

Overview of Key Issues Facing Low-Wage Immigrant Workers

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Throughout United States history, patterns of immigration have had a direct correlation with the so-called “push and pull” factors that exert influence over the labor sector. As a result of the needs in the U.S. economy, migrant workers are *pulled* into the U.S. to fill mostly low-wage jobs, while U.S. foreign policy and the effects of globalization continue to *push* migrants out of their home countries. While there are many reasons why people immigrate to the U.S., such as the desire to reunite with family members or to flee persecution or poverty in their homelands, once they arrive, immigrants play a critical role in the U.S. workforce.

In 2005, immigrants constituted nearly 15 percent of the nation’s labor force,¹ and in 2000 they headed 20 percent of low-income households in the U.S.² Moreover, it is estimated that there are approximately 7.2 million undocumented workers in the U.S. labor force,³ representing approximately 5 percent of U.S. workers and 1 out of every 5 low-wage workers.⁴ About 40 percent of the undocumented population arrived between 2000 and 2005, and about two-thirds have been in the country less than 10 years.⁵

Despite their high participation in the labor force, immigrant workers have suffered diminished rights under U.S. employment and labor laws. According to a 2005 Human Rights Watch report, “Federal laws and policies on immigrant workers are a mass of contradictions and incentives to violate their rights.”⁶ Immigrant workers are disproportionately represented in dangerous industries, such as construction, meatpacking, and poultry processing, and

in hazardous occupations within those industries.⁷ Work fatalities among U.S. workers who are foreign-born are on the rise, and the rate at which foreign-born workers die as a result of workplace accidents far exceeds that of native-born workers.⁸

Immigration enforcement and racial profiling by U.S. Immigration and Customs Enforcement (ICE) against immigrant workers has significantly increased over the last year. Since January 2006, record numbers of immigrants have been detained, families have been torn apart, and communities and businesses disrupted. For fiscal years 2006 and 2007, ICE reports that it has detained over 8,000 workers in worksite enforcement actions.⁹ Many more lawfully present and U.S. citizen workers have also been wrongfully arrested in many of ICE’s worksite enforcement actions.¹⁰

Initially, we saw an increase in immigration enforcement in the aftermath of 9/11, when the federal government instituted phase I of the Secure Border Initiative (SBI) to secure critical infrastructure sites. This resulted in the multi-agency workplace operations targeting noncitizen workers.¹¹ Beginning in

⁷ Jeffrey S. Passel, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS (Pew Hispanic Center, June 2005).

⁸ See IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS (AFL-CIO, Aug. 2005), www.aflcio.org/aboutus/laborday/upload/immigrant_risk.pdf.

⁹ ICE arrested 3,667 workers on administrative immigration violations in fiscal year 2006 and 4,077 workers in fiscal year 2007. See ICE’s “Fact Sheet: Worksite Enforcement Overview,” www.ice.gov/pi/news/factsheets/worksite.htm.

¹⁰ For example, in the multi-state raid of Swift & Co. in Dec. 2006, ICE detained and arrested numerous lawfully present and U.S. citizen workers. The United Food and Commercial Workers Union (UFCW) filed a lawsuit against ICE for the constitutional violations committed against lawfully authorized and U.S. citizen workers. For a copy of the complaint, contact NILC.

¹¹ For example, immediately following the 9/11 attacks, the federal government instituted a multi-agency effort called Operation Tarmac, which included the Immigration and Naturalization Service, the Federal Bureau of Investigation, Offices of the Inspector General for the U.S. De-

¹ Lowell, Gelatt, Batalova, et al., IMMIGRANTS AND LABOR FORCE TRENDS: THE FUTURE, PAST AND PRESENT (Migration Policy Institute, July 2006).

² Capps, Fix, Passel, et al., A PROFILE OF THE LOW-WAGE IMMIGRANT WORK FORCE (Urban Institute, 2003).

³ Jeffrey S. Passel, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (Pew Hispanic Center, Mar. 2006).

⁴ Capps, Fix, Passel, et al., *supra*, n. 2.

⁵ Jeffrey S. Passel, *supra*, n. 3.

⁶ BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS IN THE U.S. MEAT AND POULTRY PLANTS (Human Rights Watch, 2004), www.hrw.org/reports/2005/usa0105/.

April 2006, ICE has increased its worksite enforcement efforts as part of the government's new interior enforcement strategy under phase II of the SBI,¹² resulting in large military-style worksite raids impacting thousands of immigrant workers, their communities and their families.¹³

This article provides an overview of how the rights of immigrant workers under U.S. employment and labor laws are under assault and the increased immigration enforcement mechanisms that are used against them. It then highlights the urgent need for legislative and administrative reform as a means to ensure that all workers, regardless of immigration status, are able to work free of exploitation and discrimination.

RIGHTS & REMEDIES FOR IMMIGRANT WORKERS

All workers, regardless of their immigration status, are protected by federal and state labor and employment laws. While this means that undocumented workers have rights under state and federal wage and hour, health and safety, antidiscrimination, and federal labor laws, there are specific issues relevant to immigrant workers that arise with respect to the remedies available to those workers. On Mar. 27, 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S. Ct. 1275 (2002), that undocumented workers who are illegally fired for engaging in union organizing activities are not entitled to receive the back pay remedy for work they would have performed but for the firing, the only monetary remedy available under the National Labor Relations Act (NLRA). The *Hoffman* decision was limited to undocumented workers' right to back pay under the NLRA, but employers have attempted to extend the scope of the decision to threaten workers who complain about discrimination, minimum

partments of Transportation and Labor and the Social Security Administration, and state agencies such as the California Department of Motor Vehicles (which cooperated in raids conducted at Los Angeles airports) and the Massachusetts Port Authority and State Police (which cooperated in the Logan Airport raid in Boston).

¹² For more information on the SBI's interior enforcement strategy, see "ICE Announces a New Interior Enforcement Strategy," IMMIGRANTS' RIGHTS UPDATE, May 23, 2006, www.nilc.org/immsemplmnt/wkplce_enfrcmnt/wkplcenfrc022.htm.

¹³ See "Raid an 'Outrageous Use of Force,' Union Says," CNSNews.com, Dec. 13, 2006; "Inhumane Raid Was Just One of Many," BOSTON GLOBE, Mar. 26, 2007.

wage and overtime violations, workplace injuries, and health and safety violations. Equally troubling are the attempts by employers to use the discovery process in litigation to inquire into the immigration status of plaintiffs. In fact, Human Rights Watch recently reported, "Employment law in the wake of *Hoffman* . . . remains in flux, and immigrant workers' rights remain highly at risk."¹⁴

Some court cases have limited the potentially damaging impact of *Hoffman*, while other courts have expanded its scope. It is important for immigrant and workers' rights advocates to continue organizing to curtail any further erosion of low-wage immigrant workers' rights and to help workers assert the rights they clearly still have.

Right to Unionize

Undocumented workers continue to be considered "employees" under the NLRA and thus enjoy protections from unfair labor practices, but if their rights are violated and they are fired they are not entitled to back pay or reinstatement. This means that it is only after an employer has been found liable for violating the worker's rights that the worker's immigration status may be relevant to determine whether she is eligible for back pay that would compensate her for the wages she would have earned had she not been wrongfully terminated for union activities.¹⁵ However, in instances where the employer knows that the workers were undocumented at the hiring stage, back pay remedies under the NLRA may still be available for workers whose rights are violated because of their union activities. For example, in a case where the employer knowingly violated federal immigration law by hiring workers without verifying their work authorization,¹⁶ an administrative law judge (ALJ) awarded back pay to those workers who were fired in violation of the NLRA. The ALJ in *Mezonos* distinguished *Hoffman* by finding that *Mezonos* was a "wrongdoer" employer, unlike the employer in *Hoffman*, and that, unlike the worker in *Hoffman*, the workers in *Mezonos* had not committed any wrongdoing, and therefore a back pay award was not precluded. It is important to note that although

¹⁴ BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (Human Rights Watch, 2004), p. 119, www.hrw.org/reports/2005/usa0105/.

¹⁵ *Id.*

¹⁶ *Mezonos Maven Bakery, Inc. and Puerto Rican Legal Defense and Education Fund*, 29-CA-25476, Steven Davis, ALJ (Nov. 1, 2006). NILC is co-counsel on *Mezonos* with the Immigration Law Clinic at the New York University School of Law and the AFL-CIO.

the employer attempted to inquire about the workers' immigration status, no evidence one way or the other was ever presented about the workers' status.

Right to Minimum Wage and Overtime

All workers, regardless of their immigration status, continue to be protected by the Fair Labor Standards Act (FLSA) and state wage and hour laws for "work already performed."¹⁷ Not surprisingly, however, employers continue trying to argue that *Hoffman* prohibits workers from getting paid at all. For example, in *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604 (2007),¹⁸ construction workers who performed welding work on a public contract job were not paid the required prevailing wage. When the workers sued for the difference between what they were paid and the prevailing wage rate, the employer cited *Hoffman* in arguing that, because the workers were allegedly undocumented, they were not entitled to receive the unpaid prevailing wage. The trial court agreed with the employer. However, on appeal, the court upheld California law in ruling that immigration status is irrelevant to claims for unpaid prevailing wages.¹⁹

Undocumented workers also are protected by the FLSA's retaliation provision, but it is not clear whether workers who are found to have been retaliated against and unlawfully fired will be entitled to back pay as compensation for the wages they would have earned had they not been retaliated against.

Right to Be Free from Workplace Discrimination

Undocumented workers continue to be protected by the Americans with Disabilities Act (ADA), the

Age Discrimination in Employment Act (ADEA), the Equal Pay Act, and Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, national origin, gender, or religion. The Equal Employment Opportunity Commission (EEOC), however, states that *Hoffman* precludes back pay remedies under these statutes.

Some courts have questioned whether *Hoffman* extends to Title VII cases,²⁰ while another court has questioned an undocumented worker's standing or legal ability to bring an ADA claim.²¹ In addition, other courts have limited damages to plaintiffs based on immigration status. For example, a New Jersey court denied economic damages in a pregnancy discrimination suit because of the plaintiff's immigration status.²²

While federal and state labor and employment laws protect all workers regardless of immigration status, employers continue to raise the issue of immigration status during the discovery phase in the litigation of these claims. It therefore is important to take measures to protect workers making such claims. One strategy is to seek a protective order from the court, similar to the one obtained in *Rivera, et al. v. NIBCO, Inc.*, prohibiting such inquiries or retaliation.²³ In *Rivera*, the Ninth Circuit stated, "[T]he chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights . . . outweighed NIBCO's interests in obtaining the information."²⁴ The court found that were such discovery to be permitted, "countless

²⁰ See, e.g., *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238 (N.D. Ill. 2002) (noting that *Hoffman* is "not dispositive" on Title VII and FLSA claims).

²¹ *Lopez v. Superflex, Ltd.*, 2002 U.S. Dist. LEXIS 15538 (S.D.N.Y. Aug. 21, 2002).

²² See *Escobar v. Spartan Security Serv.*, 281 F. Supp. 2d 896-98 (S.D. Tex. 2003).

²³ For a copy of the *Rivera* protective order, see www.nilc.org/immsemplymnt/rivera/rivera_p_order.pdf.

The EEOC also prevailed in a case where it sought and obtained a protective order that prohibited the discovery of the immigration status and tax return information of workers who were suing their former employer for discrimination and retaliation. *Assif Asgar-Ali v. Hilton Hotel Corp.*, 798 N.Y.S. 2d 342 (2004). For an in-depth discussion on litigating discrimination claims on behalf of immigrant workers in the post-*Hoffman* era, see Christopher Ho and Jennifer C. Chang, "Drawing the Line After *Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond," 22 HOFSTRA LAB. & EMP. L.J. 473 (2005).

²⁴ *Rivera v. NIBCO, Inc.*, 364 F. 3d 1057 (9th Cir. 2004).

¹⁷ See, e.g., *Flores v. Albertsons, Inc.*, 2002 WL 1163623, at 5 (C.D. Cal. Apr. 9, 2002) (holding that *Hoffman* does not prevent recovery of paid wages under FLSA).

¹⁸ NILC filed an amicus curiae brief on behalf of the Asian Pacific American Legal Center, Bet Tzedek Legal Services, California Rural Legal Assistance, Inc., Legal Aid Foundation of Los Angeles, and Legal Aid Society - Employment Law Center. A copy of the briefs can be obtained from NILC.

¹⁹ Cal. Lab. Code Sec. 1171.5(a) states in pertinent part: "All protections, rights and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who have been employed, in the state." The employer appealed the decision to the California Supreme Court, which refused to hear the case, and has now filed a petition before the U.S. Supreme Court. NILC will be filing an opposition to this petition on behalf of the plaintiffs.

acts of illegal and reprehensible conduct would go unreported.”²⁵

Right to a Healthy and Safe Working Environment

Undocumented workers continue to be protected by the Occupational Safety and Health Act (OSHA) and the Mine Safety and Health Act. When a worker needs to be out of work due to a workplace injury, the only remedy available is the state’s worker’s compensation system. At least two courts (in Pennsylvania and Michigan) have held that while an undocumented worker is entitled to medical benefits, their right to disability benefits for wage loss may be limited.²⁶ Some states (e.g., Massachusetts and North Carolina) have ruled that workers, regardless of immigration status, have a right to be fully compensated under state workers’ compensation laws.²⁷ However, other state courts have interpreted *Hoffman* to limit undocumented workers’ entitlement to workers’ compensation benefits.

In addition to protections under state workers’ compensation laws, injured workers also can recover

damages in state tort actions. Many courts have addressed the issue of whether undocumented workers are entitled to recover lost wages in tort actions.²⁸

Some court cases have limited the potentially damaging impact of *Hoffman*, while other courts have expanded its scope. It is important for immigrant and workers’ rights advocates to continue organizing to curtail any further erosion of low-wage immigrant workers’ rights while working toward a legislative fix of the *Hoffman* decision to win back these basic remedies for all workers.

It is extremely critical to note that in many cases a worker’s status enters the record unnecessarily. It is crucial to educate workers about the importance of remaining silent about such questioning and to let them know that they have affirmative rights if they were wronged, discriminated against, or are injured on the job. Similarly, advocates must do their best to ensure that immigration status information does not get into the record or pleadings.²⁹ Recently, a federal court in Louisiana issued a protective order prohibiting the defendant from inquiring into the immigration status of H-2B workers who had sued their employer under the FLSA. In *Castellanos-Contreras, et al. v. Decatur Hotels, LLC, et al.*, when the employer sought information about its former employees’ immigration status, the workers’ attorneys filed a motion for protective order to prevent such harassing and irrelevant inquiries.³⁰

²⁵ *Id.* Other courts have similarly granted protective orders barring inquiry into immigration status. See, e.g., *Flores v. Amigon*, 233 F. Supp. 462, 465 n. 2 (E.D.N.Y. 2002); *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002).

²⁶ A Pennsylvania court held that unlawful immigration status might justify terminating benefits for temporary total disability. *The Reinforced Earth Co. v. Workers’ Compensation Appeal Bd.*, 810 A2d 99 (Pa. Sup. Ct. 2002). A Michigan court limited an undocumented worker’s coverage to medical care, while denying weekly wage replacement benefits. *Sanchez v. Eagle Alloy*, 658 N.W.2d (Mich. Ct. App. 2003). But see *Xinic v. Quick, et al.*, 69 Va. Cir. 295 (Va. Ct. App. 2005) (while finding that immigration status is relevant to recovery under the Virginia workers’ compensation law, court ultimately denied the defendant employer’s request for information about the worker’s immigration status on the grounds that revealing such information could incriminate the worker in violation of his Fifth Amendment right against self-incrimination).

²⁷ See, e.g., *Ruiz v. Belk Masonry Co., et al.*, 559 S.E.2d 249 (N.C. App. 2002) (affirming right of undocumented workers to receive workers’ compensation benefits); *Medellin v. Cashman*, No. 03324300 (Mass. Dep’t. Indus. Acc. Dec. 23, 2003). See also *Design Kitchen and Baths v. Lagos*, 388 Md. 718, 882 A2d 817 (2005) (undocumented worker injured in a work-related injury accident was an employee covered by Maryland’s workers’ compensation laws); *Farmer Bros. Coffee v. Workers’ Compensation Appeals Bd.*, 133 Cal. App. 4th 533 (Cal. Ct. App. 2005) (state’s workers’ compensation laws applicable to all workers regardless of immigration status).

²⁸ See e.g., *Rosa v. Partners in Progress Inc.*, 152 NH 6, 868 A2d 994 (2005) (finding that undocumented workers can make a claim for lost earnings under tort law and that lost earning capacity may be measured by what the worker could have earned in the U.S. only if the employer knew or should have known of the worker’s undocumented status at the time the worker was hired); *Balbuena v. IDR, Realty, LLC*, 6 N.Y. 3d 338 (NY Ct. App. 2006) (In a tort action, the highest court in the state of New York rules that unauthorized workers who were injured while working on construction sites are entitled to recover lost earnings.).

²⁹ Advocates should cite the *Rivera, et al. v. NIBCO, Inc.*, Ninth Circuit decision (*supra* n. 23), where the court barred the employer’s discovery of plaintiffs’ immigration status in a discrimination suit. The *Rivera* briefs can be obtained by contacting NILC, which is co-counsel on this case along with the Legal Aid Society - Employment Law Center.

³⁰ For a copy of the decision in *Castellanos-Contreras v. Decatur Hotels, LLC*, Case No. 2:06-cv-4340-EEF-SS (E.D.LA Oct. 22, 2007), contact NILC. NILC is co-counsel in this matter along with the Southern Poverty Law Center and civil rights attorney Tracie Washington in New Orleans.

IMMIGRATION ENFORCEMENT AT THE WORKSITE

Beginning in April 2006, in the midst of the immigration reform debate, ICE announced a new interior enforcement strategy as the second phase of its SBI that included a “new” strategy for worksite enforcement. According to ICE, the SBI was a multi-year plan intended to “secure America’s borders and reduce unlawful migration” into the U.S.³¹ This new interior enforcement strategy has resulted in what ICE claims are new steps to enhance ICE’s worksite enforcement in order to combat the unlawful employment of unauthorized workers. ICE touts its worksite enforcement strategy as being in “marked contrast” to previous efforts by the former Immigration and Naturalization Service (INS). ICE’s worksite enforcement strategy purportedly aims at promoting national security, protecting critical infrastructure, and ensuring fair labor standards.

Under this new interior enforcement strategy, ICE has certainly stepped up its worksite enforcement efforts; however, it is unclear how this increased worksite enforcement and the manner in which ICE conducts the raids serves the aims that ICE has identified. While immigration worksite enforcement actions are a mechanism for enforcing the employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA), in most cases it is workers who are targeted, not employers. Immigration worksite enforcement actions rarely result in ensuring fair labor standards in the workplace.

Moreover, we have now entered an era in which immigration enforcement at the workplace is no longer limited to immigration raids. The expansion of electronic employment eligibility verification systems — in which employers are given access to the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases to check the employment eligibility and Social Security numbers (SSNs) of all workers — is among the most pressing workplace enforcement concerns immigrants face today.

³¹ For more information on the SBI’s interior enforcement strategy, see “ICE Announces a New Interior Enforcement Strategy,” IMMIGRANTS’ RIGHTS UPDATE, May 23, 2006, www.nilc.org/immsemplymnt/wkplce_enfrcmnt/wkplcnfrc022.htm.

Worksite Audits and Investigations

To enforce the employer sanctions provisions of IRCA, ICE can conduct random or targeted investigations of employers, including reviewing and inspecting the employer’s Form I-9 documents as well as conducting investigations into the employer’s hiring practices. The penalties that can be imposed upon employers that are found to have violated the law include cease-and-desist orders, civil penalties for each offense of employing unauthorized workers, civil penalties for failure to fill out and maintain I-9 forms correctly, debarment, and criminal penalties.³² To initiate an investigation, ICE needs a lead and articulable facts that would give ICE reasonable suspicion that the employer is violating the law. Articulable facts cannot be based solely on a worker’s ancestry, but they can include race or ancestry when coupled with other facts, and the reasonable suspicion must be based on an information that an “objective reasonable” person would find suspicious and not the “subjective impression of a particular officer” or the individual bias of the officer.³³

Articulable facts that could lead to a worksite investigation include the officer’s knowledge of high concentration of undocumented workers in the area, the industry or type of employment involved, the worker’s excessive nervousness or if the worker appears to be too indifferent or too cool around the ICE officials, and the inability of the workers to speak English.

Under the law, employers are to be provided with at least three days’ notice prior to an inspection of the I-9 forms by officers of ICE, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), or the U.S. Department of Labor (DOL).³⁴ However, ICE does not need a warrant to inspect or conduct an I-9 audit. Any refusal or delay in presentation of the I-9 form for inspection is a violation of federal immigration law.³⁵ In addition, if the employer does not comply with a request to present the I-9 forms, ICE may compel production of them and any other relevant documents by issuing a subpoena.

Oftentimes, an anonymous tip along with a review of the I-9 forms will trigger an immigration worksite enforcement action. For example, the Swift & Com-

³² 8 U.S.C. § 1324a; U.S.C. § 1324c; 8 U.S.C. § 1324a(b).

³³ *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985).

³⁴ See 8 C.F.R. § 274a.2(b)(2)(ii).

³⁵ Failure to present the Form I-9 is a violation of the retention requirements. See 8 U.S.C. § 1324a(b)(3).

pany raid, also known as “Operation Wagon Train,” that took place on Dec. 12, 2006, was a six-state worksite enforcement investigation into allegations of criminal identity theft by the targeted workers. This worksite investigation was triggered after ICE discovered that undocumented workers were employed at the Swift plants after reviewing the company’s I-9 forms.³⁶ The initial Swift investigation, however, focused on criminal identity theft — i.e., on the workers and not the employer — because Swift was an employer that had been participating in DHS’s Basic Pilot employment eligibility verification program.³⁷

Anonymous tips sparking worksite investigations oftentimes come from the employers themselves, who call on immigration authorities to conduct worksite investigations in order to retaliate against workers who are organizing to improve standards and working conditions or who have otherwise exercised their workplace rights. While an internal guidance exists for ICE to follow when it receives anonymous tips about undocumented workers at a particular worksite where there is a pending labor dispute, all too often ICE conducts such worksite enforcement actions during a union organizing campaign or other labor dispute.

Advocates should be aware of the internal guidance formerly known as INS Operations Instruction (OI) 287.3a, Questioning Persons During Labor Disputes,³⁸ which provides guidance to immigration agents who are contemplating enforcement activity at worksites where a labor dispute is in progress. This internal guidance provides questions ICE agents should ask individuals who contact them with information concerning undocumented workers. The guidance requires that whenever information received from any source creates suspicion that an immigration enforcement action might involve agents in a labor dispute, a reasonable attempt should be made by the immigration enforcement agents to determine

whether a labor dispute is in progress at the worksite they are thinking about investigating or raiding. The guidance lists several sources that the agents can contact to determine whether a labor dispute is in progress: the National Labor Relations Board (NLRB), DOL, state departments of labor, or “other agencies/entities enforcing labor/employment laws.”

Given recent increased immigration enforcement, it is more important than ever that advocates educate workers and the community about their rights with respect to immigration enforcement.

Social Security Administration “No-Match” Letters

Most advocates for immigrant workers are likely familiar with SSA “no-match letters,” i.e., the notices the agency sends to inform employers and employees when employee names or SSNs listed on an employer’s W-2 report (Wage and Tax Statement) do not match SSA records. A large proportion of employers who receive the SSA notice employ low-income immigrant workers, and many no-match names are Latino, Asian, or other names frequently misspelled by employers.

In addition to sending no-match letters to workers at their homes, the SSA also sends a version of these letters to the employer when the worker’s home address is incorrect, and to any employer if the W-2s they filed resulted in a “no-match” for at least ten employees, or if at least one-half of one percent of the total number of names and SSNs they reported on W-2 forms for the year were “no-matches.”

Over the years, through workplace and community organizing, immigrant rights advocates and labor have successfully prevented employers from firing workers based on no-match letters. In the union context, several labor arbitrators have issued decisions in favor of the union finding that firing workers because of no-match letters violates the just cause provisions of collective bargaining agreements. However, employers continue to misuse the letters in ways that undermine the rights of low-wage workers nationwide.³⁹

Most recently, the federal government has attempted to use no-match letters to enforce immigration law. On Aug. 15, 2007, DHS published a final rule regarding what employers should do in order to benefit from a “safe harbor” protection upon receipt

³⁶ See *Swift & Company v. Immigration and Customs Enforcement, et al.*, Case No. 2-06CV-314-J, Memorandum of Points and Authority in Support of Plaintiff’s Motion for Preliminary Injunction and Expedited Hearing (N.D. TX Nov. 28, 2006); see also Roger Tsai, “The IRCA – Twenty Years Later,” 12 BENDER’S IMMIGRATION BULLETIN, Apr. 1, 2007.

³⁷ “Lockdown in Greeley,” THE NATION, Feb. 26, 2007. For more information on DHS’s Basic Pilot Program, see BASIC INFORMATION BRIEF: DHS BASIC PILOT/E-VERIFY PROGRAM (NILC, forthcoming in Dec. 2007).

³⁸ OI 287.3a has been redesignated as 33.14(h) of the Special Agent Field Manual (SAFM) as of Apr. 28, 2000, but still carries the same weight.

³⁹ For more information on SSA “no-match” letters, including advocacy tips, see NILC’s toolkit materials at www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm.

of a no-match letter from SSA. DHS claims that if an employer follows the “safe harbor” procedures set forth in the final rule, it will not use the no-match letter as evidence that the employer has “constructive knowledge” that it has hired undocumented workers. The rule was scheduled to go into effect on Sept. 14, 2007, and SSA planned to send no-match letters to approximately 140,000 employers — affecting over 8 million workers — beginning Sept. 4. These no-match letters would have included new language referring to the DHS rule and an insert DHS letter for employers.

NILC, along with the Immigrants’ Rights Project of the ACLU, the AFL-CIO, Altschuler Berzon, LLP, and the San Francisco and Alameda Central Labor Councils, filed a lawsuit in a federal court in San Francisco to block the implementation of the DHS regulation. On Oct. 10, 2007, the court granted a preliminary injunction preventing DHS from implementing the rule and blocking SSA from sending the new no-match letters with the DHS insert. DHS is expected to file a motion to stay the litigation on the existing rule in order for DHS to be able to issue a new rule. The new rule will be subject to the standard notice and comment period. Advocates across the country are encouraged to file comments opposing the new DHS proposed rule. The preliminary injunction issued by the court blocking the original safe harbor rule remains in effect.

If the DHS rule were to go into effect, it would basically turn the no-match letter into an immigration enforcement tool. Under the rule, a “reasonable” employer who receives a no-match letter from the SSA will not be deemed to have “constructive knowledge” that an employee is an unauthorized worker if the employer follows the outlined “safe-harbor” steps, which include firing the worker if the no-match is not resolved within the time period suggested in the safe harbor rules. Moreover, the SSA no-match letter is an ineffective enforcement tool because of the known inaccuracies in the SSA database. Of the 17.8 million errors in SSA’s database, 12.7 million (or over 70 percent) pertain to U.S. citizens. In addition, according to SSA there may be several reasons why information submitted for a worker may not match SSA’s records, including typographical errors, a change in the worker’s name due to marriage or divorce, the fact that a name is a compound one, and many other innocent reasons. Implementation of such a flawed rule would undoubtedly result in increased discrimination against immigrant workers just as IRCA’s employer sanctions provisions resulted in increased discrimination against individuals who are or “appear” to be foreign-born. The rule would also impact the economy in

that, to try to circumvent it, unscrupulous employers would hire and employ workers “off the books.” Finally, implementation of the safe harbor rule would not curb undocumented immigration.

Employers who, in attempting to follow the rule, wrongly terminate employment-authorized workers upon receipt of a no-match letter could be subject to liability for violating state and federal labor and employment laws. Moreover, the rule provides employers with an added tool to discriminate and retaliate against workers for exercising workplace rights, such that employers will use the no-match letters to justify firing workers who have complained about their working conditions or otherwise have exercised their workplace rights.

The no-match letters have failed to meet the stated goals of crediting workers’ earnings and reducing the Earnings Suspense File (the file of uncredited wages maintained by the SSA), yet have had a detrimental impact on immigrant workers. Immigrant rights advocates should demand that SSA terminate its no-match letter program in order to prevent the further unjust exploitation of low-wage immigrant workers by unscrupulous employers and the federal government.

The Social Security Number Verification Service

The Social Security Number Verification Service (SSNVS)⁴⁰ is a service that allows employers to verify the SSNs of their employees via the Internet. After running a small pilot program, the SSA expanded the program to all employers in 2005. According to SSA, the SSNVS will verify SSNs and names solely to ensure that records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement). The SSNVS does *not* confirm whether an employee has valid authorization to work in the U.S. It is only a reflection of whether the employer’s records match SSA’s records.

The SSNVS allows employers to match their record of employee names and SSNs with SSA’s records *before* preparing and submitting W-2 forms. SSA no-match letters, on the other hand, are sent by SSA after an employer has submitted W-2 forms and the agency is unable to match an employee’s name and SSN. An employers may verify its workers’

⁴⁰ See BASIC INFORMATION BRIEF: SOCIAL SECURITY NUMBER VERIFICATION SERVICE (SSNVS) (NILC, Mar. 2006).

SSNs through the SSNVS even if it never received no-match letters in which they are named.

The SSNVS program has already created enormous challenges for low-wage immigrant workers by giving employers added tools and more readily available information to exploit and unlawfully terminate workers, and the problems low-wage immigrant workers face as a result of the no-match letters have been exacerbated by the SSNVS. For example, many employers are using the SSNVS to obtain no-match information and then using that information as a pretext to fire workers.

The developments regarding employers' ability to verify the SSNs of workers through the SSNVS represent an area that advocates for immigrant workers will need to monitor carefully, as it will complicate efforts to advocate on behalf of undocumented workers seeking to assert their workplace rights. While the SSNVS provides information similar to that provided by SSA no-match letters, it is important that advocates understand that the DHS safe harbor rules do not apply to no-match information that the employer receives about a worker through the SSNVS. In addition, at least one labor arbitrator has found that an employer that uses SSNVS to verify the SSNs of its workforce and then fires those workers is violating the just cause provisions of the union collective bargaining agreement because the employer is not required by law to conduct self-audits of its workers' SSNs.

The Basic Pilot/E-Verify Program

The Basic Pilot (recently renamed "E-Verify") program is a voluntary Internet-based program that allows employers to electronically verify workers' employment eligibility by accessing information in databases maintained by the SSA and U.S. Citizenship and Immigration Services (USCIS), the latter a bureau within DHS.⁴¹ The program was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and began operating in five states in 1997 (California, Florida, Illinois, New York, and Texas). It was expanded to Nebraska in 1999 as a result of the INS's "Operation Vanguard," which was an immigration workplace enforcement operation designed to remove undocumented workers from the meatpacking industry. In 2003, Congress extended Basic Pilot to all 50 states and authorized it until Nov. 2008 under the Basic Pilot Program Exten-

sion and Expansion Act of 2003. According to DHS, 30,000 employers (out of over 5 million) are currently enrolled in the program.

Numerous entities, including those that researched and wrote two independent reports commissioned by the former INS in 2002 and by DHS in 2006, the Government Accountability Office, and SSA's Office of the Inspector General (SSA-OIG), have found that Basic Pilot/E-Verify has significant weaknesses, including (1) its reliance on government databases that have unacceptably high error rates and (2) employer misuse of the program to take adverse action against workers.⁴² For example, 17.8 million of SSA's records contain discrepancies that could result in workers being initially flagged as not authorized for employment. Database errors are not distributed evenly, however: foreign-born workers (including those who have become U.S. citizens) are *30 times* more likely than native-born U.S. citizens to be incorrectly identified as not authorized for employment. The reports also found that employers take adverse action against workers whose information cannot be immediately confirmed by the system by firing or suspending them in violation of the rules of the memorandum of understanding participating employers agree to, which provides that workers will have a limited time to contest and correct the information. For example, according to a 2006 report, 19 percent of employers restricted work assignments, 14 percent delayed job training, and 2 percent reduced pay

DHS has been engaged in aggressive outreach to employers to register them for the system. In Aug. 2006, the agency also announced that it would issue regulations requiring all federal government contractors and vendors to participate in Basic Pilot/E-Verify, which represents approximately 200,000 new businesses that would access the system. In Congress, there are at least 11 bills pending in the House and Senate that would make Basic Pilot/E-Verify mandatory for some or all employers. Any expansion of the Basic Pilot/E-Verify program will increase the number of immigrant and other low-wage workers who will face difficulties gaining employment because of the inaccuracies in the government databases and delays in entering information regarding new immigrants.

⁴¹ For more information, see BASIC INFORMATION BRIEF: DHS BASIC PILOT/E-VERIFY PROGRAM (NILC, forthcoming in Dec. 2007).

⁴² For a summary of NILC's concerns, see BASIC PILOT/E-VERIFY: NOT A MAGIC BULLET (NILC, Sept. 2007), www.nilc.org/immsemplymnt/ircaempverif/e-verify_nomagicbullet_2007-09-17.pdf.

The Image Program

The ICE Mutual Agreement between Government and Employers (IMAGE) program is one of the most recent enforcement programs developed by ICE that is likely to result in further barriers to undocumented and low-wage immigrant workers exercising their workplace rights.

IMAGE is a joint government and private sector program introduced in July 2006 by ICE to help employers “self-police” with respect to complying with the federal immigration law’s prohibition against hiring workers who are ineligible to be employed in the U.S. IMAGE was started in response to an Apr. 1999 GAO report titled *Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, which noted the high percentages of unauthorized workers employed in certain industries.

IMAGE is voluntary for employers. According to ICE, employers that participate in IMAGE can reduce unauthorized employment and the use by workers of fraudulent identity documents by implementing IMAGE’s “best hiring practices.” As part of IMAGE, ICE and USCIS provide employers with education and training in proper hiring practices, fraudulent document detection, use of Basic Pilot/E-Verify and antidiscrimination procedures.

In order to participate in IMAGE, employers must apply to be accepted into the program by completing a questionnaire and submitting to an ICE assessment that includes a preliminary review of the employer’s I-9 form records and requiring employers to verify the SSNs of their current workforce through the SSA’s online SSNVS system. If accepted into the program, the employer would then undergo a formal I-9 audit by ICE. The IMAGE “best practices” include semi-annual I-9 audits, registering for Basic Pilot/E-Verify, establishing a protocol for SSA no-match letters, and establishing a “tip line” for employees to report immigration violations to ICE.

Advocates should be vigilant to determine if employers have signed up for IMAGE when contacted about SSA no-match or reverification issues at the workplace. Employers could also use IMAGE to undermine employees’ rights by signing up for the program in the midst of an ongoing union organizing campaign or when their employees have otherwise exercised their workplace rights. Unscrupulous employers may knowingly hire undocumented workers, but then enroll in IMAGE when they want to fire or retaliate against employees or otherwise discourage them from claiming their rights. Moreover, employers that repeatedly have violated labor and employment law could easily be deemed “IMAGE-certified,” since IMAGE does not screen out participants

based on their labor violations track record. For example, the Smithfield Co., which in North Carolina operates one of the largest hog processing plants in the country and an employer with a long history of egregious labor and employment violations, volunteered for IMAGE, which resulted in the firing of hundreds of workers and has threatened to interfere with an ongoing union organizing campaign at that plant. In addition to worker firings, several workers have been detained by ICE as a result of Smithfield’s involvement in IMAGE.

LEGISLATIVE PRIORITIES AND OPPORTUNITIES FOR IMMIGRANT WORKERS

Immigrant workers and their families face a number of significant challenges, including increased immigration enforcement at the worksite, perilous work conditions, nonpayment of wages, retaliation for exercising legal rights, and differential treatment based on immigration status. This vulnerability of immigrant workers not only directly affects the workers themselves, but it 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. It is only through increased enforcement of our labor laws, under which employers can be penalized at the local, state, and federal levels, that unscrupulous employers will think twice about recruiting and exploiting undocumented workers.

To address this issue, the conveners of the Low-Wage Immigrant Worker Coalition developed a “statement of principles” to strengthen employment and labor protections for all low-wage workers.⁴³ The statement includes a number of specific recommendations under the broad categories of (1) ensuring that immigration enforcement complements rather than undermines the enforcement of labor, employment, and civil rights laws; (2) equalizing workers’ access to the protections of labor, employment, and civil rights laws; (3) ensuring that all workers have a safe workplace; (4) making companies responsible for complying with labor protections for all their workers; and (5) fully pro-

⁴³ The LWIW Coalition is co-convened by the AFL-CIO, Change to Win, Interfaith Worker Justice, Jobs with Justice, National Day Labor Organizing Network, National Employment Law Project, National Immigration Law Center, and National Council of La Raza.

protecting workers who labor under existing temporary worker programs.

NILC adopted a number of the recommendations in our 2007 “Comprehensive Immigration Reform: Legislative Priorities for Immigrant Workers” statement of principles.⁴⁴ While a comprehensive immigration reform bill failed to pass this year, it is likely that we will see similar proposals in the coming years. Legalizing the status of undocumented immigrants by itself 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. Worksite immigration enforcement does not solve this problem because it does not address the economic incentive that employers have to hire undocumented workers by any means possible, including moving into the underground economy, misclassifying workers as independent contractors, and using sham subcontracting arrangements.

Opportunities also exist to improve labor conditions for all workers at the state and local level. For example, in 2007 Illinois passed a law that provides antidiscrimination and privacy protections for workers whose employers use Basic Pilot/E-Verify. Other affirmative proposals include ensuring that enforcement of state labor, employment, and civil rights statutes that protect workers is conducted regardless of the workers’ immigration status, prohibiting state labor agencies from sharing immigration status information obtained in the course of a labor complaint or labor investigation with federal immigration authorities, prohibiting employers from turning over personnel information to federal immigration authorities without a warrant, and making it an unlawful employment practice under state law to discriminate against an employment-authorized worker in the hiring, terms and conditions, or termination of employment based on national origin or citizenship/immigration status. For a full list of affirmative measures that could be considered at the state and local levels, see “Pro-Immigrant Measures Available to State or Local Governments: A Quick Menu of Affirmative Ideas.”⁴⁵

⁴⁴ See COMPREHENSIVE IMMIGRATION REFORM: LEGISLATIVE PRIORITIES FOR IMMIGRANT WORKERS (NILC, Feb. 2007), pp. 5.14–5.18 of this manual.

⁴⁵ Pages 3.1–3.6 of this manual.