Proposals to Strengthen the Labor, Employment, and Civil Rights of All Workers within Comprehensive Immigration Reform

NOVEMBER 2009

Introduction

Immigrants currently comprise over 15 percent of the United States' overall workforce and 20 percent of its low-wage workforce. In fact, half of all new U.S. labor force participants added between 1990 and 2000 were immigrants. Many immigrants, however, work under dangerous and exploitative conditions akin to those of over a century ago that led to the adoption of today's labor and employment laws. "Bad-apple" employers often view immigrant workers as easier to exploit than other workers, and thus as more desirable. The vulnerability of immigrant workers is a weakness undermining the broader labor market. When some workers are easy to exploit, the conditions of all workers suffer because of race-to-the-bottom competition and because opportunities for collective action by workers are undermined. The pressure of this unfair competition also threatens the viability of law-abiding businesses, since they are forced to adjust to less scrupulous competitors' reduced labor and other operating costs.

Employer sanctions do not work to counteract this problem because they weaken, instead of strengthen, the bargaining strength of all workers vis-à-vis their employers. Under the current system, many employers knowingly hire undocumented workers who they believe will be reluctant to hold them accountable for labor law violations. It is common practice for these same employers to use the existence of the employer sanctions scheme to threaten undocumented workers with deportation if they do, indeed, complain about deplorable working conditions.

By itself, making it possible for undocumented immigrants to legalize their status would eliminate a key barrier that currently prevents immigrants and their coworkers from improving their working conditions. But unless legalization is accompanied by provisions strengthening labor and civil rights protections, employers will continue to have an incentive to recruit and exploit immigrant workers to avoid those responsibilities. Strengthening these laws would significantly reduce employers' incentive to circumvent immigration laws to employ immigrant workers at lower wages and in substandard conditions, and at the same time it would result in improving the working conditions of *all* workers.

As Congress considers legislation to reform our immigration system, the following three items should be included so that all workers' interests are protected:

- Ensure that immigration enforcement complements rather than undermines the enforcement of labor and employment laws.
- Strengthen the Immigration and Nationality Act's (INA's) antidiscrimination protections to bring them into line with protections provided by other civil rights laws.
- Ensure that any electronic employment eligibility verification system is implemented in a way that minimizes both disruption to workers and the increase in discrimination and privacy violations that the system is likely to cause.

Ensure that immigration enforcement complements rather than undermines the enforcement of labor and employment laws

The threat that their employer will use their immigration status against them is one of the most significant barriers facing workers who seek to assert their labor rights. Current law deters immigrant workers from reporting labor violations because it fails to protect them when employers report them to immigration authorities in retaliation for asserting their rights. The following provisions would make it harder for unscrupulous employers to abuse our immigration laws by using U.S. Depart-

NOTE: This document does not include labor reforms needed to address the abuses and problems experienced by current workers on temporary visas. Any immigration reform proposal must include these reforms.

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ment of Homeland Security (DHS) immigration enforcement activity as a means of inhibiting union organizing or retaliating against workers who file labor complaints.

- **Keep detained workers in the U.S. to pursue labor claims against employers.** When labor law violations are discovered during an immigration enforcement action at a worksite, provide temporary visas for workers detained as a result of the action. Providing a temporary visa to such workers will preserve labor law enforcement opportunities by allowing them to work with the government to prosecute the employer for the labor violations.

- **Provide protection for workers who are victims of exploitation and retaliation by employers.** Expand availability of U visas so that they may be granted to workers who suffer gross exploitation, including being retaliated against for exercising labor rights, and also to victims of civil violations of labor and employment laws. Currently, only victims of specified, narrow categories of criminal violations may be eligible for U visas. Making U visas available to individuals who have been victimized by violations of labor and employment laws would promote active enforcement of these laws and make the threat of retaliating against victims unavailable to abusive employers.

- **Prohibit immigration enforcement actions that cause workers to distrust health and safety personnel.** Prohibit U.S. Immigration and Customs Enforcement (ICE) agents from masquerading as personnel from an agency or organization that enforces health and safety law or other labor laws, or that provides health care services or any other services intended to protect life and safety. Enacting such a prohibition would create a clear firewall between immigration enforcement actions and services intended to ensure the safety of all workers and their families.

- **Hold employers liable for labor violations, regardless of the immigration status of the worker.** Clarify that an employer that violates labor laws remains liable for back pay and other monetary damages regardless of the worker-victim's immigration status. The denial of the rights and remedies of labor law to undocumented workers leads to increased exploitation by employers and decreased bargaining power for all workers, U.S.-citizen and immigrant alike.

■ Make the Immigration and Nationality Act's antidiscrimination protections equivalent to those in the Civil Rights Act of 1964

The antidiscrimination protections in the INA were enacted to address discrimination that was expected to — and, in fact, *did* — result from the implementation of employer sanctions. The INA's antidiscrimination protections are intended to complement those in Title VII (of the Civil Rights Act of 1964) that prohibit discrimination based on race, color, national origin, religion, and gender, by protecting legal immigrants from discrimination based on national origin or citizenship status. However, significant limitations in the INA cause tens of thousands of lawful workers to be excluded from its protections and remedies. Enactment of the following provisions, coupled with vigorous enforcement of the other civil rights laws, would reduce employers' incentive for to seek out certain categories of workers who they know are easier to exploit.

- **Ensure nondiscrimination in employment.** Prohibit national origin and citizenship status discrimination during the employment relationship (i.e., with regard to the terms and conditions of employment). While employers are prohibited from discriminating at the time of hiring and firing, the INA does not prohibit these same employers from discriminating against workers in the terms and conditions of employment based upon citizenship/immigration status. So, for example, it does not prohibit employers from harassing employees based on their citizenship or immigration status.

- **Protect all workers from discrimination.** Allow all workers to file citizenship or national origin discrimination claims. Under current law, lawful permanent residents who are eligible for but have not filed an application for naturalization are excluded from eligibility to file claims alleging citizenship or national origin–based discrimination.

- **Align INA rules with those of Title VII for combating immigration-related unfair labor practices**. Reform the rules governing unfair immigration-related labor practices by (1) eliminating the restrictive timeframe that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has in which to file a complaint, (2) giving administrative law judges the discretion to award appropriate remedies that are available under other civil rights laws, (3) eliminating the provision requiring

workers to prove that the employer "intended" to discriminate against them in document abuse cases, (4) allowing individuals to prevail by demonstrating that a specific employment practice causes an unjustified adverse impact on them, and (5) increasing the fines for employers that are found to have violated the law.

■ Ensure that any electronic employment eligibility verification system is implemented in a way that minimizes both disruption to workers and the increase in discrimination and privacy violations that the system is likely to cause

An electronic employment verification system (EEVS), through which the federal government would verify the employment eligibility of employers' new hires, is often viewed as an easy way to curtail the employment of unauthorized workers in the U.S. Yet many immigrant and worker advocates are justifiably leery of a nationwide EEVS because of problems with DHS's E-Verify program. The problems associated with an EEVS affect all workers, and any proposed EEVS must be designed to avoid E-Verify's negative consequences.

- **Apply the new EEVS only to new hires.** Reverification of the entire workforce would place a huge administrative burden on workers and businesses alike. A current turnover/separation rate of 40 percent a year (50-60 million employees hired each year) means that most people's employment eligibility will be verified by the new system in a timely manner without forcing employers to go through old records and reverify existing workers.
- **Phase the EEVS in with performance evaluations.** Phase-in the EEVS incrementally by size of employer or by industry, with vigorous performance evaluations taking place prior to each expansion. Evaluations should address, at a minimum, wrongful terminations due to system errors, employer compliance with program rules, and the impact of the system on workers' privacy. Minimum performance criteria should be met within each of these areas before subsequent expansions of the system.
- **Ensure data accuracy.** Establish data accuracy standards that are subject to annual review to ensure that the data accessed by employers is accurate and continuously updated. Errors in the data will result in denial of employment to eligible U.S. citizens and work-authorized foreign-born workers.
- **Provide for workable documentation requirements.** All workers—U.S. citizens and immigrants alike—must have the ability to prove their employment eligibility and identity. Currently, 21 million U.S. citizens do not possess government-issued photo ID, so any new documentation requirements must be realistic and accessible to the broad range of workers in our country.
- **Protect workers from misuse of the system.** Protect workers by prohibiting use of the EEVS to selectively verify only certain workers, pre-screen workers before a job offer, take adverse employment actions based on system determinations, and fail to inform workers of their rights under the program. Establish an oversight and penalty structure to ensure employer compliance with program rules.
- **Ensure due process for workers subject to EEVS database errors.** Provide for administrative and judicial review and allow workers to remain employed while they challenge government errors. Provide compensation from the government, costs, and attorney's fees when an error in the EEVS databases results in wrongful termination of employment.
- **Protect the privacy of workers.** Minimize the amount of data collected and stored and create penalties for collecting, maintaining, or distributing data not authorized in the statute. Create penalties to deter the use of EEVS data to commit identity fraud or for any other unauthorized purpose.
- **Create oversight of the EEVS.** In order to ensure that employers are complying with program requirements, authorize random audits of the program that include, but are not limited to, a review of employer compliance with EEVS requirements, a review of the adequacy of EEVS rules and procedures to protect authorized workers, and a review of whether the program is being managed in a way that appropriately addresses civil rights and civil liberties concerns.
- **Fund an outreach program.** Following in the footsteps of the process instituted when the I-9 employment eligibility verification form was first introduced in 1986, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) should be charged with conducting outreach and education to both workers and employers in order to inform them about how the system works, rights and responsibilities under the new system, and avenues for

redress in the case of error or unfair employment practices.

- **Create a term-limited employment verification advisory panel.** The advisory panel would advise the Social Security Administration and DHS on implementation of the EEVS, including standards of database accuracy, privacy, and compliance, in addition to outreach to workers and employers. The panel would include representatives from appropriate federal agencies, organizations with technological and operational expertise in database accuracy, and other stakeholders that represent the interests of persons and entities affected by database inaccuracies, including business, labor unions, privacy advocates, and immigration organizations.
- **Clarify that states are preempted from requiring businesses to use any EEVS.** Clarifying the statute's language with respect to this issue would ensure that the federal government controls uniform expansion of the program.
- **Test new ideas through pilot projects.** DHS's E-Verify program is not the only possible platform for electronic eligibility verification, and alternative verification systems have been proposed. Any new idea should not be implemented on a large scale, however, before being rigorously tested. Pilot programs should measure the effectiveness, accuracy, and usability of new systems, and assess how they compare to E-Verify.

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