019 and was initially set to expire on January 24, 2020.⁷² However, the rule’s expiration deadline has been extended multiple times through Executive Orders N-40-20 and N-66-20.⁷³

Cal. Code of Reg. §5141.1 applies to most outdoor workplaces where the AQI for PM2.5 is 151 or higher, and where the employer should reasonably anticipate that employees may be exposed to wildfire smoke.⁷⁴ Moreover, the mandate states that it is the responsibility of the employer to determine employee exposure to PM2.5 by checking the AQI forecast at the beginning of each shift and periodically thereafter. When the AQI is between 151 and 500, the employer shall provide a sufficient number of N95 respirators to employees for voluntary use and encourage them to use the equipment. When the AQI is above 500, which translates to “hazardous air quality,” respirators are absolutely required. Lastly, respirators “shall be cleaned or replaced as appropriate, stored, and maintained, so that they do not present a health hazard to the user.”⁷⁵

IV. CRITICISMS OF THE EMERGENCY MANDATE

A. The Mandate is Unenforceable

The mandate is simple enough, but employers often disregarded it. Part of the reason for this is that the mandate relies on the employer’s good faith efforts. For example, the emergency mandate states that it is the responsibility of the employer to check the AQI at the beginning of the

70. See PROPOSED EMERGENCY ACTION, *supra* note 6, at 5.

71. STATE OF CAL., DEP’T. OF INDUS. RELS., FINDING OF EMERGENCY, 1-3 (July 18, 2019), <https://www.dir.ca.gov/oshsb/documents/Protection-from-Wildfire-Smoke-Emergency-FOE.pdf>.

72. STATE OF CAL., DEP’T. OF INDUS. RELS., PROTECTION FROM WILDFIRE SMOKE (Aug. 2020), <https://www.dir.ca.gov/oshsb/Protection-from-Wildfire-Smoke-Emergency.html> [hereinafter PROTECTION FROM WILDFIRE SMOKE].

73. *Id.* According to the Department of Industrial Relation’s website, the emergency rule expired on January 20, 2021. However, I anticipate that it will be extended through another Executive Order as wildfire seasons approach, or at least until a more permanent solution is passed.

74. STATE OF CAL., DEP’T. OF INDUS. RELS., WORKER PROTECTION FROM WILDFIRE SMOKE (Feb. 2021), <https://www.dir.ca.gov/dosh/doshreg/Protection-from-Wildfire-Smoke/Wildfire-smoke-emergency-standard.html>.

75. STATE OF CAL., DEPT’T OF INDUS. RELS., Notice of Proposed Emergency Action by the Occupational Safety and Health Standards Board Regarding Proposed Changes to California Code of Regulations, Title 8, New Section 514.1 Protection from Wildfire Smoke (2019), https://www.dir.ca.gov/title8/5141_1.html.

workday or shift, and thereafter as necessary.⁷⁶ Checking the air quality on a daily basis is important because depending on the AQI, certain employer responsibilities are triggered. However, there was no accountability mechanism set in place to ensure compliance on the part of employers, making the mandate easy to disregard.

Moreover, the mandate is problematic because Cal OSHA does not have the capacity to conduct field inspections to ensure compliance.⁷⁷ According to Doug Parker, Chief at Cal OSHA, OSHA has about “200 field enforcement officers to inspect around 200,000 workplaces in California that are potentially impacted by wildfire smoke.”⁷⁸ Simply put, the agency does not have the people power nor the capacity to do a site visit, measure the air quality, and ensure that every employer is in compliance.⁷⁹ In light of these limitations, the California Department of Industrial Relations also set up an anonymous hotline where workers could report unsafe working conditions.⁸⁰ The hotline was seldom used by farmworkers, even when they witnessed violations of the emergency mandate, because they feared that the calls would be traced back to them.⁸¹ Fear of losing their livelihoods and/or of being deported due to immigration status, in addition to a general lack of awareness of the hotline’s existence in the first place, were the major reasons that the hotline went unused.⁸²

Critics of the mandate also argue that OSHA’s messaging is conflicting.⁸³ On the one hand, air districts urged people to stay indoors to avoid toxic smoke inhalation, avoid strenuous work or outdoor exercise, and to plan daily activities according to smoke conditions.⁸⁴ These public health advisories failed to consider the daily lived experiences of farmworkers whose entire work is centered in an outdoor field, and who cannot avoid being outdoors. The emergency mandate offers contradictory advice, telling workers that “they can go out into the field and exert themselves, as long as they have a mask in their possession.”⁸⁵ This dissonance underscores the fact that farmworkers’ continued labor is valued as essential, yet their health and wellbeing are not.

76. *Id.*

77. Monica Campbell, *Amid wildfires, US farmworkers labor with few protections*, THE WORLD (Sept. 18, 2020), <https://www.pri.org/stories/2020-09-18/amid-wildfires-us-farmworkers-labor-few-protections>.

78. *Id.*

79. *Id.*

80. STATE OF CAL., DEP’T. OF INDUS. RELS., *COMO REPORTAR A UN EMPLEADOR INCUMPLIDO?*, https://www.dir.ca.gov/letf/Spanish/Reporting_Unlawful_Activities.html (last visited Nov. 9, 2021).

81. *See* Campbell, *supra* note 77.

82. *Id.*

83. *See* Mahoney, *supra* note 41.

84. *See* AIRNOW, *supra* note 35.

85. *See* Mahoney, *supra* note 41.

B. Farmers Believe that the Mandate is too Restrictive

Farmers' response to the regulation has also been mostly negative. At a committee hearing on agriculture at the State capitol in November 2020, Jamie Johansen, the President of the California Farm Bureau Federation, which represents the interests of farmers and ranchers throughout California, called for more flexibility from OSHA and argued that the mandate was difficult for employers to comply with.⁸⁶ Mr. Johansen noted that in light of the unprecedented COVID-19 pandemic, personal protective equipment, such as N95 masks, was virtually impossible to come across.⁸⁷ The State recognized that the global pandemic was making N95 masks hard to find, so the Office of Emergency Services shipped more than three million masks to county agricultural commissioners in 35 counties for distribution to farmworkers.⁸⁸ However, Mr. Johansen argued, despite this effort mask access was still not feasible.⁸⁹ He further argued that given mask unavailability, the mandate "prevented even the most usual of activities, such as harvesting, planting or cultivation, or application of pesticides."⁹⁰ Mr. Johansen ended his testimony by urging the State to adopt a less restrictive approach that would give employers more flexibility, or at the very least, have the county agricultural commissioners stockpile N95 masks to ensure that there would not be another shortage in the future.⁹¹

Employers are also wary of the mandate because they fear liability. The California Association of Winegrape Growers website, for example, urges growers to stockpile N95 masks because "wildfires in California have tragically become routine" and with the mandate still in effect, it is employers' responsibility to protect workers.⁹² The website reiterates the major responsibilities for employers set out in the emergency regulation and how to comply with them.⁹³ The website also reminds growers that the use of the mask is entirely voluntary if the AQI is below 500.⁹⁴ The Association

86. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 1:06:11 (statement of President of California Farm Bureau Federation Jamie Johansen).

87. *Id.* at 1:05:20.

88. Manuela Tobias, *California farmworkers say they didn't get masks during wildfires*, DESERT SUN (Sept. 14, 2020), <https://www.desertsun.com/story/news/health/2020/09/14/california-farmworkers-say-they-didnt-get-masks-during-wildfires/5794828002/>.

89. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 1:06:28 (statement of President of California Farm Bureau Federation Jamie Johansen).

90. *Id.* at 1:05:30.

91. *Id.* at 1:06:10.

92. CAL. ASS'N OF WINEGRAPE GROWERS, REGUL. FOR WORKERS NEAR WILDFIRE SMOKE, https://www.cawg.org/Wine1/Resources/_Wildfire_Smoke_Regulation/Shared_Content/Resources/Wildfire_Smoke/Exposure%20to%20Wildfire%20Smoke.aspx?hkey=0f93d07a-2e3a-475b-944c-459b08754451 (last visited Nov. 9, 2021).

93. *Id.*

94. *Id.*

adds that, “for some workers, the N95 mask is uncomfortable or makes it difficult to breathe, so some workers may choose not to wear one... Consequently, growers are required to provide full information to the worker and some growers may want to ask workers sign a waiver when using the mask voluntarily.”⁹⁵ The website includes a link, only available to its members, of sample waiver forms that growers may implement in their companies, which further cements the notion that employers dislike the mandate because they fear liability.⁹⁶

C. The Mandate Did Very Little to Actually Protect Farmworkers

In theory, the emergency rule aims to protect outdoor workers such as farmworkers from toxic smoke inhalation and attempts to clarify employer responsibilities. But in practice, the rule has done very little to protect farmworkers. Many farmworkers never received the proper N95 respirators, there was pushback from farmers who believed this mandate was too restrictive, and there were no enforcement mechanisms in place to ensure that the mandate was being followed.

According to the United Farm Workers Union, “enforcement of the regulation is problematic” because of employer noncompliance.⁹⁷ In a statewide poll that the union conducted in August 2020 to get a better understanding of how the mask mandate was going, they found that of the 350 workers who responded, many from the Central Valley, 84% reported that they had not received a mask.⁹⁸ Though employers did not provide the proper protective masks, data shows that farmworkers continued working during the wildfires, making it very likely that they labored in toxic air and were exposed to toxic particulates. Mr. Amezquita, manager at the Salinas farmworkers co-op, noted that of the residents who continued working, only the ones who worked with the larger employers were provided masks. He added that this was perhaps due to the fact that only the larger employers had the means to purchase the masks or acquire them through county partnerships. Those who worked for smaller farmers often received cheaper surgical masks, which were not in compliance with the state’s mandate and do not filter out small particulate matter as effectively as N95 masks do.⁹⁹

95. *Id.*

96. *Id.*

97. See Mahoney, *supra* note 41.

98. *Id.*

99. *N95 Respirators, Surgical Masks, and Face Masks*, FDA (Sept. 15, 2021), <https://www.fda.gov/medical-devices/personal-protective-equipment-infection-control/n95-respirators-surgical-masks-and-face-masks> (According to the FDA, surgical masks do not filter or block very small particles in the air and do not provide complete protection from contaminants because of the loose fit between the surface of the mask and the face. On the other hand, an N95

Pictures of farmworkers laboring under orange, ash-filled skies without N95 masks circulated on social media sites and newspapers, prompting grassroots organizations to mobilize and secure masks for workers. For example, organizations around the Bay Area, including La Santa Torta, a Mexican food truck located in Oakland, mobilized community support through social media platforms.¹⁰⁰ La Santa Torta collected donated supplies such as N95 respirators, grocery store gift cards, and hygiene products at various pre-announced locations in the Bay Area before driving them down to the Central Valley.¹⁰¹

D. Was the Mandate Merely Symbolic?

Analyzing all of the mandate's shortcomings makes one wonder if its passage was merely symbolic, given that it includes no real way of being enforced. In a newspaper interview, Doug Parker, the Chief of Cal OSHA, mentioned that he wishes the State had a stronger regulatory framework in place with the appropriate enforcement tools to better protect farmworkers, but that the current mandate was truly "a balancing of interests" and the end result of the regulatory process.¹⁰² Mr. Parker is right. A permanent regulatory framework that perfectly captures the interests of farmworkers, advocates, and farmers is difficult to attain. The following section includes some alternatives to the problem and anticipated pushback.

V. POLICY RECOMMENDATIONS

Despite the mandate's limitations, it should be made permanent because it is a step in the right direction, and some protections are better than no protections. However, alternative ways of looking at the issue are merited. I believe that implementing hazard pay for farmworkers, allowing workers to take time off during the wildfires, encouraging farmers to stockpile N95 masks for future use, having advocacy organizations play a more active role in educating farmworkers about their rights, and adopting new value systems in agribusiness are all creative ways of addressing the problem. These solutions are not intended to be mutually exclusive, and will likely be met with resistance because of the many competing interests at play.

respirator is "a respiratory protective device designed to achieve a very close facial fit and very efficient filtration of airborne particles.").

100. La Santa Torta (@lasantortorta), INSTAGRAM (Aug. 24, 2020), <https://www.instagram.com/p/CES7rkFhx3Z/>.

101. Email conversation on April 12, 2021 with UC Hastings colleague, Jonathan Martinez, regarding his grassroots volunteering efforts with La Santa Torta.

102. See Campbell, *supra* note 77.

A. The Emergency Regulation Should be Made Permanent

The emergency mandate was originally passed on July 18, 2019, and has been extended twice as of the time of this writing, but it has not yet been made permanent.¹⁰³ Despite its shortcomings, the mandate should be made permanent because it was a progressive move by our lawmakers. The mandate and surrounding dialogue also forced Californians and advocates on both sides of the issue to confront the harsh realities of the wildfire crisis we are facing and its impacts on farmers, farmworkers, and the food that we consume. The mandate should also be made permanent because wildfires will most certainly continue to threaten our communities. Some experts suggest that fires will continue to intensify unless we first combat the effects of climate change.¹⁰⁴ Others are more optimistic about our future and believe that we can coexist with wildfires, as long as we invest in forest health projects, green belts, and identifying hazard areas.¹⁰⁵ These are long-term solutions, but farmworkers need immediate protections, which the mandate can provide.

Critics on both sides of the debate will likely be wary of the mandate if it is permanently adopted. Farmers will likely say that it is too restrictive, given that this is their current stance.¹⁰⁶ Advocates who want more protections for farmworkers will say the opposite, that the mandate is only symbolic because it has no real way of being enforced. However, I think that some, though not all, of the failures of the mandate can be mitigated now that we have more insight into what went wrong. For example, we know that many farmworkers never received an N95 respirator because farmers were unable to secure them due to a national mask shortage occasioned by COVID-19. But now that more people are vaccinated and the State has the lowest infection rate in the nation,¹⁰⁷ the mask shortage might be a non-issue in the future, as further discussed below. Another source of criticism regarding the mandate stems from its unenforceability, but perhaps this can be mitigated by increased presence of advocacy organizations, who encourage farmworkers to report unsafe working conditions.¹⁰⁸

103. See PROTECTION FROM WILDFIRE SMOKE, *supra* note 72.

104. See Krishnaukumar and Kannan, *supra* note 1.

105. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 39:12 (statement of CAL FIRE Chief Acting Deputy Director for Communications Nick Shuler).

106. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 1:06:11 (statement of President of California Farm Bureau Federation Jamie Johansen).

107. Gavin Newsom (@gavinnewsom), INSTAGRAM (Apr. 29, 2021), https://www.instagram.com/p/COQW8hJBB-B/?utm_source=ig_web_copy_link.

108. This topic is further elaborated in the “Advocacy Organizations will Need to Maintain a Strong Presence” section.

B. Employers Should be Proactive About Securing N95 Masks for Future Use

In 2020, the COVID-19 global pandemic resulted in an N95 mask scarcity. Many employers cited this as a major reason for their inability to procure protective equipment for their workers and comply with the State's mandate.¹⁰⁹ To avoid this situation in the future, employers should be proactive and purchase compliant masks to have them on hand for when they are needed. Depending on the number of workers, the employer should anticipate buying in bulk as there is no telling how long each season's wildfires will last. Also, employers should stock up anyway, since they need to periodically provide clean masks to their employees to be in compliance with the mandate.

Out of all of my policy recommendations, this is the most feasible because now that nearly two years have passed since the initial start of the COVID pandemic, a pack of thirty N95 masks retails for about \$27, or \$0.90 per mask.¹¹⁰ There will likely be criticisms of this recommendation because it reinforces the current emergency mandate, which has already been criticized as providing the most basic of protections for farmworkers. It further assumes that the farmworkers will be wearing the masks to begin with. In my interview with Mr. Amezcua, he said that residents mentioned being unable to work effectively with their masks on. Working in the fields is already strenuous enough, but working with a very thick, multi-layer mask makes breathing very difficult, especially in hot and dry conditions, so some farmworkers opted not to wear them.¹¹¹

C. Implementation of Hazard Pay on a Local Level

Implementing local ordinances that require employers to pay temporary additional compensation to farmworkers laboring under hazardous air conditions is another potential solution. Hazard pay is defined as "additional pay for performing hazardous duties or work, involving physical hardship. Work duty that causes extreme physical discomfort and distress which is not adequately alleviated by protective devices is deemed to impose a physical hardship."¹¹² Under this definition, farmworkers should be entitled to additional pay for their work because they labor in the fields during record

109. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 1:04:26 (statement of President of California Farm Bureau Federation Jamie Johansen).

110. 30 Pack of N95 Masks, AMAZON, https://www.amazon.com/Protective-Efficiency%E2%89%A595-Against-Disposable-Respirator/dp/B08RMN5MMQ/ref=sr_1_9?dchild=1&keywords=n95+mask&qid=1630713209&sr=8-9.

111. See Amezcua Interview, *supra* note 44.

112. U.S. DEPT. OF LAB., HAZARD PAY, <https://www.dol.gov/general/topic/wages/hazardpay>.

toxic air quality, which causes extreme physical discomfort that is not adequately alleviated by protective devices such as masks.

Palm Springs, located in California's Coachella Valley, recently implemented a hazard pay ordinance that serves as an interesting case study. The Coachella City Council unanimously approved of an emergency "hero pay" ordinance for essential workers, including hazard pay benefits to farmworkers.¹¹³ The ordinance requires agricultural operations that employ 300 or more workers nationally, and more than five employees in the city, to pay their workers an additional \$4 per hour for at least 120 days.¹¹⁴ There is a lot that can be learned from this "hero pay" ordinance because it was implemented at the local level, circumventing many bureaucratic hurdles, and does a good job of balancing interests. This initiative takes into account the fact that small farmers have been particularly devastated by the wildfires by requiring only farmers who employ more than five people in the city to pay the additional rate. The ordinance is also temporary, which takes into account the fact that farmers are hurting financially and raises wages for only short periods of time.

However, a hazard pay policy would likely be met with resistance by farmers, and perhaps even advocates. Small farmers and growers will argue that instituting a hazard pay ordinance will hurt their businesses in a time where they are struggling financially as a result of the wildfires and COVID-19. A few days after the hero pay ordinance was passed in Palm Springs, several groups sued the city in federal court, arguing that "is not prudent to place an additional burden on an industry that is struggling under the weight of the pandemic."¹¹⁵ Other city councils around California that pass similar ordinances would likely face legal backlash as well. Advocates for farmworkers also may be hesitant about hazard pay provisions because an extra couple of dollars per hour will not protect farmworkers from inhaling toxic particles. Increased hourly pay can also have the negative effect of incentivizing employers to reduce hours for their workers, which would cause farmworkers to suffer financially.

Despite the anticipated litigation and challenges from farmers and farmworkers, I think that the hazard pay ordinance should be implemented as a policy solution. Paying farmworkers more during the wildfire months, which typically only occur during the summer and early fall, is reasonable because it would not unduly burden employers. Adopting the ordinance at the local level would also remove bureaucratic hurdles that might be encountered at the state level. Of course, the downside to this is that the

113. Rebecca Plevin, *California city becomes first in the nation to give "hero pay" to farmworkers, other essential employees*, PALM SPRINGS DESERT SUN (Feb. 11, 2021), <https://www.usatoday.com/story/news/nation/2021/02/11/coachella-california-oks-hero-pay-essential-workers-farmers/6725528002/>

114. *Id.*

115. *Id.*

hazard pay provision would only be available to farmworkers in some counties, rather than uniformly throughout the state. Lastly, adoption of a hazard pay provision will signal to the farmworkers that both their work and health is valued.

D. Implementing a “Fire Day” Model Parallel to the “Snow Day” Model

Given that wildfires will likely be a significant part of California's foreseeable future, it is advisable that the State create a more permanent solution by looking at what other states that face inclement weather conditions are doing to achieve a balance of interests between workers and employers. Looking to states where snow poses significant seasonal challenges such as icy roads, poor visibility, unavailability of public transportation, and power outages can be a good start. Under the Fair Labor Standard Act's (FLSA) working time provisions, when employers are forced to close their offices due to inclement weather conditions, exempt employees' pay “cannot be docked.”¹¹⁶ On the other hand, when the office is open but employees cannot make it for whatever reason, they are considered absent for personal reasons under the FLSA, and the employee does not have to be paid. When the office is closed for more than a week, exempt employees do not need to be paid.¹¹⁷

The adoption of a similar model in California that borrows language from the FLSA's working time provisions, but that includes some amendments, is a progressive way of protecting farmworkers. First, the fact that farmworkers are excluded from the FLSA's overtime provisions¹¹⁸ should not discourage legislators from looking to the FLSA for guidance. In practice, the “fire day” model would more or less function as follows: if a farmer is forced to close down their business operations due to wildfires, they would be required to pay their employees, so as to not penalize them for the bad weather. However, if the farmer keeps their operations open, and the farmworkers simply cannot come in, then the farmer would not be obligated to pay. In this way, farmers would only need to pay their workers when the wildfires make work impossible, and not simply when the farmworkers choose not to come in to work. As to additional amendments, an anti-retaliation component to the “fire day” model is crucial to ensure that farmworkers would not be the subject of an adverse employment action for choosing to not go to work.

The feasibility of implementing such a model in California is low, and would likely prompt a lot of pushback from farmers. Given the financial

116. *Let it Snow, Let it Snow: FLSA Inclement Weather Basics*, THOMPSON INFO. SERV. (Westlaw 21 No. 6 Employer's Guide to the Fair Labor Standards Act Newsletter 1).

117. *Id.*

118. See FARMWORKER JUST., *supra* note 23.

losses that some farmers have already experienced, they might resist a model that shifts the financial responsibility onto them when they are forced to close their operations, as opposed to having the State pick up that responsibility in the form of unemployment insurance. To get around this issue, experts and legislators can collaborate on a financing mechanism that takes these issues into account and splits the costs between farmers and the government. Alternatively, legislators can reach a different compromise with farmers: one in which the farmers would only be required to compensate farmworkers for one week. In this way, farmers would not be so financially drained if they were forced to close down their business due to the wildfires.

Moreover, farmers and farmworker advocates might oppose adopting a “fire day” model on grounds that it is too restrictive and/or ambiguous as to the conditions that would force an employer to close down their operations, given that this would then trigger the employer’s responsibility to pay its employees. The FLSA is of little help here because it does not specify the conditions under which employers may choose to close down their offices due to inclement weather. California can opt for a similar approach and leave office closures to the employer’s discretion, but this risks employers keeping their operations open, even when it is unsafe, just to avoid paying workers. On the other hand, the State could require that operations cease when the AQI reaches a certain threshold. However, this might create the same unenforceability issues as the emergency mandate faced, given that only about 200 OSHA field agents are available to inspect more than 200,000 places across the State.¹¹⁹

Farmworkers might also be critical of this model because should they choose to stay home during the wildfires when their employer keeps their operations open, they will lose pay. Even if farmworkers are given the option to stay home during the wildfires, which would be better for their health, they might refuse to do so if it compromises their pay. As previously noted, farmworkers have a strong work ethic and are motivated by making ends meet. In a statewide poll conducted by the UFW, the workers that responded seemed less worried about the long-term health effects of the fires, and moreso concerned with “trying to figure out next week.”¹²⁰

All in all, the “fire day” model presents many challenges, and achieving a perfect balance of interests is simply not feasible. Nonetheless, it presents the State with an opportunity to learn from states that also deal with inclement weather conditions to see what frameworks were successful for them, and whether those frameworks can be replicated here.

119. See Campbell, *supra* note 77.

120. See Mahoney, *supra* note 41.

E. Advocacy Organizations Will Need to Maintain a Strong Presence

Advocacy organizations, such as the UFW, have a long history of mobilization in California and have been instrumental in organizing farmworkers and teaching them the tools to be their own advocates.¹²¹ Wildfires are just the latest in a string of injustices affecting farmworkers over decades, and advocacy organizations need to increase their presence. Advocacy organizations can inform farmworkers about their rights to labor in safe conditions, the process for reporting and filing grievances against their employers through the anonymous hotline, and other basic workplace rights through trainings and educational outreach. During unprecedented times like these, with compounding effects of the climate crisis and a lingering global pandemic, advocacy organizations can act as liaisons between farmworkers and the State.

It is important to note that organizing “know your rights” trainings, and other educational seminars are challenging endeavors. In an amici brief (unrelated to the current wildfire crisis) advocating for union organizers to be afforded a limited right to access private property on which agricultural employees are working, CRLA argued that “farmworkers remain inaccessible outside of the workplace.”¹²² This is attributed to the fact that farmworkers are often unreachable by phone because of the unavailability of cell phones and social media, they are inaccessible where they live because they are oftentimes unhoused or live in temporary homes, and sometimes, they simply do not want to talk to advocates because they are undocumented or fear that they will lose their jobs.¹²³ Thus, farmworkers would likely only be available for these educational trainings while they’re at work, but advocates might encounter hostility on part of the employer. To overcome this hurdle, advocates would need to get very creative about finding ways to effectively communicate with farmworkers. One idea might be to precord “know your rights” trainings and then circulate the links among farmworkers, which would allow them to view the training at a convenient time for them. Alternatively, organizations can print pamphlets and make them available at housing co-ops and public spaces such as community centers, churches, and grocery stores which are frequented by farmworkers.

121. *UFW History*, UNITED FARM WORKERS, <https://ufw.org/research/history/ufw-history/> (last visited Nov. 9, 2021).

122. *See* Brief, *supra* note 25, at 9.

123. *Id.*

F. Adopting New Value Systems in Agribusiness

Oftentimes “agribusinesses prioritizes profit over human life,” so adopting new value systems in agribusiness is imperative.¹²⁴ The aim of this alternative approach is not to vilify farmers, as they too have faced so much adversity and loss surrounding wildfire seasons since 2017. However, the discourse cannot simply focus on economic losses. Agribusiness leaders must adopt new attitudes that place farmworkers at the center of our food production model. Making structural changes to the workday, such as enabling workers to take more breaks during the day, to seek shelter inside of their cars or carpool vans, and to have the option of calling out sick when the air is toxic without fear of losing their job, would be great measures to start.

Farmworker advocates might argue that these structural changes are too slow and do not recognize the urgency of the situation. This is a valid point. Changing industry standards is a slow process, but advocacy is a very powerful tool that can propel these changes. Pamphlets, such as the one on *La Cooperativa Campesina*, which informs farmworkers of their right to safe drinking water, fifteen-minute shade breaks, well-maintained toilet facilities, and handwashing stations are powerful reminders that major shifts in agribusiness and new attitudes that recognize the dignity of our farmworkers are indeed possible through advocacy.¹²⁵

VI. CONCLUSION

In conclusion, the wildfires in recent years have been the worst-ever recorded in the state’s modern history in terms of sheer loss and destruction,¹²⁶ and they are expected to worsen in the future due to climate change. This crisis—combined with the effects of a global pandemic—reminds us that now, more than ever before, farmworkers desperately need to be protected from working under hazardous conditions that place their health and lives at risk. The State responded by passing an emergency mandate that was a step in the right direction and should be made permanent, despite its problems. However, alternative ways of approaching the situation are needed in addition to the mandate. The solutions discussed in this investigation may seem impossible or slow, but advocates are hopeful that if

124. See Marquez Interview, *supra* note 51.

125. *Conozca sus derechos en el lugar de trabajo*, LA COOPERATIVA CAMPESINA DE CALIFORNIA, <http://www.lacooperativa.org/farm-workers-know-your-rights-in-the-workplace/> (last visited Nov. 9, 2021).

126. See CAL. ST. ASSEMBLY MEDIA ARCHIVES, *supra* note 10, at 34:24 (statement of CAL FIRE Chief Acting Deputy Director for Communications Nick Shuler).

these changes in agribusiness are going to be feasible, “they are going to be feasible in California.”¹²⁷

127. See Marquez Interview, *supra* note 51.
