



Workers' Rights on ICE

How Immigration Reform Can Stop Retaliation and Advance Labor Rights

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About NELP

The National Employment Law Project (NELP) is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights.

Through its Immigrant Worker Justice Project, NELP works at the intersection of labor law and immigration law. We seek to expand and defend the labor rights of all workers, and to ensure that immigrant workers can assert their labor rights in a climate of equality and fairness, free from fear of reprisal. Our partners include workers centers and unions, immigrant rights groups, progressive lawyers, and community organizations. With them, we promote policies that expand the power of community organizing and protect immigrant workers' labor, civil, and human rights.

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Executive Summary

Often [immigrants work in] a shadow economy, a place where employers may offer them less than the minimum wage or make them work overtime without extra pay. And when that happens, it's not just bad for them, it's bad for the entire economy, because all the businesses that are trying to do the right thing that are hiring people legally, paying a decent wage, following the rules, they're the ones who suffer. They have got to compete against companies that are breaking the rules. And the wages and working conditions of American workers are threatened too.

— *President Barack Obama, January 29, 2013.*¹

For the first time in many years in the United States, a broad consensus of policymakers and ordinary citizens agrees that the time has come for an overhaul of our immigration system. This overhaul will benefit immigrant workers, workers in low-wage sectors of our economy, and the economy as a whole.

The U.S. labor market remains weak, with three unemployed workers competing for every available job. This imbalance gives employers great power to set the terms and conditions of employment and to violate workers' rights without fear of consequences. This is especially the case in low-wage industries marked by rampant workplace abuse.

Employers and their agents have far too frequently shown that they will use immigration status as a tool against labor organizing campaigns and worker claims. From New York to California, Washington to Georgia, immigrant workers themselves bear the brunt of these illegal tactics. For example,

- A California employer falsely accuses a day laborer of robbery in order to avoid paying him

for work performed. Local police officers arrest the worker. Although the police find no merit to the charges, he is turned over to Immigration and Customs Enforcement (ICE).

- A company in Ohio, on the eve of a National Labor Relations Board (NLRB) decision finding it guilty of several unfair labor practices, carries out its threats to “take out” union leadership by re-verifying union leaders' eligibility to work in the United States.
- A Seattle employer threatens workers seeking to recover their unpaid wages with deportation, and an ICE arrest follows.
- An injured worker in New York is arrested, at his employer's behest and on false criminal charges, just moments before a hearing on his labor claims.
- In the Deep South, a group of immigrant workers are facing deportation solely because they are defending labor and civil rights. The Southern 32 have exposed ICE's refusal to offer workers protections when enforcement actions block worker organizing on construction sites and day labor corners.

Silencing or intimidating a large percentage of workers in any industry means that workers are hobbled in their efforts to protect and improve their jobs. As long as unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security. Law-abiding employers are forced to compete with illegal practices, perpetuating low-wages in a whole host of industries.

The Obama administration has taken some steps to prevent immigration status-related retaliation by protecting immigrants who are victims of crime in the workplace, and by exercising prosecutorial discretion in limited cases to protect immigrant workers involved in labor disputes. But these efforts are not enough, particularly given the expansion of immigration enforcement at the federal and local levels. The U.S. government currently spends more on its immigration enforcement agencies—\$18 billion in fiscal year 2012—than all other federal law enforcement agencies combined.² The build-up of immigration enforcement provides unscrupulous employers with additional tools to retaliate against immigrant workers who seek to exercise their rights.

We can create a real, effective, pro-immigrant worker reform agenda to ensure that workers can speak up about labor abuses, now and in the future. We must learn from worker experiences and the failed policies of the past.

First, we must ensure that the eleven million undocumented immigrants living in the U.S. have the ability to become citizens and exercise our most cherished freedoms. Immigration reform must include a broad and fair path to citizenship that brings low-wage immigrant workers – including “contingent” workers like caregivers and day laborers – out of the shadows. Immigration reform must allow these aspiring citizens to work

collectively to upgrade jobs and contribute to a growth economy. As we know from the 1986 immigration reform, creating more U.S. citizens through a legalization program will improve wages and working conditions for all workers. In the process, it will strengthen our economy.

Second, to solidify the gains that will come from immigration reform, we must ensure that no employer can use immigration law to subvert labor laws and to retaliate against workers in the future.

A new immigration policy must include:

- Equal remedies for all workers subjected to illegal actions at work;
- A firewall between immigration enforcement and labor law enforcement; and
- Immigration protections for workers actively engaged in defending labor rights
- Robust enforcement of core labor laws in low-wage industries.

The National Employment Law Project (NELP) has prepared this analysis and offers the stories of immigrant workers to underscore the importance of ensuring workplace protections for all who work in the United States, regardless of status, and to emphasize the critical need for a broad pathway to citizenship. Such protections will benefit all workers by raising workplace standards and removing rewards for employers who abuse workers for their own gain.

Overhaul of Immigration Law Must Protect All Workers' Rights

I. Labor abuses and retaliation against U.S. citizen and immigrant workers are all too common in expanding low-wage labor markets

A. Immigrants, including the undocumented, work mainly in low-wage sectors of our economy

Immigrants comprise a growing part of the United State labor force. In 2010, 23.1 million foreign-born persons participated in the civilian labor force.³ Of these workers, some eight million undocumented workers form 5.2 percent of the U.S. labor force.⁴

Immigrant workers are present in every occupation in the United States. More than 25 percent of the foreign-born work in service occupations; 13 percent work in natural resources, construction, and maintenance occupations; 15.5 percent work in production, transportation, and material moving occupations; 17.8 percent in sales and office occupations; and 28.6 percent in management, business, science, and art occupations.⁵

Immigrant workers are over-represented in a majority of the largest and fastest-growing occupations in the United States. For example, between 2010 and 2020, we will need more home health aides, nursing aides, personal care aides, food preparation and serving workers, heavy tractor trailer truck drivers, freight stock and material movers, childcare workers, and cashiers—industries that employ a large number of immigrant workers.⁶

In an anemic and uneven economic recovery, 58 percent of the jobs gained in the last three years are in low-wage sectors—the sectors in which

many immigrants work.⁷ In particular, among undocumented immigrants in the labor force, 30 percent work in the service industry, 21 percent work in the construction industry, and 15 percent work in the production and installation industry. Undocumented immigrants labor as farm workers, building, grounds keeping and maintenance workers, construction workers, food preparation and serving workers, and transportation and warehouse workers. Undocumented immigrants represent 23 percent of workers in private household employment, and 20 percent of those in the dry cleaning and laundry industry.⁸

B. Labor abuses are common in low-wage, high-immigrant occupations

Labor abuses are endemic to most low-wage occupations and industries. Workers in industries most likely to employ low-wage immigrant workers, such as domestic work,⁹ agriculture,¹⁰ restaurants,¹¹ construction,¹² and nail salons,¹³ report high incidences of wage and hour violations, health and safety violations, work-related injuries, and discrimination.

In a landmark survey of more than 4,000 low-wage workers in New York, Chicago, and Los Angeles, more than two in three experienced at least one type of pay-related workplace violation in their previous week of work, with violations



Employer Files False Police Report to Avoid Paying Day Laborer His Wages, Leading to Deportation Proceedings

Garden Grove, CA (2012)

On the morning of March 9, 2012, Jose Ucelo-Gonzalez was hired from a Home Depot parking lot by Michael Tebb, a private contractor, to pave the parking lot of a local hospital.

At the end of the day, Ucelo-Gonzalez asked Tebb to pay him for his ten hours of work. Tebb made motions as if he wanted to fight, cursed at him, and said that he would have Ucelo-Gonzalez arrested for stealing. Tebb got in his truck and drove away, abandoning Ucelo-Gonzalez without a ride and leaving him without his pay.

Ucelo-Gonzalez called the police, who asked him for the exact address of his location. As he left the parking lot to find out the address, eight police cars pulled up. Tebb was with them. The police arrested and handcuffed Ucelo-Gonzalez. At the police station, Ucelo-Gonzalez explained that Tebb had not paid him his wages and had made false accusations, and had a co-worker come and serve as a witness on his behalf. Although the police noted that Ucelo-Gonzalez was “very sincere in his statements,” and although the false charges were ultimately dropped against him, Ucelo-Gonzalez was transferred to ICE custody.²⁴

photo of Jose Ucelo-Gonzalez courtesy of NDLO

most prevalent in the high-growth areas of domestic employment, retail and personal care industries.¹⁴ Undocumented workers, moreover, are far more likely to experience violations of wage and hour laws. According to the survey, over 76.3 percent of undocumented workers had worked off the clock without pay; 84.9 percent of undocumented workers had received less than the legally-required overtime rate; and 37.1 percent had received less than the minimum wage for their work. Undocumented workers experienced these violations at rates higher than their native-born counterparts.¹⁵

C. Retaliation and threats — although illegal — are common

Our nation’s labor and employment laws protect undocumented workers—just like any other worker.¹⁶ These laws include protections against employer retaliation. Labor and employment laws prohibit employers from reprisals when workers engage in protected workplace activity, regardless of the worker’s immigration status.¹⁷

Nevertheless, retaliation is common against all workers who speak up about abuse on the job, ask questions about workplace protections, or exercise their rights to engage in collective action. In fiscal year 2012, the U.S. Equal Employment Opportunity Commission (EEOC) received more than 37,800 complaints that included retaliation claims.¹⁸ Among the workers included in the three-city survey mentioned above, 43 percent of those who made complaints or attempted to organize a union experienced retaliation by their employer or supervisor.¹⁹

A study of immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers’ compensation claims for fear of getting “in trouble” or being fired.²⁰ In another study of immigrant workers’ perceptions of workplace health and safety, researchers from the University of California at Los Angeles (UCLA) observed that “[w]orkers worried because they know the work they did was dangerous, and also because they knew that if they got injured they

would have limited medical care options. Some respondents said that they could not really ‘afford to worry’ because they needed the job and had little control over the working conditions.”²¹

While threats of job loss have an especially serious consequence in this job market, an employer’s threat to alert immigration or local law enforcement of an undocumented immigrant worker’s status carries added force. Such action

Injured Immigrant Worker Arrested at NY Human Rights Hearing Due to Employer Retaliation, Sent to Immigration

Spring Valley, New York (2012)

In 2010, Jose Martinez,* a landscaper in New York, injured his hand at work. Instead of assisting Martinez after his injury, his employer, who had also failed to pay him proper wages, immediately fired him. On the advice of an attorney, Martinez filed a workers’ compensation claim and complaints with the New York Department of Labor and NY Division of Human Rights, which began investigating his claims.

Minutes before Martinez’s hearing before the NY Division of Human Rights, a police car from his employer’s town arrested Martinez. The police informed Martinez that, as a result of complaints by his employer, there was a warrant for two criminal charges against him. He was detained, then transferred to ICE custody, where he spent six weeks in detention. He is still fighting his deportation. One of the criminal complaints brought by his employer has since been dismissed, and Martinez is currently trying to defend himself against the other. Martinez’s employer later confirmed that he gave the local police department information about the hearing before the Division of Human Rights. While Martinez is still trying to recover his lost wages and help for his injuries, his employer has threatened his family in Guatemala. Martinez is afraid to come to court and afraid for his life.²⁵

Employer Sexually Assaults Employee, Forces Her to Remain Silent Because of Immigration Status

Philadelphia Metro area (2010)

Josefina Guerrero,* an immigrant worker from Mexico, worked at a food processing facility outside Philadelphia, Pennsylvania. She enjoyed her work, until one of her supervisors began to make sexually explicit gestures and touch her as she worked on the line. While she tried to avoid him, one day he cornered her at the plant, and forced her to have sex. As he made his advances, he told her that if she did not comply, he would report her undocumented status and have her fired. Josefina was deeply traumatized, and was afraid to come forward, because her supervisor told her that she had no rights in this country as an undocumented worker. Although she was assaulted in 2010, it took her almost two years to come forward to share her story.²⁶

is at least as frequent as other forms of retaliation. An analysis of more than 1,000 NLRB certification elections between 1999 and 2003 found that “[i]n 7% of all campaigns – but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants – employers make threats of referral to Immigration Customs and Enforcement (ICE).”²² Immigration worksite enforcement data for a 30-month period in the New York region between 1997 and 1999 show that more than half of raided worksites had been subject to at least one formal complaint to, or investigation by, a labor agency.²³

II. Heightened immigration enforcement has given unscrupulous employers new tools for retaliation against immigrant workers

A. Expansion of immigration enforcement at local and federal levels brings new players to the retaliation game

Anecdotal reports show that in recent years, employers who seek to retaliate against immigrant workers have increasingly filed reports with local law enforcement agencies, in addition to direct reports to federal immigration officials. Enforcement targeting undocumented immigrants has reached record levels. The U.S. government currently spends more on its immigration enforcement agencies—\$18 billion in FY 2012—than all other federal law enforcement agencies combined.²⁷ The U.S. Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) agencies now refer more cases for prosecution than all combined agencies within the U.S. Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).²⁸

Immigrant communities feel keenly the effects of these heightened enforcement activities at the local level. In FY 2012 alone, the Obama administration deported a record 409,849 individuals from the United States. During the last four years, the Obama administration has deported more than 1.5 million people, at a rate faster than the previous Bush administration.²⁹

The growth of immigration enforcement programs such as 287(g) agreements and Secure Communities, has expanded the reach of federal immigration enforcement agencies at the local level, radically transforming the immigration enforcement landscape. 287(g) agreements

permit local law enforcement agencies to enforce federal immigration law. Secure Communities is a federal program that allows state and local law enforcement agencies to instantaneously share immigration information with the U.S. Department of Homeland Security (DHS) and check the immigration status of any individual taken into custody against a flawed and inaccurate database, even without the filing of a criminal charge. Under Secure Communities, ICE may place an immigration detainer—a pre-trial hold—on any individual who appears on the federal database, and transfer the individual into immigration custody. Secure Communities has had a disastrous effect on immigrant communities, including on victims of crime and employer abuse. In FY 2010, Secure Communities led to the issuance of 111,093 immigration detainers by ICE at the local level.³⁰ Underscoring the inaccuracies of the DHS database, Secure Communities has even led to the improper immigration-related arrest of approximately 3,600 U.S. citizens by ICE.³¹

In addition, deputization agreements formed under Section 287(g) of the Immigration and Nationality Act have enabled local law enforcement agencies to perform some of the functions of federal immigration agents, laying the groundwork for a greatly expanded immigration enforcement system. Although the Obama administration began to phase out local partnerships under the program in 2012 in favor of the use of Secure Communities, the impact of 287(g) agreements remains.³² Critics argue that the 287(g) program lacked proper oversight, allowed local law enforcement agencies to pursue immigration enforcement in discriminatory ways, and diverted resources from the investigation of local crimes.³³

As demonstrated by the following examples, the flawed integration of local law enforcement with federal immigration enforcement has provided employers with additional means to retaliate against immigrant workers who seek to exercise their workplace rights. Employers may capitalize on language barriers or local law enforcement biases against immigrants to achieve their ends. Due to the growing federal-local collaboration on immigration enforcement, immigrant workers who are falsely accused of crimes often have no recourse and instead, end up in deportation proceedings after blowing the whistle on labor violations.

In addition, agents of employers, including insurance agencies that provide workers' compensation coverage, have chosen to report immigrant workers to local law enforcement agencies for inconsistent Social Security numbers. Although it is well-settled that workers, regardless of immigration status, are entitled to workers' compensation coverage,³⁴ at least one large insurance company has persuaded local prosecutors to file identity theft charges or other document-related charges with local police departments, thereby avoiding payment to the injured worker.

Day Laborer Lands in Jail and Faces Immigration Hold after Requesting Wages

Winnetka, California (2013)

Hector Nolasco, a day laborer in Winnetka, California, currently faces deportation because his employer falsely reported him to the police in order to avoid paying him his wages. On February 3, 2013, Hector and a friend were hired to pack and move boxes at a restaurant for five hours. Nolasco worked for six hours, and when he asked to be paid for the extra hour, his employer refused. Instead, the employer threatened to call the police.

Nolasco and his friend decided to leave, and began a three mile walk back to the corner from which they were hired. The employer followed them, hurling insults and gesturing threateningly. Suddenly, the police arrived, and placed Nolasco under arrest. Nolasco later learned that his employer had told the police that Nolasco had threatened him with a knife—the box cutter that Nolasco had used to pack boxes. Although Nolasco's friend, who was present all day, confirmed that Nolasco never threatened anyone, Nolasco remains in police custody on a misdemeanor charge of displaying a deadly weapon. He has also been issued an ICE hold.³⁵

photo of Hector Nolasco courtesy of NDLO



Unpaid Construction Worker Deported After Employer Retaliates, Calls Police

Charlestown, MA (2012)

Gabriel Silva,* a construction worker from Brazil, was hired during the summer of 2012 by a subcontractor to install plaster and sheetrock in Charlestown, Massachusetts. The subcontractor failed to pay Silva the \$6500 owed for his work, and on August 12, 2012, Silva returned to request his wages.

While Silva and a friend were waiting in their van for the check, the subcontractor called the local police department and reported that “two contractors were at his home and [were] refusing to leave the property.” By the time the police arrived, Silva and his friend had already decided to give up and leave. As they drove off, the police stopped their van, and asked Silva for a copy of his driver’s license. Silva handed the police officer a copy of his passport, and told the police officer that they had been trying to recover their unpaid wages. The police officer asked the pair for their green cards, which they could not provide. The police officer then called an ICE agent. Silva and his friend were transported back to the police station, and their vehicle was towed. The ICE agent interviewed Silva and his friend, and issued an immigration detainer. Silva and his friend were ultimately transferred into ICE custody and deported. The Brazilian Immigrant Center is still attempting to recover Silva’s wages.³⁶

Restaurant Worker Arrested and Deported After Trying to Collect Two Months of Unpaid Wages

Lanett, AL (2012)

Pablo Gutierrez* worked at a restaurant in Lanett, Alabama. While at the restaurant, he worked from 8:00 in the morning until 10:00 pm at night, seven days a week, for \$1300 per month – an hourly wage of less than \$3.50 per hour. After he had gone for two months without being paid, he asked his employer for a raise. His employer fired him on the spot. When he asked his employer for his unpaid wages, his boss told him to come back the next Saturday to collect his pay.

Gutierrez returned the following Saturday, October 6, 2012, right before the restaurant closed. As he waited in his car for his employer to come out of the restaurant, he saw his boss make a call on a cell phone. Suddenly, a police car pulled up, and the police officer asked Gutierrez why he was there. While Gutierrez explained that he was trying to collect his wages, three additional police cars pulled up. After the police officers talked to Gutierrez’s employer, the police asked him for a drivers’ license, and he was arrested at once. Gutierrez later understood that he had been charged with attempted robbery. Gutierrez was transferred to immigration custody, and after spending almost two months in jail and immigration detention, was deported to Mexico on November 26, 2012.³⁷

Grandmother Imprisoned and Deported After Workers' Compensation Insurance Company Reported Her to Local Law Enforcement

York County, Pennsylvania (2012)

Juana Garcia,* a grandmother of eleven, nine of whom are U.S. citizens, and an immigrant from Mexico, worked for several years at a York County, Pennsylvania pizza restaurant. Garcia worked long hours at the restaurant—over 12 hours a day, 5 days a week—and also cleaned the restaurant owner's home on one of her two days off. She worked well over 40 hours a week, and was never properly paid overtime.

Garcia's legal problems began when a shelf fell on her at work, injuring her badly. Her employer reported her injury to the workers' compensation insurance company. The insurance company then contacted the local police department to initiate a criminal investigation because her Social Security number did not match records at the Social Security Administration. Garcia was charged and convicted for identity-related offenses, and was sentenced to several months in federal prison. Garcia was then transferred to the custody of immigration officials, and was deported to Mexico. Garcia never collected the wages she was due from her employer, and was deeply traumatized by incarceration and separation from her children and grandchildren in the United States.³⁸

Immigrant Construction Workers Try to Recover Unpaid Wages, Reported to ICE

Seattle, WA (2012)

Casa Latina's Workers Defense Committee, an immigrant worker center in Seattle, Washington, worked with three construction workers whose employer owed them collectively a total of over \$30,000. This employer was known to Casa as a repeat offender with a lengthy record of wage and hour violations.

In February 2012, the three workers approached their employer to request their pay, and gave the employer a list of wages owed and hours worked. During the meeting, the employer threatened to call immigration authorities if they continued to request their unpaid wages. The workers filed a wage complaint with the Washington State Department of Labor and Industries. A few days later, ICE arrived at the home of one of the workers and took him into custody. The other two workers remain in great fear, and have since dropped their claim against the employer.³⁹



photo courtesy of Casa Latina

Farm Workers Detained by Immigration after Assault by Abusive Employer Who Filed False Police Report

Cordele, GA (2010)

When Ernesto Lopez,* and brothers Julio and Juan Diaz,* traveled with a watermelon-picking crew to Georgia, they realized that the bad rumors that they had heard about their employer were true. Their employer often yelled at workers, refused to pay them if the trucks were not loaded to his liking, and warned the workers about immigration. The workers did not receive all the pay that they were due, and were housed in a motel, assigned to them by their boss, who lived nearby with his family.

On June 5, 2010, Ernesto, Julio, and Juan decided that they wanted to find another place to work. Although they were scared, Ernesto and Julio called their boss to tell him that they wanted to leave and move to a different crew. Their boss would not allow them to leave. Soon after, their boss and eight of his friends and relatives came to their room, and began to beat Ernesto, Julio, and Juan. Ernesto was beaten over the head by a bottle; Julio was choked and he lost consciousness. Due to the commotion, two police officers, neither of whom spoke Spanish, soon arrived at the motel. They spoke to the boss in English, and arrested Ernesto, Julio, and Juan, who only speak Spanish.

When Ernesto, Julio, and Juan were brought to the police station, they were charged with disorderly conduct and told that they could leave if they paid bail. The three workers pooled their money so that Ernesto, who was most severely injured, could leave and get help. The day after Julio and Juan met with a legal aid lawyer, the disorderly conduct charges were dropped against them, and they were transferred to an immigration detention center. Julio and Juan's lawyer later found out that ICE had told the police department that it would be faster to get rid of the workers if the charges were dropped.⁴⁰

Insurance Agency Reports Injured Worker after Workers' Compensation Claim, Leading to Deportation Proceedings

Milwaukee Metro Area, Wisconsin (2009)

Omar Damian Ortega worked as a welder for his employer for over eight years until March 2009, when he suffered a back injury. After he filed an appeal for his workers' compensation claim, his employer's insurance company called the local police department to investigate whether Mr. Damian Ortega had, years earlier, used a false Social Security number to get his job. The insurance company stated that "it is its policy to "notify the necessary law enforcement and government agencies when it believes an identity theft has occurred."

After the insurance company contacted the local police department, the police drove to Mr. Damian Ortega's house and questioned him. Mr. Damian Ortega was arrested a few days later. After approximately five months in jail, he pled guilty to two misdemeanors involving use of a false social security number. He was then transferred to the custody of Immigration and Customs Enforcement, where he faced deportation proceedings.

B. Increase in worksite immigration enforcement and I-9 audits encourages employers to "self-audit" during labor disputes

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), a cornerstone of today's immigration policy. Central to IRCA was the creation of employment sanctions, which impose civil and criminal penalties on employers for knowingly hiring and employing workers without authorization.⁴¹ IRCA requires employers to verify a worker's identity and eligibility to work, and complete and retain an "I-9" form for each new employee, or risk a fine.⁴² Despite its intention to deter employers from knowingly hiring undocumented workers, workers themselves have borne the punitive

brunt of the employment sanctions regime.

In the past three years, the Obama administration has reduced the frequency of worksite raids and has instead increased administrative audits of employers to detect compliance with I-9 requirements. Since January 2009, ICE has conducted more than 8,079 audits of employers, compared with 503 audits in FY 2008.⁴³ Although this strategy of “silent raids” differs from the prior administration’s primary focus on high-profile raids, the effect on workers is devastating. Where workers have conducted union organizing drives, employers may claim that they must re-verify employees’ I-9 forms to comply with an ICE audit—even where none in fact is present. Such an announcement stokes fear in an already vulnerable workforce, and can unfairly interfere in an organizing campaign.

In limited circumstances, employers may re-verify, or ask workers to produce their I-9 work authorization documentation again, after the employer’s initial verification at the time of hire, without running afoul of anti-discrimination or retaliation protections.⁴⁴ However, in some cases, employers have improperly conducted I-9 self-audits just after employees have filed workplace-based complaints, or in the midst of labor disputes or collective bargaining, creating a climate of fear. In other instances, employers have attempted to re-verify workers following a reinstatement order, an illegal practice under the National Labor Relations Act.⁴⁵ Employers often provide little or no notice to workers about the reason for the I-9 re-verification, and fail to provide a reasonable period of time for employees to respond to the self-audit, even when they are proper.

Employer Conducts Immigration Reverification After Workers File Complaint with Department of Labor for Safety and Wage Violations

Esmoke | Lakewood, NJ (2012)

Employees at the Esmoke company in Lakewood, New Jersey, make electric cigarettes—“fake cigarette” devices filled with nicotine and used to quit smoking. Workers who make these devices must mix dangerous chemicals and solder batteries to the electric cigarette. At Esmoke, workers had a number of serious health and safety complaints, and had not received wages, including overtime, from their employer.

After workers filed a complaint with the Department of Labor’s Wage and Hour Division (WHD) and Occupational Health and Safety Administration (OSHA), OSHA inspectors conducted a surprise investigation of the plant on September 27, 2012.⁴⁶ Managers at the plant immediately told the workers not to answer the inspectors’ questions, hid chemicals in their offices, and instructed the workers to falsely tell the inspectors that they used gloves.

One week after the OSHA investigation, the employer began to ask employees if they were legally authorized to work and told some workers that immigration agents would soon be coming to the plant. Word spread. Workers—except those close to the boss—were given I-9 and IRS W-4 forms to complete. Most workers had never been given these forms before, despite requirements that employers attain those forms from any new employees. Two of the workers who initiated the complaint were terminated from their jobs.

The WHD also investigated for labor law violations, and found that the employer had not paid over \$33,000 worth of overtime wages to its workers. However, the employer required some workers to provide valid social security cards in order to receive their checks. Several workers remain unpaid.⁴⁷



Palermo Pizza Attempts to Reverify Immigration Status of Workers Organizing to Form a Union

Palermo Pizza | Milwaukee, Wisconsin (2012)

For at least three years, workers at Palermo Villa, Inc., one of the country's largest producers of frozen pizza, had been working with a community group, Voces de la Frontera, to address workplace issues including health and safety, overtime pay, and discrimination. In May 2012, three-

quarters of the production workers signed a petition in favor of a

union, and on May 29, 2012, they requested that Palermo recognize their union and filed a formal petition with the NLRB. The next day, Palermo gave workers a letter indicating that ICE had conducted an I-9 audit and the workers were required to reverify their immigration status within 28 days.

Four days later, Palermo told its employees that they would have only 10 days to reverify their status. Scores of Palermo's workers went on strike to protest the immigration crackdown, as well as the poor wages and working conditions.⁴⁸ Palermo responded by telling workers that a union would cost the company thousands of dollars and that the company would not accept it.⁴⁹

A few days later, after several labor leaders complained that the immigration audit at Palermo's was undermining a unionization effort, ICE wrote Palermo suspending its audit. At this point, Palermo had no information indicating that any of its employees were unauthorized to work, and was in no danger of penalties, because the ICE investigation had been stayed. Nonetheless, one day after receiving notice that ICE was not pursuing enforcement action against it, Palermo fired some 75 striking workers. Palermo claimed that the firings were not motivated by anti-union animus, but to comply with immigration law, a dubious claim in light of ICE's retraction of its investigation and in light of further actions by the company: It distributed a notice to workers that said, "unions want to take your job and give them to protesters." Palermo also posted a banner at the facility stating that, "a union will not change your immigration status."⁵⁰

photos courtesy of Jenna Pope



Employers have improperly conducted I-9 self-audits just after employees have filed workplace-based complaints, or in the midst of labor disputes, or collective bargaining, creating a climate of fear.

In a national survey of 4,000 low-wage workers, 20 percent said that they did not make a complaint to their employer during the past 12 months, even if they had experienced a serious problem.

Pomona College Fires Dining Hall Workers through Immigration Reverification after Workers Organize for Union

Pomona College | Pomona, California (2011)

For two years, dining hall workers at Pomona College in Claremont, California organized to form a union. Discussions between workers and the College have been unsuccessful. In 2011, the administration began enforcing a rule barring dining hall employees from talking to students in the cafeteria.⁵¹ The union filed unfair labor practice charges in August and September 2011 challenging the rule.⁵² The College later changed the no-contact rule in the face of prosecution from the general counsel of the National Labor Relations Board.

In the middle of the campaign, the College received a letter from an undisclosed source accusing it of having a policy of not obtaining documentation of work authorization from its employees. The College administration investigated this complaint and found it to be false. Even though the College's review found that there was no such history of noncompliance, and although no federal agency had investigated the College for noncompliance, the College Board of Trustees decided to re-verify the immigration status of its staff. It turned the matter over to the law firm of Sidley Austin, a corporate law firm which offers services including "union avoidance" for "clients who desire to remain union-free."⁵³



The college gave staff notice that they needed to bring in their documents within 3 weeks and by early December 2011, Pomona had fired 17 workers. Sixteen of them were dining hall workers. Some of the staff members had been employed by the College for decades.

It is impossible to know whether the college's actions were motivated by its desire to avoid unionization of its employees. What is clear is that the vagueness of the complaint that Pomona allegedly received and its harsh response —after two years of union organizing and amid pending charges of unfair labor practices⁵⁴—resulted in job loss for some of Pomona's long-standing employees.

photos courtesy of UNITE HERE



Poultry Processor Targets Immigrant Worker Leaders, Investigates Immigration Status to Stop Union Organizing

Case Farms | Winesburg, Ohio (2011-2012)

Case Farms is a chicken slaughterhouse and processor located in Winesburg, Ohio. In the mid-1990s, the company began to recruit and hire Guatemalan workers from Florida and from its own processing plants in North Carolina. In

2000, approximately 350 Guatemalan workers worked at Case Farms. By 2007, Case Farm workers won union representation by the United Food and Commercial Workers (UFCW) Local 880 by a nearly 2 to 1 margin, but the company's campaign against the union had just begun.

For four years, in a climate of extreme hostility and illegal retaliation against workers by the employer, the union attempted, without success, to negotiate with the company to gain a contract. In June 2011, a federal district court issued an injunction against Case Farms' anti-union activities.⁵⁵ On September 16, 2011, the NLRB Division of Judges issued a cease and desist order against the company, after finding that its Human Resource manager had stated that he was intending to "take out" the Union supporters "one at a time."⁵⁶

Just weeks before the NLRB released its decision, Case Farms on its own began an internal investigation into the immigration status of ten worker leaders who supported unionization, all of Guatemalan origin. The only stated basis for the company's actions was that some of the workers were originally from Guatemala or had traveled to Guatemala. The company had no basis for investigating the status of five of the ten workers. Although legally a person's ethnicity or national origin is not a legitimate basis upon which to determine citizenship status, Case Farms fired all ten workers.⁵⁷ The organizing campaign at the plant has since halted.

photo courtesy of Tim Mullins



C. Use of E-Verify exacerbates retaliation by employers

E-Verify is a federally-created internet-based program that allows employers to confirm the immigration status of newly hired workers. To use the E-Verify system, employers must enter an employee's identification information, including name, Social Security number, date of birth, citizenship, and alien number into an online database, which is matched against databases maintained by the Social Security Administration (SSA) and DHS. The E-Verify system is voluntary for most employers, although at least

some employers in 19 states and those with federal contracts must enroll in E-Verify.⁵⁸ Although use of E-Verify has expanded rapidly over the last decade, only around 350,000 employers are currently enrolled.⁵⁹

Policymakers have called for the implementation of mandatory E-Verify systems as part of immigration reform.⁶⁰ A mandatory E-Verify system would cause qualified workers to lose job opportunities, increase employment discrimination, decrease tax collection, and increase "off-the-books" employment, allowing more labor abuses to flourish.⁶¹

Proponents of E-Verify argue that the system will modernize the nation’s employment immigration verification systems, but at least in its current form, E-Verify has led to widespread confusion and error. In 2009, a government-commissioned report estimated the error rate of the E-Verify system to be at 4.1 percent, with inaccuracies found to be 30 to 50 times higher for naturalized citizens and legal immigrants than for native-born citizens.⁶² The Social Security Administration projects that under current conditions, a mandatory E-Verify program could result in the misidentification of 3.6 million workers as unauthorized for employment each year.⁶³

Mandatory use of E-Verify will provide employers added incentive to erroneously call their workers independent contractors or simply

pay them “off the books” in order to skirt their E-Verify obligations. The Congressional Budget Office estimates tax losses at over \$17.3 billion.⁶⁴ In addition, as examples show, unscrupulous employers have misused E-Verify as an opportunity to intimidate and retaliate against workers for union organizing or for engaging in concerted efforts to address workplace violations.

The experience of state implementation of E-Verify proves instructive. In some states, E-Verify legislation requires state governments to verify immigration status for some employees, creating conflict with state and federal enforcement of labor standards for undocumented workers. Where this is the case, workers who wish to pursue labor claims face an especially high risk of immigration-related consequences.⁶⁵



Latino Supermarket Chain Signs Up for E-Verify and Re-Verifies I-9 Forms in Midst of Unionizing Campaign

Mi Pueblo Supermarket Chain | San Francisco Bay Area (2012)

Workers at the Mi Pueblo supermarket chain, which caters to the Latino immigrant community in the San Francisco Bay Area, have been trying to join a union for years. In response to complaints about unfair hiring practices and violations of wage and hour laws, the United Food and Commercial Workers (UFCW) union Local 5 began a campaign to organize workers, gathering authorization cards from workers seeking collective bargaining. However, in August 2012, as the union organized both workers and local community to support the union, Mi Pueblo announced that it had decided to voluntarily join the E-Verify program to screen new hires for immigration status. Although Mi Pueblo explained that it was “forced” to use the E-Verify program by the government, ICE spokespeople confirmed that E-Verify is a voluntary program in California.⁶⁶

Mi Pueblo’s announcement that it would use E-Verify angered the local community, and UFCW scheduled a boycott of the supermarket chain the next month. However, days before the boycott was to begin, in October 2012, Mi Pueblo announced that federal immigration agents had launched an audit of the entire supermarket chain.⁶⁷ The effect of this announcement was disastrous: many workers quit working at Mi Pueblo out of fear. Despite the fear caused by Mi Pueblo and the I-9 audit, as well as union-busting tactics used by the employer, the union continues to organize.⁶⁸

photos courtesy of David Bacon



Employer Decides Unilaterally to Enter E-Verify Program without Bargaining with Union

Pacific Steel Casting Company | Berkeley, California (2012)

Berkeley's Pacific Steel Casting Company (Pacific Steel) decided unilaterally to implement the use of E-Verify in its workplace. Even though Pacific Steel workers are represented by the Glass, Molders, Pottery, Plastics & Allied Workers International Union, Local No. 164B, AFL-CIO, CLC (Local 164B), the union was not notified. When Local 164B learned of Pacific Steel's enrollment and requested written confirmation, Pacific Steel untruthfully claimed that because it was a federal contractor, it was required to use E-Verify and refused to bargain with the union over this issue.⁶⁹

To protect its members, the union filed unfair labor practice charges with the National Labor Relations Board (NLRB). In settlement of the charges, Pacific Steel agreed to reinstate employees and pay employees for any wages and benefits lost after many were terminated as a result of Pacific Steel's unlawful entry into the E-Verify Program. The agreement, signed on March 22, 2012, also requires that Pacific Steel terminate its enrollment in E-Verify.

photos courtesy of David Bacon



Mandatory use of E-Verify will provide employers added incentive to erroneously call their workers independent contractors or simply pay workers “off the books” in order to skirt their E-Verify obligations. The Congressional Budget Office estimates tax losses at over \$17.3 billion.

Providing eight million workers with a pathway to citizenship will ease the climate of fear that prevents the exercise of workplace rights

Retaliation and threats of retaliation have created a culture of fear among low-wage and immigrant workers. In a national survey of 4,000 low-wage workers, 20 percent said that they did not make a complaint to their employer during the past 12 months, even if they had experienced a serious problem. Of these workers, most were afraid of having their wages and hours cut or of losing their job.⁷⁰

Undocumented workers do not form a majority in any industry, but work alongside U.S. citizens and documented workers. When as many as 20 percent of low-wage workers are afraid to exercise their workplace rights, the remaining workers cannot effectively organize a union or voice collective complaints. It comes as no surprise that wages and unionization rates both remain low in industries with large numbers of undocumented workers.⁷¹

Providing a pathway to citizenship for the 11 million undocumented immigrants in the United States—8 million of whom participate in the labor force—will facilitate efforts to improve job quality and economic security for both U.S. and aspiring citizens. Immigration reform that puts all workers on a level playing field would create a virtuous cycle in which legal status and labor rights exert upward pressure on the wages of both native-born and immigrant workers.⁷² Higher wages and better jobs translate into increased consumer purchasing power, which will benefit the U.S. economy as a whole.⁷³

The historical experience of legalization under the Immigration Reform and Control Act of 1986 demonstrates that comprehensive immigration reform that includes a pathway to citizenship for the undocumented will improve our economy. In 1986, IRCA provided immediate direct benefits by successfully turning formerly clandestine workers into higher-paid employees. Wages increased because workers gained the right to live and work legally in the United States.⁷⁴ Today, providing a clear path for undocumented workers to become citizens will raise wages, increase consumption, create jobs, and generate additional tax revenue.⁷⁵ Experts estimate that providing a way for undocumented immigrants to realize their dreams of U.S. citizenship will add a cumulative \$1.5 trillion to the U.S. gross domestic product—the largest measure of economic growth—over 10 years.⁷⁶

A new immigration policy must ensure that employers can no longer use immigration status to retaliate against workers

Retaliation against immigrant workers has silenced fair pay, health and safety claims, and union organizing campaigns. While a broad legalization program will allow these workers to safely come forward, immigration policies must also guard against future employer manipulation of the immigration laws. In crafting those policies, we can learn from an evaluation of current efforts to protect immigrant workers from retaliation and ensure that labor agencies can enforce baseline laws.

I. Firewalls between immigration and labor enforcement must be reinforced

In the mid-1990s, the U.S. Department of Labor and the Immigration and Naturalization Service (INS) developed new policies to address the effect of strict enforcement of immigration laws on labor law enforcement. The first, an internal Operating Instruction at INS, and the second, a Memorandum of Understanding between the INS and the U.S. Department of Labor, intended to uphold dual national interests in protecting labor rights and enforcing immigration standards. Both of these interests are undercut when employers are allowed to use immigration status as an exit strategy in labor disputes.

A. Immigration and Naturalization Service Operating Instruction 287.3(a) must be updated and codified

Since 1996, INS and now ICE have been guided by an internal policy intended to ensure that immigration authorities do not become

unwittingly involved in labor disputes as a result of employer retaliation.⁷⁷ The policy, Operating Instruction 287.3(a) (OI), requires immigration agents to receive approval from an ICE Director before continuing an investigation where it appears that the employer has attempted to use DHS to interfere with workers' exercise of their employment and labor rights.⁷⁸

The OI includes a provision requiring ICE agents to determine whether information provided about an undocumented immigrant is given to interfere with a workplace dispute or to retaliate against any worker, and closely examine information from any source that may raise this concern. Where there is a suspicion that an employer may have brought in ICE during a labor dispute, ICE must make specific inquiries into the source and details of the information it receives. The OI also requires internal discussion with ICE District Counsel and

approval of the ICE Assistant District Director for Investigations or an Assistant Chief Patrol Agent before any immigration enforcement action takes place in such cases.

As cases in this report illustrate, the OI, while a good start, often falls short in protecting immigrant workers involved in workplace disputes, and requires substantial improvement in implementation. First, the OI remains an internal protocol, and lacks the force of codification. Local ICE offices are often unaware of its existence and therefore respond to employer calls for worker arrests without question. Second, the degree of discretion

afforded ICE under the OI does not provide security for advocates or workers, who might fear disclosing to ICE the existence of a labor dispute, because of limited reports of ICE using such information to *trigger* an enforcement action. Finally, the OI applies only to retaliation by *employers*. Because agents of employers, including their friends, associates, and insurance companies, may make reports to ICE, and because local police referrals to ICE through programs such as Secure Communities have increased, the OI does not provide sufficient protection to immigrant workers who are victims of employer reprisals.

After Labor Commissioner Issues Judgment Against Employer Who Failed to Pay Worker, Employer Harasses Worker and Threatens to Report to Immigration with False Evidence

San Jose, CA (2013)

Mario Cruz,* a gardener from Mexico, trimmed trees in San Jose, California. After his employer failed to pay him, he filed a complaint with the California Labor Commissioner (CLC). The CLC entered a judgment requiring the employer to pay him over \$50,000 for unpaid wages. Three months after the decision, Cruz still had not received any of his wages. With the help of a local advocacy group, Cruz sent a letter to his employer requesting his wages and indicating that he might file a lien on his employer's property if his employer did not pay.

Cruz did not receive any payment in response to his letter. Instead, on January 22, 2013, Cruz's employer paid a visit to his house. His employer threatened to have him deported. The employer visited Cruz twice more, but when Cruz refused to open the door, his employer repeated his threats to call immigration. When Cruz called the police to make a report, the police refused to help.

On January 25, 2013, immigration enforcement agents showed up at the house of one of the witnesses in Cruz's CLC case. Cruz worried that the visit was related to his case. Cruz heard that his employer had also threatened another worker who had tried to file claims for unpaid wages in the past. His employer had told his co-worker to take less money or that drugs would be planted in his car. Cruz is now afraid of leaving the house, and is afraid that his employer is going to harm him.⁷⁹

Employer Reports Worker Who Filed Wage and Hour Lawsuit to Friend at Department of Homeland Security; DHS Conducts In-Home Raid of Worker

Orange County, New York (2012)

In March 2012, workers at a seafood processing and packing plant in Orange County, New York, filed a class action lawsuit against their employer for violations of the Fair Labor Standards Act and New York State Labor Law. Despite her apprehension, Maria Guadalupe Escobar Ibarra, a worker at the plant, agreed to be a named plaintiff in the case, believing it was important to stand up for her rights and those of her co-workers. Ten days after the case was filed in court, however, a supervisor at the plant contacted Escobar and the other named plaintiff in the case, informing them that her employer was willing to pay them a large sum of money if they dropped out of the case, and also said that the employer would consider contacting immigration authorities about her immigration status if she did not drop out of the case.

One morning in July, as Escobar and a friend drove to work, a special agent for the Department of Homeland Security stopped their vehicle, and instructed her to return to her home. When Escobar returned, the agent slammed open her door, and repeatedly yelled at her and demanded that she show him her papers, gesturing at the gun on his belt. Because Escobar was

afraid, she handed him a set of papers. Soon after, a local police car pulled up to arrest Escobar. The police did not tell her anything, and instead handcuffed and loaded her in the car.

After Escobar was fingerprinted and booked in the station, she realized that she had seen the agent before. He was a friend of one of her employers. The police charged Escobar with a felony for possession of a forged instrument and she was transferred to immigration custody. Escobar has been deeply traumatized by the employer's retaliation against her, and doesn't know if it was worth it to file suit against her employer. She is still fighting her criminal and deportation cases.⁸⁰

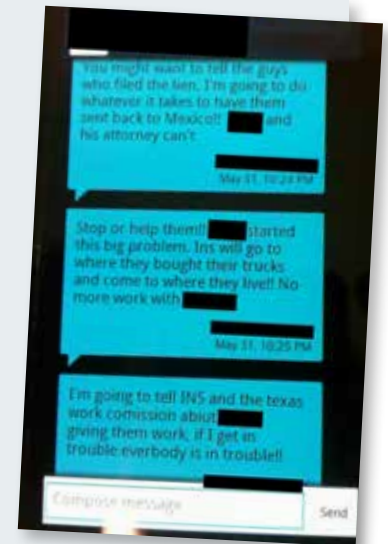
Employer Ordered to Pay Wages Threatens to Report Workers to Immigration

Austin, Texas (2012)

In March and April 2012, after a group of immigrant construction workers had worked for weeks painting, framing, and installing sheet rock, fixtures, and flooring in an Austin, Texas shopping mall, their employer failed to pay them for several weeks of work. The workers contacted the Equal Justice Center, which represented the workers in their efforts to recover their unpaid wages.

In order to collect the workers' unpaid wages, the Equal Justice Center placed a mechanic's lien on the property—a temporary hold on property for debts owed—which led the general contractor to pressure the workers' direct employer to pay their unpaid wages. Instead of paying the workers their wages, the subcontractor sent the workers text messages threatening to report them to immigration enforcement. "Play games with me!!" he texted. "You might want to tell the guys who filed the lien, [sic] I'm going to do whatever it takes to have them sent back to Mexico!! And [] attorney can't stop or help them . . . I'm going to tell INS and the Texas Work Commission about [their new employer] giving them work, if I get in trouble everybody is in trouble!!"⁸¹

photos courtesy of Equal Justice Center



Employer Contacts Immigration Officials to Deport Housekeeper Who Sued for Wages

New York, New York (2011)

Santosh Bhardwaj, a domestic worker from India, was brought to the United States by her employer, Prabhu Dayal, under false pretenses. Dayal, the head of the Indian consulate in New York, promised that he would pay her ten dollars an hour for her work, overtime pay, and good working conditions. Instead, Bhardwaj's employer confiscated her passport when she arrived, and subjected her to almost one year of forced labor in their home. On a typical day, Bhardwaj worked over twelve hours a day, seven days a week, cooking, doing laundry, making beds, sweeping, mopping, dusting, vacuuming, cleaning toilets, washing windows, polishing silver, serving food and tea, and polishing the shoes of the Dayal family. When the family had a party, she was required to cook and clean for the guests. The Dayals threatened to send Bhardwaj back to India if she did not do her job properly. Despite her backbreaking schedule, and despite their promise to pay her ten dollars an hour, Bhardwaj was paid only \$300 a month.

When Bhardwaj, with the help of the Legal Aid Society and a law firm, Outten and Golden, sued Dayal for unpaid wages, he retaliated by threatening and intimidating her. Dayal released her photograph to the press, and publicly called for her deportation. He contacted law enforcement authorities encouraging her deportation. Although Bhardwaj was able to avoid deportation, this experience left her shaken.⁸²

Immigrant Worker Joins Lawsuit against Employer, Arrested by ICE due to Employer Retaliation

Anaheim, CA (2010)

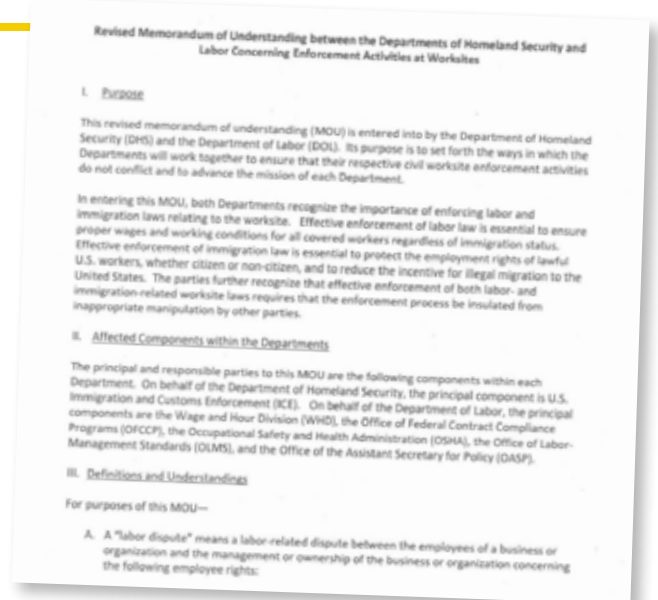
Osfel Andrade, an immigrant from Mexico, worked in the shipping department of Terra Universal, a laboratory equipment manufacturer in Fullerton, California when immigration agents conducted a worksite raid on June 29, 2010. During the raid, ICE agents arrested 43 workers and placed them in deportation proceedings. Andrade was not arrested that day, but instead of remaining hidden from authorities, he agreed to serve as a named plaintiff in a class action case against his former employer. The case seeks back wages for years of unpaid wages, exploitation, and discrimination on behalf of hundreds of workers.

After Andrade joined the lawsuit, associates of his former employer attempted to pressure him to drop out of the case. Andrade refused. Shortly thereafter, ICE agents arrested Andrade at his home, and placed him in immigration detention, where he was held for three weeks until released on bond. Evidence indicates that Terra Universal informed ICE of Andrade's immigration status in retaliation for filing the lawsuit.

After Andrade's arrest by ICE, two of the other named plaintiffs in the lawsuit subsequently withdrew from the case. Andrade, however, has remained in the case, despite the fear and emotional distress caused by his employer's retaliation. His courage has earned him the respect of his co-workers and community members, and he was recently honored with the Freedom From Fear

Award, in recognition of the significant risk he has taken to confront injustice on behalf of immigrants in the United States.⁸³

photo of Osfel Andrade courtesy ACLU of Southern California



B. The Department of Labor (DOL) Memorandum of Understanding with the Department of Homeland Security must be expanded and codified

In 1998, then-INS and DOL signed a Memorandum of Understanding (MOU) to address their respective roles in the enforcement of immigration and labor law. In 2010, the Obama administration substantially overhauled this MOU.⁸⁴

The revised DOL–DHS MOU aims to limit ICE enforcement activities from interfering with DOL investigations and audits, including enforcement of wage and hour and health and safety laws. Given the frequency of wage and hour abuses in industries in which many immigrants work, the MOU attempts to ensure that workers feel free to come forward to report serious labor abuse without fear of deportation, and that DOL can improve labor practices in these industries. The MOU applies to any DOL investigation, regardless of whether retaliation has occurred, in recognition that the sequence of a DOL investigation followed by any ICE enforcement action would chill worker complaints and thwart DOL's mission to enforce core labor standards.

To ensure that ICE does not interfere in DOL enforcement activities, the MOU has established

a process for both agencies to coordinate their workplace enforcement activities. The MOU requires DOL to communicate with ICE as to its worksite enforcement activities, and limits ICE from engaging in worksite enforcement during the pendency of a DOL investigation.

The MOU can be improved to establish a strong firewall between labor and immigration enforcement. Because it is only an agreement between DOL and ICE, no equivalent firewall

exists for workplaces with pending state and federal discrimination claims, workers' compensation claims, state wage and hour investigations, or state health and safety investigations. The MOU explicitly allows ICE to resume or begin an audit after a DOL investigation concludes, sending the message to workers that if they complain, ICE may eventually come after them. To improve upon the MOU and create a stronger firewall, Congress should expand and codify the measure.

II. Remedies for labor abuses for undocumented workers must be restored

In addition to codification of best agency practices, Congress must restore equal remedies to undocumented workers subject to illegal working conditions. Undocumented workers are covered under all major labor and employment laws in the United States, including the Fair Labor Standards Act, Title VII of the Civil Rights Act, the National Labor Relations Act, the Occupational Safety and Health Act,⁸⁵ the state counterparts to these, and state workers' compensation laws, but a 2002 U.S. Supreme Court decision limits the remedies available such workers. In 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 148-52 (2002) that undocumented workers who are fired for activities protected by the National Labor Relations Act (NLRA) are covered by the Act, but cannot recover back pay (the wages they would have earned had they not been illegally fired) or be reinstated.

The *Hoffman* decision sparked a mountain of litigation under virtually every federal and state employment statute, yielding a variety of inconsistent decisions. For example, in discrimination case law, the Ninth Circuit Court of Appeals has suggested that *Hoffman's* holding

is limited to actions under the NLRA.⁸⁶ Another federal district court found immigration status relevant to entitlement to emotional distress damages as a result of gender discrimination.⁸⁷ In New Jersey, one court found that undocumented immigrants are not covered under state discrimination law.⁸⁸ And despite overwhelming authority to the contrary, at least one federal judge has expressed doubt that undocumented workers are entitled to wages for hours actually worked.⁸⁹

Perhaps more importantly, the decision has given employers a free pass from having to pay for violations of the NLRA. As exemplified in many of the retaliation cases cited above, the decision provides an invitation for businesses to demand immigration documents from immigrant litigants, and to escape from paying compensation for violations of the law. Restoring equal remedies for all workers would reduce the incentive for employers to hire undocumented workers without regard to their status, and then aggressively pursue disclosure of immigration status in litigation. Instead of being afraid to pursue their legal claims, workers should be encouraged to come forward to report serious labor abuses.

III. Ensure that retaliation in the form of criminal activity does not interfere with worker rights

U Visas for immigrant victims of crimes must be made more broadly available and expanded to cover broader forms of employer retaliation

A “U visa” is a temporary status for immigrant victims of crime, including crimes committed in the workplace, intended to encourage immigrants to cooperate with law enforcement investigations. Congress created the U visa in 2000 as part of the Victims of Trafficking and Violence Protection Act (TVPA), in order to strengthen the ability of law enforcement agencies to investigate and prosecute crimes against immigrants and to offer protection to immigrant victims who fear reporting crimes due to their immigration status.⁹⁰ Holders of U visas receive lawful status for up to four years, are eligible to adjust their status to that of lawful permanent resident after three years, and are authorized to work. In addition, their qualifying family members may receive derivative visas.⁹¹ This immigration relief protects workers against employer retaliation when workers are willing to call attention to workplace abuse. It strengthens the ability of labor and civil rights law enforcement agencies to gain workers’ trust and cooperation in detecting and investigating crimes.

In order to qualify for a U visa, a petitioner must obtain certification from a law enforcement agency or judge confirming that the petitioner is a victim of a qualifying criminal activity and has been helpful in detecting, investigating, or prosecuting that crime. During the past three years, federal and state labor and civil rights law enforcement agencies, including the U.S. Equal Employment Opportunity Commission (EEOC),

the U.S. Department of Labor, the National Labor Relations Board, the New York State Department of Labor, and the California Department of Fair Employment and Housing have released agency guidelines for certification of U visa petitions. A law enforcement agency’s certification does not guarantee that the U visa will be granted. U.S. Citizenship and Immigration Services (USCIS) has jurisdiction to approve or deny the visa.⁹² The agency may grant up to 10,000 U visas per year, not including qualifying dependents.⁹³ The 10,000 cap for U visas was reached for the first time in 2010.⁹⁴

Learning from the agencies’ experience, immigration policy can improve protection of victims of workplace crime and retaliation. Several agencies certify for criminal activities more narrowly than what is currently provided by statute. Currently, because of the novelty of workplace-based U visas, USCIS adjudicators unfamiliar with such cases need additional support and training on how to clearly assess issues such as eligible certifying agencies and the abuse suffered by workers in an exploitative employment environment. On a broader level, the statutorily provided number of U visas is inadequate to meet the needs of law enforcement agencies, and may suffer from an impending backlog without necessary adjustments to the annual cap. Finally, as a remedial measure, U visas do not provide broad coverage for victims of retaliation by employers. Congress should modify U visa provisions to expand explicit coverage of victims of employer retaliation. Specifically, the Protect our Workers from Exploitation and Retaliation (POWER) Act, introduced in both houses of Congress, should be included in a new immigration reform law.⁹⁵

IV. Ensure no deportation results from a labor dispute

On June 17, 2011, in the midst of public outcry about the devastating impact of Secure Communities, ICE Director John Morton released two memoranda describing the agency's prosecutorial discretion strategy. The two memoranda outline the agency's enforcement priorities, as well as areas in which the agency would exercise its prosecutorial discretion to enforce immigration law. Specifically, the memoranda clarify that ICE could exercise its prosecutorial discretion in a number of ways, including declining to: initiate a removal proceeding; release an individual from detention; grant deferred action, parole, or stay a final order of removal; close a removal proceeding to prevent deportation; administrative closure (temporary removal of case from immigration court calendar); or grant of immigration relief, including parole.⁹⁶ ICE also specified that it is against department policy to initiate removal proceedings against victims or witnesses to a crime, and that "particular attention should be paid to . . . individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing

conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor."⁹⁷

Despite the high hopes for ICE's prosecutorial discretion policy, it soon became clear that only a minimal number of workers would benefit from it. One year after ICE's policy went into effect, advocates declared the policy a failure, noting that of the 288,000 cases reviewed by ICE, only 1.5 percent of cases were granted discretion.⁹⁸ Moreover, it became clear that ICE has failed to properly screen for victims of crime and civil rights complainants in their custody. In particular, ICE has failed to identify or notify victims in custody of eligibility for prosecutorial discretion, particularly those who are *pro se*. Finally, prosecutorial discretion has proven difficult to obtain in cases where a victim of crime or employer retaliation was mistakenly arrested and charged with a crime. As an interim measure, the Obama administration should commit to full implementation of the "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs," memo for workers who are involved in labor or civil rights disputes, with employment authorization.

ICE payday raid at workplace with labor dispute results in deportation proceedings against workers

Kenner, Louisiana (2011)

Luis Zavala and two dozen construction workers in the home elevation industry and members of the Southern 32 and the New Orleans Workers' Center for Racial Justice were engaged in a labor dispute with their employer about unpaid wages and overtime. ICE conducted a violent payday raid coordinated with several law enforcement agencies but excluding the Department of Labor. After arresting and detaining the workers, ICE interrogated them about their unpaid wages and labor dispute, but still placed the workers in deportation proceedings. Several workers have already been deported and others continue to fight their deportation cases. Over a year later, their employer has been prosecuted, but the workers have not received their wages. Despite ongoing investigations by multiple federal labor and civil rights agencies, over 20 workers continue to fight their deportation cases based on the workplace raid.⁹⁹

Recommendations for an overhaul of immigration laws to protect workers' labor rights, improve their wages and working conditions and boost our economy

Research and individual experiences show that rampant labor violations and widespread practices of retaliation have become key features of the low-wage labor market in the United States. In many of these occupations and industries, vulnerable immigrants cannot exercise their labor rights. Bad jobs will not become good jobs when a substantial portion of the workforce is so constrained.

The time has come for an overhaul of our immigration system for both humanitarian and economic reasons. Successful immigration reform has the potential to improve job quality in the low-wage jobs that fuel our economy, and to remove the ability of employers to use immigrant status for retaliation or other unlawful purposes. To achieve these goals, immigration reform must:

- Include a broad and fair path to citizenship that brings low-wage immigrant workers – including “contingent” workers like caregivers and day laborers – out of the shadows and allows them to work collectively to upgrade jobs and contribute to a growth economy.
- Ensure that employers cannot use immigration status as a means of escaping responsibility for workplace abuses.
- Restore workplace remedies in order to ensure fairness to workers and deter employers from hiring vulnerable immigrants for the purpose of exploitation.
- Ensure robust enforcement of baseline workplace laws.

- Provide immigration status, including work authorization protections, to workers engaged in defending labor rights.

Based on the data and analysis presented in this report, NELP recommends the following be included in immigration reform legislation:

Pathways to citizenship must be as broad-based as possible.

- Base pathways to citizenship on physical presence in the United States, not on past or future employment requirements.
- Provide flexible standards for documentary evidence in support of applications for citizenship. Legislation must include coverage of workers in “contingent” jobs such as day laborers, domestic workers, caregivers, and agricultural workers and those who might have difficulty proving their presence and work history in the United States.¹⁰⁰ Valid evidence should include records received from employers, including pay stubs or time sheets,

and records maintained by unions and from membership organizations such as worker centers and religious organizations.

- Any program that regularizes status must cover family members of applicants who would not themselves qualify for a pathway to citizenship.

Pathways to citizenship must include waivers of immigration offenses related to work.

- Undocumented persons may have worked without authorization, or may have worked with false documents, sometimes at the behest of their employers. In order to ensure that immigrant workers are not penalized for status-based offenses related to unauthorized employment in a pathway to citizenship, immigration reform must include a broad waiver for offenses associated with such work, including past use of false documents to obtain employment.

Immigration reform proposals must protect workers seeking to adjust their status.

- Provide that employment records supplied by an individual's employer in support of adjustment of status may not be used as grounds for prosecution or investigation for prior unauthorized employment.

- Prohibit as an unfair immigration-related employment practice any dismissal or retaliation by an employer because of a worker's application for legalization or citizenship, including dismissal for an employee's past use of false documents to obtain employment.
- Permit immigrant workers who have adjusted their status to correct their Social Security records without penalty and receive credit for past work.
- Provide that persons who apply but who do not ultimately qualify for legalization and citizenship will not be subjected to arrest or deportation.
- Ensure that individuals applying for immigration status relief are eligible for representation by federal Legal Services Corporation grantees, and encourage workers' organizations to aid in the process.
- Suspend ICE worksite enforcement activities during any application period authorized by statute.

Principles to protect workers' rights

Current tools that protect the ability of workers to claim wages, take collective action to enforce their rights, and upgrade working conditions must be modernized and codified.

- Codify into law and update ICE Operating Instruction 287.3a to ensure that DHS screens for and refrains from enforcement action in cases where employers or other individuals provide information concerning the employment of undocumented or unauthorized individuals to DHS in order to interfere with the labor and employment rights of workers.
- Codify and broaden the Memorandum of Understanding between the Department of Homeland Security and Department of Labor to ensure that DHS refrains from engaging in civil worksite enforcement activities at a worksite that is the subject of a pending litigation or complaints and claims to state and federal labor agencies.

Provide immigration status including work authorization protections to workers engaged in defending labor rights.

- Include the POWER Act in immigration reform legislation, to strengthen and streamline access to U visas for any individual who has filed a workplace claim or who is a material witness in any pending or anticipated proceeding involving a workplace rights claim, and expand grounds for U visas to include victims of employer retaliation.

All workers must be fully protected under all labor and employment laws regardless of immigrations status.

- Ensure payment of full backpay remedies or other monetary relief for unlawful labor and employment practices or work injuries to an employee regardless of immigration status.
- Prohibit as an unfair immigration-related employment practice any intimidation, threats, retaliation, or coercion, including the threat of removal and the use of I-9 employer self-audits, against any individual, regardless of legal status, with the purpose of interfering with any labor and employment rights or privileges.
- Clarify that immigration enforcement is the federal government's domain. State anti-immigrant bills that impose sanctions on workers or their employers for violation of immigration laws should be strictly preempted.
- Due to error rates and the likelihood that electronic verification systems would incentivize employers to push workers into abusive "off the books" work, NELP opposes the expansion of the E-Verify. To the extent that an E-Verify system is made mandatory, it should apply only to new hires, incorporate worker protections to guard against misuse by employers, protect workers' privacy and civil rights, and provide due process and remedies for workers who lose jobs due to database errors.

Strengthen enforcement of employment and labor laws.

- Increase the number of investigators enforcing minimum wage and overtime laws at the Department of Labor by 500 over four years, the number of OSHA inspectors by 500 over four years with similar increases in funding for state OSHA enforcement, and EEOC staffing should be increased by 650 investigators, mediators, attorneys, and support staff over four years.
- Ensure joint responsibility for workplace violations and compliance by worksite employers, and staffing, recruiting and transporting agencies. Clearly prevent businesses from using multi-tiered subcontracting arrangements to avoid labor and employment responsibilities for their workers. Ensure that these responsibilities cover both domestic and foreign labor recruiting.
- Clamp down on employer attempts to evade tax liabilities and workplace protections by misclassifying their employees as independent contractors or by paying them “off the books.”

Endnotes

- 1 *President Obama Unveils His Proposals for Immigration Reform (Transcript)*, Washington Post, Jan. 29, 2013, available at http://www.washingtonpost.com/politics/president-obama-discusses-his-proposals-for-immigration-reform-transcript/2013/01/29/73074f9c-6a3c-11e2-af53-7b2b2a7510a8_print.html.
- 2 Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* 9 (2013) (citing Department of Justice, Summary of Budget Authority by Appropriation (2012); Department of Homeland Security, FY 2012 Budget in Brief 9 (2012)), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.
- 3 Brookings Institute, *Immigrant Workers in the U.S. Labor Force* (2010), available at http://www.renewoureconomy.org/sites/all/themes/pnae/img/Immigrant_Workers_Brookings.pdf.
- 4 Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (2011), available at <http://pewhispanic.org/files/reports/133.pdf>. The Department of Homeland Security's Office of Immigration Statistics's new estimates, released in March 2012, indicated that as of January 2011, 11.5 million undocumented immigrants resided in the U.S., virtually unchanged from the Pew Hispanic Center's estimates as of March 2010. See Jeanne Batalova & Alicia Lee, *Frequently Requested Statistics on Immigrants and Immigration in the United States* (2012), available at <http://www.migrationinformation.org/USfocus/display.cfm?ID=886#5>. This report uses the terms "undocumented" and "unauthorized" synonymously to describe individuals present in the United States without legal status.
- 5 Elizabeth M. Grieco, et al., U.S. Census Bureau, *The Foreign-Born Population in the United States: 2010* (2012), available at <http://www.census.gov/prod/2012pubs/acs-19.pdf>.
- 6 Audrey Singer, *Immigrant Workers in the U.S. Labor Force* (2012), available at <http://www.brookings.edu/research/papers/2012/03/15-immigrant-workers-singer>.
- 7 National Employment Law Project, *The Low Wage Recovery and Growing Inequality* (2012), available at http://www.nelp.org/page/-/Job_Creation/LowWageRecovery2012.pdf?nocdn=1.
- 8 Jeffrey S. Passel and D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (2009), available at <http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>.
- 9 DAMAYAN Migrant Workers Association and the Urban Justice Center, *Doing the Work That Makes all Work Possible: A Research Narrative on Filipino Domestic Workers in the Tri-State Area* (2010) (three out of four workers surveyed reported wage and hour violations).
- 10 Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* (2011), available at <http://harvestingjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf> (temporary foreign agricultural workers report "rampant and systematic abuse.")
- 11 Megan Gaydos et al., *Promoting Health and Safety in San Francisco's Chinatown Restaurants: Findings and Lessons Learned from a Pilot Observational Checklist*, 126 Public Health Reports 62 (2011); Restaurant Opportunities Center United, *Behind the Kitchen Door: A Multi-Site Study of the Restaurant Industry* (2011) (almost half of restaurant workers surveyed reported overtime violations; over a quarter reported racial discrimination); Alicia Salvatore and Niklas Krause, *Health and Working Conditions of Restaurant Workers in San Francisco's Chinatown: Report of Preliminary Survey Findings* (2010) (unpublished report) (on file with authors) (50 percent of workers surveyed earned less than minimum wage).
- 12 Abel Valenzuela et al., *On the Corner: Day Labor in the United States* (2006) (85 percent of day laborers surveyed nationwide, most working in construction or landscaping, reported some type of labor abuse); Chirag Mehta and Nike Theodore, *Workplace Safety in Atlanta's Construction Industry: Institutional Failure in Temporary Staffing Arrangements*, 9 WorkingUSA 59 (2006) (23 percent of construction workers surveyed reported a serious injury in the past year).
- 13 Catherine Porter, *Overexposed and Underinformed: Dismantling Barriers to Health and Safety in California Nail Salons* (2009) (study of Vietnamese-American nail technicians found prevalence of work-related health effects, such as musculoskeletal disorders, respiratory symptoms, skin problems, and headaches).
- 14 Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009), available at <http://www.unprotectedworkers.org/>.
- 15 National Employment Law Project, *Workplace Violations, Immigration Status, and Gender: Findings from the 2008 Unregulated Work Survey* (2011), available at http://www.nelp.org/page/-/Justice/2011/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf?nocdn=1.

- 16 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-903 (1984) (undocumented workers are “employees” under NLRA); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (undocumented workers protected under the Fair Labor Standards Act (FLSA)); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (undocumented workers protected under federal anti-discrimination laws); *Rios v. Enterprise Ass’n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (same).
- 17 29 U.S.C. § 215(a)(3); *Sure-Tan*, 467 U.S. 883 (an employer’s use of a worker’s immigration status to retaliate for labor union activities is an unfair labor practice in violation of the National Labor Relations Act); *Contreras v. Corinthian Vigor Insurance Brokerage*, 103 F. Supp. 2d 1180 (N.D. Cal. 2000) (concluding that an employer’s report to then-INS and Social Security Administration of an undocumented worker’s status violated anti-retaliation provisions of the FLSA); *EEOC v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006) (finding inquiry into employee’s immigration status after filing of discrimination claim to be unlawful retaliation).
- 18 Scott Flaherty, *Retaliation, Race Bias Top EEOC Complaints In 2012*, Law 360, Jan. 29, 2013, available at <http://www.law360.com/articles/410694/retaliation-race-bias-top-eec-complaints-in-2012>.
- 19 Bernhardt, et al., *supra* note 14 at 3.
- 20 Teresa Scherzer et al., *Work-Related Pail and Injury and Barriers to Workers’ Compensation Among Las Vegas Hotel Room Cleaners*, 95 Am. J. Pub. Health 483 (2005).
- 21 Marianne P. Brown et al., *Voices from the Margins: Immigrant Workers’ Perceptions of Health and Safety in the Workplace* (2002), available at <http://www.losh.ucla.edu/losh/resources-publications/pdf/voicesreport.pdf>.
- 22 Michael J. Wishnie, Introduction: The Border Crossed Us: Current Issues in Immigrant Labor, 28 N.Y.U. Rev. L. & Soc. Change 389, 391 (2004).
- 23 This already high figure likely understates the correlation between worksite immigration enforcement and ongoing labor disputes, as these “the calculations do not account for union grievances, litigation, oral and other informal complaints to employers, and complaints to other administrative agencies (such as employment discrimination or workplace safety agencies).” *Id.* at 392.
- 24 Complaint for Damages, *Ucelo-Gonzalez v. Tebb, et al.*, No. 3D-2012-00588416 (Ca. Supr. Ct., Orange County, Aug. 3, 2012); Gabriel San Roman, *Lawsuit: Day Laborer Faces Deportation After Anaheim Employer Filed False Police Report*, OC Weekly, Sept. 15, 2012, available at http://blogs.ocweekly.com/navelgazing/2012/09/jose_ucelo_gonzalez.php.
- 25 Interview with Karen Zdanis, Esq. (Jan. 23, 2013). Names denoted by an asterisk indicate that names have been changed to protect the identity of the worker.
- 26 Interview with Liz Chacko, Staff Attorney, Friends of Farmworkers, Inc. (Jan. 24, 2013).
- 27 Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* 9 (2013) (citing Department of Justice, Summary of Budget Authority by Appropriation (2012); Department of Homeland Security, FY 2012 Budget in Brief 9 (2012)), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.
- 28 Meissner, *Immigration Enforcement* at 10 (citing to Transnational Records Access Clearinghouse (TRAC), www.tracfed.syr.edu).
- 29 Department of Homeland Security, Immigration and Customs Enforcement, *Removal Statistics*, <http://www.ice.gov/removal-statistics/> (last visited Feb. 2, 2013); DHS, ICE, *ICE Total Removals Through August 25, 2012*, available at <http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals1.pdf> (last visited Feb. 2, 2013); Corey Dade, Obama Administration Deported Record 1.5 Million People, National Public Radio, Dec. 24, 2012, available at <http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people>.
- 30 Department of Homeland Security, Immigration and Customs Enforcement, *IDENT/IAFIS Interoperability Statistics 2* (2011), available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf.
- 31 Aarti Kohli et al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* 2 (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.
- 32 Michele Waslin, *ICE Scaling Back 287(g) Program*, Immigration Impact, Oct. 19, 2012, available at <http://immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program/>.
- 33 8 U.S.C. § 1357(g); see Immigration Policy Center, *The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement*, available at <http://www.immigrationpolicy.org/just-facts/287g-program-flawed-and-obsolete-method-immigration-enforcement>.
- 34 Courts in Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania South Carolina, Tennessee, Texas, and Virginia have concluded that undocumented immigrant workers are covered under workers’ compensation statutes. See *Gamez v. Indus. Comm’n*, 141 P.3d 794 (Ariz. Ct. App. 2006); *Farmers Bros. Coffee v. Workers’ Comp. Appeals Bd.*, 133 Cal. App. 4th 533 (Cal. Ct. App. 2005); *Champion Auto Body v. Gallegos*, 950 P.2d 671, 673 (Colo. Ct. App. 1997); *Asylum Co. v. District of Columbia*

- Dept. of Employment Services*, 10 A.3d 619, 634 (D.C. 2010); *Safeharbor Employer Servs., Inc. v. Velazquez*, 860 So. 2d 984, 986 (Fla. App. Ct. 2003); *Earth First Grading v. Gutierrez*, 606 S.E.2d 332 (Ga. Ct. App. 2004); *Econ. Packing Co. v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 915, 926 (Ill. App. Ct. 2008); *Doe v. Kansas Dep't of Human Res.*, 90 P.3d 940 (Kan. 2004); *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 755 (Ky. 2011); *Rodriguez v. Integrity Contracting*, 38 So.3d 511 (La. Ct. App. 2010); *Medellin*, No. 033243-00, 2003 WL 23100186 (Mass. Dep't of Indus. Accidents Dec. 23, 2003); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 830 (Md. 2005); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003); *Roset-Eredia v. F.W. Dellinger, Inc.*, 660 S.E.2d 592, 599 (N.C. Ct. App. 2008); *Visoso v. Cargill Meat Solutions*, 778 N.W.2d 504, 511 (Neb. 2009); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 225 (N.J. Super. 1996); *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 177 (Nev. 2001); *Gonzalez v. Performance Painting, Inc.*, 258 P.3d 1098, 1105 (N.M. Ct. App. 2011); *Amoah v. Mallah Mgmt., LLC*, 866 N.Y.S.2d 797, 801 (N.Y. App. Div. 2008); *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 707 (Ohio Ct. App. 2004); *Cherokee Indus., Inc., v. Alvarez*, 84 P.3d 798 (Okla. 2003); *Curiel v. Envtl. Mgmt. Servs.*, 655 S.E.2d 482, 484 (S.C. 2007); *Silva v. Martin Lumber Co.*, No. M2003-00490-WC-R3-CV, 2003 WL 22496233 (Tenn. Workers' Comp. Panel 2003); *Appellant: *** v. Respondent: ****, 2002 WL 31304032 (Tex. Work. Comp. Comm'n 2002).
- 35 Interview with Jessica Karp, Staff Attorney, National Day Labor Organizing Network (Feb. 13, 2013).
- 36 Interview with Schuyler Pisha, Esq., Legal Services, Brazilian Immigrant Center (Jan. 9, 2013).
- 37 Interview with Tom Fritzsche, Staff Attorney, Southern Poverty Law Center (Jan. 24, 2013).
- 38 Interview with Meredith Rapkin, Executive Director, Friends of Farmworkers (Jan. 23, 2013).
- 39 Interview with Cariño Barragan, Campaign Organizer, CASA Latina (Jan. 23, 2013).
- 40 Interview with Leah Lotto, Staff Attorney, Georgia Legal Services, Farmworker Rights Division (Jan. 24, 2013).
- 41 See 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2), (e)(4), (f).
- 42 8 U.S.C. § 1324a(b).
- 43 Meissner, *Immigration Enforcement* at 83 (citing to testimony of DHS Secretary Janet Napolitano before the House Committee on the Judiciary, *Oversight of the Department of Homeland Security*, 112th Cong., 2d Sess., July 19, 2012).
- 44 8 C.F.R. § 274a.2(b)(vii).
- 45 Case Handling Instructions for Compliance Cases after Flaum Appetizing Corp., OM 12-55 (May 4, 2012), available at <http://www.nlr.gov/publications/operations-management-memos>.
- 46 U.S. Department of Labor, Occupational Safety & Health Administration, Inspection Information, Inspection Number 655718.015—Esmoke, Sept. 24, 2012, http://www.osha.gov/pls/imis/establishment.inspection_detail?id=655718.015 (last visited Jan. 31, 2013).
- 47 Interview with Louis Kimmel, Director of Operations and Membership, New Labor (Jan. 30, 2013).
- 48 Steven Greenhouse, *Fight over Immigrant Firings*, New York Times, July 27, 2012, available at <http://www.nytimes.com/2012/07/28/business/striking-palermospizza-workers-say-immigrants-were-fired-to-stop-a-union.html?pagewanted=all>.
- 49 Worker Rights Consortium, *Assessment, Palermo Villa, Inc. (Milwaukee, WI) Findings, Recommendations And Status* (2013), available at http://www.news.wisc.edu/assets/30/original/WRC_Assessment_re_Palermo_Milwaukee_WI_2-5-2013.pdf?1360263103.
- 50 *Id.*
- 51 Jennifer Medina, *Immigrant Worker Firings Unsettle a College Campus*, New York Times, Feb. 21, 2012, available at <http://www.nytimes.com/2012/02/02/us/after-workers-are-fired-an-immigration-debate-roils-california-campus.html?pagewanted=all&r=0>.
- 52 Wes Haas and Ian Gallogly, *NLRB Will Investigate Labor Practice Charges at Dining Halls*, The Student Life, Dec. 2, 2011, available at <http://tsl.pomona.edu/articles/2011/12/2/news/840-nlrw-will-investigate-labor-practice-charges-at-pomona-dining-halls>.
- 53 Sidley Austin LLP, <http://www.sidley.com/labormanagement> (last visited Feb. 1, 2013).
- 54 Wes Woods II, *Pomona College Agrees to Settlement With NLRB over Dining Hall Workers Issue*, Inland Valley Daily Bulletin, Feb. 13, 2012, available at http://www.mercurynews.com/california/ci_19954491; interview with Jessica Choy, Research Analyst, UNITE HERE (Jan. 30, 2012).
- 55 Order of Interim Injunctive Relief, *Lund v. Case Farms Processing, Inc.*, No. 5:11CV 679, at *5 (N.D. Ohio, June 20, 2011).
- 56 *Case Farms Processing, Inc.*, No. 8-CA-39752, 2011 WL 4350210, at *25 (Sept. 16, 2011).
- 57 Interview with Tim Mullins, UFCW Local 880 (Jan. 25, 2013) and review of documents previously provided (on file with authors).
- 58 National Conference of State Legislatures, *2012 Immigration-Related Laws and Resolutions in the States* (2012), available at <http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-and-resolutions.aspx>.
- 59 Meissner, *Immigration Enforcement* at 79-80.

- 60 See, e.g. Press Release, White House Office of the Press Secretary, Fact Sheet: Fixing our Broken Immigration System so Everyone Plays by the Rules (Jan. 29, 2013) (calling for “mandatory, phased-in electronic employment verification”), available at <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules>.
- 61 National Immigration Law Center, *How Errors in E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants* (2011), available at <http://www.nilc.org/workerseverify.html>.
- 62 Westat, Findings of the E-Verify Program Evaluation 194 (2009), available at http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.
- 63 *Transcript from Hearing on Employment Eligibility Verification Systems* (Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, June 7, 2007).
- 64 Letter to John Conyers, Chair, Committee on the Judiciary, U.S. House of Representatives, from Peter Orszag, Director, Congressional Budget Office, Apr. 4, 2008, available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/91xx/doc9100/hr4088ltr.pdf>.
- 65 These states include Georgia, North Carolina, South Carolina, and Tennessee. Georgia requires its state Labor Commissioner to perform 100 audits/year on public employers and contractors who fail to enroll in E-Verify. Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87 § 3(9) (Ga. 2011). North Carolina requires all employers to use E-Verify, and the state Labor Commissioner has enforcement authority and power to fine employers for non-compliance with E-Verify requirements. S.B. 1523, 2005 Sess. (N.C. 2006). South Carolina requires private employers to use E-Verify, and allows the state Department of Labor to enforce violations of E-Verify requirements, leading to possible suspension of business licenses. S.B. 20, 119th Gen. Assemb. (S.C. 2011). Tennessee also requires the state commissioner of labor and workforce development to enforce employers’ non-compliance with E-Verify requirements. HB 1378, 107th Leg. (Tenn. 2011).
- 66 Lee Romney and Cindy Chang, *Latino Food Chain’s Participation in E-Verify Leaves a Bad Taste*, L.A. Times, Sept. 17, 2012, available at <http://articles.latimes.com/2012/sep/17/local/la-me-mi-pueblo-20120917>.
- 67 Matt O’Brien, *Mi Pueblo Markets Came Under U.S. Immigration Audit, Company Says*, San Jose Mercury News, Oct. 6, 2012, available at http://www.mercurynews.com/bay-area-news/ci_21708357/mi-pueblo-markets-came-under-u-s-immigration.
- 68 Interview with Gerardo Dominguez, Organizing Director, UFCW Local 5 (Jan. 31, 2013).
- 69 Weinberg, Roger & Rosenfeld, NLRB Settlement Finds E-Verify is a Mandatory Subject of Bargaining, Weinberg, Roger & Rosenfeld (2011), available at http://www.unioncounsel.net/developments/immigration/everify/nlrbsettlement_finds_e_verify_subject_of_bargaining.html.
- 70 Bernhardt, et al., *Broken Laws*, supra note 14. See also David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance and Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol’y J. 59, 83 (2005) (compiling studies suggesting that “despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights”).
- 71 U.S. Dep’t of Labor, Bureau of Labor Statistics, *Economic News Release, Union Members Summary* t.3 (2013), <http://www.bls.gov/news.release/union2.nr0.htm>.
- 72 Raúl Hinojosa-Ojeda, *Raising the Floor for American Workers, The Economic Benefits of Comprehensive Immigration Reform* (2012), available at <http://www.americanprogress.org/wp-content/uploads/2012/09/immigrationeconreport3.pdf>.
- 73 *Id.*
- 74 Sherrie A. Kossoudji and Deborah A. Cobb-Clark, *Coming out of the Shadows: Learning about Legal Status and Wages from the Legalized Population*, 20 U. Chicago J. Lab. Econ. 598 (2002).
- 75 *Id.*
- 76 *Id.*
- 77 On March 1, 2003, the functions of the former Immigration and Naturalization Service (“INS”) were transferred from the Department of Justice to three agencies (the U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services) in the newly formed Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).
- 78 Immigration and Naturalization Service, Operating Instruction 287.3a, *Questioning Persons during Labor Disputes* (1996), available at <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-61072/0-0-0-61097.html>.
- 79 Interview with Oscar Espino-Padron, Legal Fellow, Wage Justice Center (Jan. 31, 2013).
- 80 Interview with Molly Graver, Staff Attorney, Worker Justice Center (Jan. 23, 2013).
- 81 Interview with Aaron Johnson, Attorney, Equal Justice Center (Jan. 9, 2013).
- 82 First Amended Complaint, *Bhardwaj v. Dayal*, No. 11-civ-4170

- (S.D.N.Y. Aug. 12, 2011); *Housekeeper Sues Indian Diplomat Prabhu Dayal in NYC over Wages*, CBS New York, Jun. 21, 2011, available at <http://newyork.cbslocal.com/2011/06/21/housekeeper-sues-indian-diplomat-prabhu-dayal-in-nyc-over-wages/>.
- 83 Class Action Complaint for Damages, Declaratory and Injunctive Relief, *Morales et al., v. Terra Universal, Inc.*, No. CV-10-6490 (C.D. Cal. Aug. 31, 2010); Osfel Andrade: Anaheim, CA Freedom From Fear Award, <http://freedomfromfearaward.com/celebrate/osfelandrade> (last visited Feb. 1, 2013); Cindy Carcamo, *ACLU: Fullerton Company Exploited Immigrants*, Orange County Register, Sept. 7, 2010, available at <http://www.ocregister.com/articles/workers-264437-officials-pasquarella.html>; Interview with Jennie Pasquarella, Staff Attorney, American Civil Liberties Union of Southern California (Feb. 2, 2013).
- 84 U.S. Department of Labor, U.S. Department of Homeland Security, *Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites* (Dec. 11, 2011), available at <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf>.
- 85 Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e; National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-187; Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678.
- 86 *Rivera et. al. v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), cert. denied, 544 U.S. 905 (2005).
- 87 *EEOC v. Evans Fruit Co.*, No. CV-10-3033, 2011 WL 1884477, at *2 (E.D. Wash. April 11, 2011).
- 88 *Crespo v. Evergo Corp.* 366 N.J. Super. 399 (N.J. Super. Ct. App. Div. 2004).
- 89 *Jin-Ming Lin v. Chinatown Rest. Corp.*, 771 F. Supp. 2d 185 (D. Mass. 2011).
- 90 Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1464, 1533 (2000).
- 91 8 U.S.C. § 1184(p) (2012).
- 92 8 C.F.R. § 214.14(c)(1) & (b)(1).
- 93 *Id.* § 214.14(d)(2).
- 94 Press Release, U.S. Citizenship and Immigration Services, USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010 (Jul. 15, 2010), <http://1.usa.gov/L4OWef>.
- 95 POWER Act, S. 1195, HR 2169, 112th Cong., 1st Sess. (2011), available at <http://thepoweract.com/wp-content/uploads/2010/08/MDM11377.pdf>. See also Harold Myerson, *Protecting Undocumented Workers*, Los Angeles Times, June 24, 2011, available at <http://articles.latimes.com/2011/jun/24/opinion/la-oe-meyerson-undocumented-abuses-20110624>.
- 96 Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” (June 17, 2011), available at <http://www.ice.gov/doclib/securecommunities/pdf/prosecutorial-discretion-memo.pdf>.
- 97 Memorandum from John Morton, Director, ICE, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” (June 17, 2011) available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.
- 98 Press Release, American Immigration Lawyers Association, DHS Prosecutorial Discretion Initiative Falls Short (Jun. 7, 2012).
- 99 Interview with Jennifer Rosenbaum, Legal Director, New Orleans Worker Center for Racial Justice (Feb. 15, 2013).
- 100 Three-quarters of the undocumented workers surveyed in the national survey of 4,000 low-wage workers had not received records of pay for their previous work week. National Employment Law Project, *Immigration Status and Pay Documentation: Findings from the 2008 Unregulated Work Survey* (2013), available at <http://www.nelp.org/page/-/Justice/2013/Fact-Sheet-Immigration-Status-Pay-Documentation.pdf?nocdn=1>.

