

# COMPREHENSIVE IMMIGRATION REFORM

## Legislative Priorities for Immigrant Workers

February 2007

### INTRODUCTION

Immigrants currently comprise 15 percent of the United States' overall workforce and 20 percent of its low-wage workforce. In fact, half of all new participants added to the U.S. labor force 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, rather than enhance, the bargaining strength of all workers *vis a vis* their employers. Under the current system, many employers knowingly hire undocumented workers whom 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.

Legalizing 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. Strengthening these laws would significantly reduce the incentive to circumvent immigration laws to employ immigrant workers at lower wages and in substandard conditions, and at the same time improve the working conditions of *all* workers.

As Congress considers legislation to reform our immigration system, the following four 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.
- ❖ Ensure that any new employment eligibility verification system is implemented in a manner that minimizes both disruption to workers and the likely increase in discrimination and privacy violations.
- ❖ Bring antidiscrimination protections in the Immigration and Nationality Act (INA) into line with those in other civil rights laws.
- ❖ Strengthen labor and employment laws to hold bad-apple employers accountable when their actions undermine conditions for all workers.

**NOTE:** *This document does not include labor reforms needed to address the abuses and problems experienced by current workers on temporary visas, nor does it address labor protections needed in any future programs that may be enacted. Any immigration reform proposal must include these reforms.*



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## PROVISIONS TO STRENGTHEN WORKPLACE PROTECTIONS

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### ■ **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 retaliate against them by reporting them to immigration authorities. The following provisions would make it harder for bad-apple employers to abuse our immigration laws by using threats of reporting workers to the U.S. Department of Homeland Security (DHS) to inhibit union organizing or to retaliate against those who file labor complaints.

- ❖ **Employers liable regardless of immigration status of worker.** Clarify that an employer that violates labor laws remains liable for back pay or other monetary damages regardless of the worker's immigration status.
- ❖ **Common sense procedures for raids.** Codify existing rules of conduct for worksite raids during a labor dispute by requiring U.S. Immigration and Customs Enforcement (ICE) officials to follow common sense procedures when investigating workplaces that have ongoing labor disputes and refrain from carrying out raids in those circumstances.
- ❖ **No masquerading as health or safety personnel.** Stop ICE agents from masquerading as personnel from an agency or organization that protects health or public safety or provides domestic violence services.
- ❖ **Keep workers in U.S. to pursue claims against employers.** Preserve labor law enforcement opportunities by (1) preventing workers from being removed from the country before labor law enforcement agencies have an opportunity to interview them when labor law violations are discovered during an immigration enforcement action, and (2) granting workers who have been detained because their employer retaliated against them in the course of a labor dispute an opportunity to petition for visas and work authorization while they pursue the retaliation claim against that employer.
- ❖ **Confidentiality for those who cooperate with labor law investigations.** Reduce the fear of immigration consequences for reporting labor law violations by requiring federal labor law enforcement agencies to keep information about workers' immigration status discovered in the course of their investigations confidential.

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

Many advocates for immigrants are rightfully skeptical of a nationwide mandatory electronic employment verification system (EEVS). However, regardless of how one feels about expansion of the current employer sanctions regime, some type of an expanded EEVS program that applies to *all* workers seems to be an inevitable component of any comprehensive reform enacted by Congress. Advocates have therefore focused their attention on the features of the new system that will minimize the damage it will likely cause to immigrants, businesses, and the rest of the workforce, and that will maximize its workability. Experience with the Basic Pilot program, upon which

most EEVS proposals are based, demonstrates that the current system has major flaws that must be corrected before it is expanded and applied nationwide, including government databases that have unacceptably high error rates and employer use of the program to discriminate against workers.<sup>1</sup> If these flaws are not addressed before an EEVS is applied nationwide, it will result in severe negative consequences for workers and businesses alike: It will prevent authorized workers from obtaining employment, cause certain businesses and industries to move into the unregulated underground cash economy, and create an incentive for employers and workers to circumvent the EEVS by misusing valid or counterfeit

documents. The following features would address the Basic Pilot program's current flaws .

- ❖ **Phase in.** Phase in an EEVS at a reasonable rate, by size of employer, and provide for certification by the comptroller general that it meets requirements regarding database accuracy, low error rates, privacy, and measurable employer compliance with system requirements before implementation and each phase expansion. Such a phase-in will hold the government accountable for these reasonable and essential outcomes, providing an incentive to invest in proper planning and design features.
- ❖ **Antidiscrimination protections.** Require the EEVS to comply with existing antidiscrimination protections in the INA, and prohibit employers from misusing the system by (1) conducting employment eligibility verification before offering employment; (2) unlawfully reverifying workers' employment eligibility; (3) using it selectively or only to deny workers employment benefits or otherwise interfere with their labor rights, or to engage in any other unlawful employment practice; (4) taking adverse action against workers whose status cannot initially be confirmed by the EEVS; or (5) selectively excluding certain people from consideration for employment due to the perceived likelihood that additional employment eligibility verification might be required, beyond what is required for other job applicants.

- ❖ **Due process protections against erroneous determinations.** Create due process protections that: (1) allow workers to review and challenge the accuracy of the data in the EEVS; (2) require employers that participate in the EEVS to notify individuals that any information entered into the EEVS may be used for immigration enforcement; (3) require employers to provide detailed information about an individual's right to contest an EEVS finding, and the procedures for doing so; (4) clarify that an individual's failure to contest an EEVS finding does not constitute "knowledge" that an immigrant is undocumented under the current regulatory definition; and (5) create an administrative and judicial review process to challenge EEVS findings.
- ❖ **Privacy and identity theft protections.** Create privacy and identity theft protections that protect information stored in the system from misuse and sale or other commercial use; and create civil and criminal penalties for unlawful use of information in the EEVS.
- ❖ **Application only to new hires.** Apply only to *new* hires since workplace turnover (at a national turnover/separation rate of 40 percent, or 50-60 million employees, a year) means that eventually most people will be verified by the new system in a relatively timely manner without forcing employers to go through old records and reverify all existing employees.

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### ■ **Bring antidiscrimination protections in the Immigration and Nationality Act into line with those in other civil rights laws.**

The antidiscrimination protections in section 274B of the INA, which were added by the Immigration Reform and Control Act of 1986, were enacted to address discrimination that was expected to — and, in fact, *did* — result from the implementation of employer sanctions. While the INA's antidiscrimination protections have been critical in protecting thousands of workers from discrimination, tens of thousands more are excluded from its protections and remedies because of the law's limitations. The following provisions would bring INA section 274B into line with other civil rights laws — such as Title VII of the Civil Rights Act — that prohibit discrimination based upon race, color, national origin, religion, and gender. Enactment of these

provisions, coupled with vigorous enforcement of the other civil rights laws, would reduce the incentive for employers to seek out certain categories of workers whom they know are easier to exploit.

- ❖ **Nondiscrimination in employment.** Prohibit national origin discrimination during the employment relationship. The current prohibition is limited to discrimination in hiring, recruitment, or discharging.
- ❖ **Protect long-term lawful permanent residents.** Allow all workers to file citizenship or national origin discrimination claims, removing the current requirement that essentially bars long-term lawful permanent residents from doing so.

❖ **More reasonable rules for combating immigration-related unfair labor practices.** Reform the rules governing unfair immigration-related labor practices by (1) extending the time that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has in which to file a complaint from 180 days to 2 years, (2) permitting back pay as a remedy, (3) giving administrative law judges the discretion to award other appropriate remedies that are available under other civil rights laws, (4) eliminating the provision

requiring workers to prove that the employer “intended” to discriminate against them; and (5) increasing the fines for employers that are found to have violated the law.

❖ **Safe harbor to correct records.** Create a safe harbor for employers when workers correct personnel records to satisfy the employment eligibility verification requirements, and provide a remedy for workers who are fired for coming forward to correct their records after legalizing their status.

## ■ Strengthen labor and employment laws to hold “bad-apple” employers accountable when their actions undermine conditions for all workers.

Immigrant workers are overrepresented in the lowest paying and most dangerous industries, where labor violations are most prevalent. The primary economic incentive for employers to recruit, hire, and unfairly exploit immigrants derives from the confidence bad-apple employers have that they will not be held liable for egregious labor and employment violations. For example, wage theft by employers is the most common labor violation. As long as bad-apple employers can depress wages by hiring workers who face possible immigration consequences if they stand up for their rights, they will continue to violate the Fair Labor Standards Act (FLSA) with impunity. The following provisions would strengthen labor and employment laws to hold employers accountable for violating them:

❖ **Enhanced enforcement of minimum wage and overtime laws.** Strengthen enforcement of minimum wage and overtime laws by (1) increasing fines for those who violate the law, (2) expanding discretionary remedies for violations of the law, (3) expanding the class of those who are eligible to initiate complaints, and (4) expanding liability for violations to joint employers.

❖ **Stop businesses from turning a blind eye to products made in sweatshops.** Hold businesses accountable for distributing and selling products made by companies that violate wage and overtime laws (e.g., by using child labor or sweatshops).

❖ **Enhanced enforcement of health and safety laws.** Strengthen enforcement of health and safety law by (1) increasing fines for those who violate the law, (2) expanding discretionary remedies for violations of the law, (3) expanding the class of those who are eligible to initiate complaints, and (4) clarifying that employers must provide all required safety equipment free of charge to protect workers from hazardous conditions.

❖ **Stop misclassification of workers as independent contractors.** Close loopholes that allow employers to misclassify employees as independent contractors to avoid liability under labor and employment laws.

❖ **Strengthen workers’ bargaining rights.** Expand the remedies available to workers under the National Labor Relations Act and increase fines for employers who are found to have violated the law.

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<sup>1</sup> For more information on the Basic Pilot, see “The Basic Pilot Program: Not a Magic Bullet” (NILC, Jan. 2007), [www.nilc.org/immseplymnt/ircaempverif/basicpilot\\_nomagicbullet\\_2007-01-11.pdf](http://www.nilc.org/immseplymnt/ircaempverif/basicpilot_nomagicbullet_2007-01-11.pdf).