

The Rights of Migrant Workers and Their Families in an Irregular Situation

**Statement Submitted for the United Nations Committee on the Protection of the Rights of All
Migrant Workers and Members of Their Families
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This statement is submitted for the Committee's consideration as it prepares a General Comment on the normative content of the rights of migrant workers. We thank the Committee for its tireless work protecting the rights of migrant workers in irregular situations around the world.

As the Committee knows, the United States of America is the top migrant-receiving nation in the world, with the largest international migrant population in the world.¹ There are some eight million undocumented immigrants working in the United States economy.² Most of these work in the agriculture, construction, services, and manufacturing sectors, performing some of the most dangerous and low-paid jobs in our economy.

Because of the United States' status as a nation of immigrants, it may be useful to the Committee to report on the status of workplace rights among migrants in irregular status within the United States, and to share with the Committee both some best practices and shortcomings of U.S. law and practice. While the United States is not a signatory to the United National International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, this summary will provide a demographic description of the unauthorized³ migrant population in the U.S., followed by a general description of barriers to enforcement of undocumented workers' labor rights, highlight both the substantive labor rights of migrants in irregular situations and the limitations of these, and summarize best practices within the United States, along with their limitations.

We urge the Committee to include in its Comment recommendations that countries pay close attention to both the process and the substance of labor rights for migrants, as a matter of compliance with the Convention, and as a matter of compliance with general principles of non-discrimination.

¹ United Nations, Department of Economic and Social Affairs, Population Division (2009). International Migration, 2009 Wall chart (United Nations publication, Sales No. E.09.XIII.8).

² Jeffrey S. Passel and D'Vera Cohn, Unauthorized Immigrant Population: National and State Trends, 2010. (Washington, DC: Pew Hispanic Center) at <http://pewhispanic.org/files/reports/133.pdf>.

³ This document uses the terms "irregular," "unauthorized" and "undocumented" interchangeably, to refer generally to migrant workers who lack authorization to work in the United States.

MIGRANT WORKERS IN THE UNITED STATES

The United States is home to roughly thirty seven million migrants.⁴ As of March 2010, there are approximately 11.2 million undocumented migrants living in the United States.⁵ About 8 million unauthorized immigrants are currently at work in the country.⁶ They make up a large share of all workers in many industries – an analysis of 2008 Current Population Survey (CPS) data found that 25% of all workers employed in farming occupations, 19% in building groundskeeping and maintenance, 17% in construction and 12% in food preparation were unauthorized.⁷

Foreign-born workers form a disproportionately large share of the working poor in the U.S. An analysis of 2006 CPS data found that legal immigrant adults are considerably more likely to be in families with incomes below the federal poverty line (19.7%) than native-born adults (13.2%).⁸ Unauthorized adults were almost twice as likely to earn below the federal poverty line (25.2%) than native born adults.⁹

Because of their economic desperation, undocumented workers are vulnerable to exploitative and unlawful work conditions. In fact, industries most populated by unauthorized workers are not only dangerous and undesirable with extremely low wages, but are known for their frequent violation of labor and employment laws. A U.S. Department of Labor (DOL) survey found that in 2000, 100% of all poultry processing plants were non-compliant with federal wage and hour laws.¹⁰ A separate DOL survey found that in 1996, half of all garment-manufacturing businesses in New York City could be characterized as sweatshops, and a 2004 study found that 54% of garment contractors in the Los Angeles industry violated the minimum wage law.¹¹ A DOL survey in agriculture focused on cucumbers, lettuce and onions, revealed that compliance with employment and labor laws was

⁴ Press Release, U.S. Census Bureau, Nation's Foreign-Born Population nears 37 Million (Oct. 19, 2010), at http://www.census.gov/newsroom/releases/archives/foreignborn_population/cb10-159.html, Elizabeth M. Grieco & Edward N. Trevelyan, *Place of Birth of the Foreign-Born Population: 2009*, American Community Survey Briefs (Oct. 2010), at <http://www.census.gov/prod/2010pubs/acsbr09-15.pdf>.

⁵ Jeffrey S. Passel and D'Vera Cohn, Unauthorized Immigrant Population: National and State Trends, 2010 (Washington, D.C., Pew Research Center), at <http://pewhispanic.org/files/reports/133.pdf>.

⁶ *Id.* at pg. 1.

⁷ Jeffrey S. Passel and D'Vera Cohen, A Portrait of Unauthorized Immigrants in the United States, Pew Hispanic Center (April 14, 2009), at <http://pewhispanic.org/files/reports/107.pdf>.

⁸ Jeffrey S. Passel, Unauthorized Migrants in the United States: Estimates, Methods, and Characteristics, Organization for Economic Co-operation and Development, Working Paper No. 57, pg. 18 (Sept. 5, 2007), at <http://www.oecd.org/dataoecd/41/25/39264671.pdf>.

⁹ *Id.*

¹⁰ U.S. Dep't of Labor, FY 2000 Poultry Processing Compliance Report (2000).

¹¹ U.S. Dep't of Labor, *Close to Half of Garment Contractors Violating Fair Labor Standards Act.*, Daily Lab. Rep. (BNA) 87 (May 6 1996); David Weil, *Compliance With the Minimum Wage: Can Government Make a Difference?* at http://www.soc.duke.edu/sloan_2004/Papers/Weil_Minimum%20Wage%20paper_May04.pdf.

unacceptably low.¹² The Department found in 2000 that 60% of United States nursing homes routinely violated overtime, minimum wage or child labor laws.¹³ A private survey of hundreds of New York City restaurants found that more than half were violating overtime or minimum wage laws.¹⁴

A recent survey of over 4,000 workers in New York, Chicago and Los Angeles found that 26 percent had not been paid the minimum wage in the workweek preceding the survey. Of those who had worked over 40 hours in the prior week, 76 percent were not paid the legally mandated overtime pay.¹⁵ Significantly, the study found that unauthorized workers – in particular, women workers – were far more likely to experience wage and hour violations than other workers.¹⁶

In 2009, 4,551 workers were killed on the job in the United States,¹⁷ and nonfatal workplace injuries and illnesses occurred at a rate of 3.9 cases per 100.¹⁸ Fatalities on the job among foreign-born workers¹⁹ have been increasing at a time in which the overall rate of workplace fatalities for all workers has been decreasing.²⁰ The Bureau of Labor Statistics found that from 1992 to 2006, Latino workers experienced a general increase in the number of fatal injuries in the workplace, peaking at 990 in 2006. Although the number of work-related Latino fatalities fell to 668 in 2009, the drop was likely the result of high unemployment among Latino workers, as well as underreporting, rather than an increase in workplace safety.²¹ Fifty-nine per cent of fatalities among Latinos in were workers who were born outside the United States.

¹² U.S. Dep't of Labor, *Compliance Highlights*, 1, 3 (1999).

¹³ U.S. Dep't of Labor, Employment Standards Administration, *Nursing Home 2000 Compliance Fact Sheet*, [on](#) file at the National Employment Law Project).

¹⁴ Restaurant Opportunities Center of New York and the New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry* (2005), at <http://www.urbanjustice.org/pdf/publications/BKDFinalReport.pdf>.

¹⁵ "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," University of Illinois at Chicago Department of Urban Planning and Policy, National Employment Law Project and UCLA Institute for Research on Labor and Employment, Sept 2009, at http://nelp.3cdn.net/59719b5a36109ab7d8_5xm6bc9ap.pdf.

¹⁶ National Employment Law Project, *Workplace Violations, Immigration Status, and Gender: Summary of Findings from the 2008 Unregulated Work Survey*, August 2011, at http://www.nelp.org/page/-/Justice/2011/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf?nocdn=1.

¹⁷ U.S. Dep't of Labor, Bureau of Labor Statistics, Revisions to the 2009 Census of Fatal Occupational Injuries (CFOI) Counts, 2009, http://www.bls.gov/iif/oshwc/cfoi_revised09.pdf.

¹⁸ U.S. Dep't Of Labor, Bureau Of Labor Statistics, Census Of Fatal Occupational Injuries Summary, 2008, at <http://www.bls.gov/news.release/cfoi.nr0.htm>; Workplace Injury and Illness Summary, at <http://www.bls.gov/news.release/osh.nr0.htm>. These numbers do not, of course, take into account injuries that go unreported. Underreporting is a serious issue for many workers who fail to report injuries either because of a fear of retaliation or because of economic incentives that employers offer them. Lenore S. Azaroff et. al. *Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting*, 92 AM. J. PUB. HEALTH 1421, 1421–22, (2002).

¹⁹ No statistics exist that describe workplace accidents among unauthorized workers. We use foreign-born and Latin workers as a rough indicator of conditions affecting the unauthorized worker population.

²⁰ Zuehlke E, "Immigrants Work in Riskier and More Dangerous Jobs in the United States" Population Reference Bureau, 2009, at <http://www.prb.org/Articles/2009/usimmigrantsriskyjobs.aspx?p=1>.

²¹ U.S. Dep't of Labor, Bureau of Labor Statistics, National Census of Fatal Occupational Injuries in 2010, 2011, at <http://www.bls.gov/news.release/pdf/cfoi.pdf>; Greenhouse, S, *Fatalities on the Job Fell in 2009*, NY TIMES, Aug. 19, 2010, at <http://www.nytimes.com/2010/08/20/business/20osha.html>.

Similarly, the average occupation injury rate for immigrant workers is 31 injuries per 10,000 workers higher than the average rate, and the occupation fatality rate is almost 1.6 deaths per 100,000 workers higher than average.²²

INTERNATIONAL LEGAL FRAMEWORK: THE CONVENTION ON THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES

The Migrant Workers Convention is explicit in its mandate that migrants enjoy treatment not less favorable than nationals with respect to terms and conditions of work, including but not limited to pay, hours of work, holidays with pay, health and safety, etc.²³ The Convention also recognizes the right of migrants to participate in trade unions and other associations established “with a view to protecting their economic, social, cultural and other interests and the rights associated therewith,²⁴” and the right to social security.²⁵

Inter-American Court’s Advisory Opinion on the Legal Status and Rights of Undocumented Migrants

In September of 2003, the Inter-American Court issued Advisory Opinion OC-18 on the Rights of Undocumented Migrants,²⁶ in which it held international principles of human rights prohibit discrimination on the basis of immigration status, using the term “discrimination” to refer to “any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.”²⁷

The Court’s decision made clear that countries have the right to decide under what conditions foreigners may enter its borders, but once a worker enters into an employment relationship, “the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment.”²⁸ It then outlined the different labor rights which it said were fundamental and must be respected by member countries.²⁹

²² Pia M. Orrenius and Madeline Zavodny, "Do Immigrants Work in Riskier Jobs?" *Demography* 46, no. 3 (2009): 535-551, at <http://www.law.berkeley.edu/files/OrreniusZavodnypaper.pdf>.

²³ U.N. CONVENTION ON THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES, Article 25.

²⁴ *Id.*, Art. 26.

²⁵ *Id.*, Art. 27

²⁶ THE LEGAL STATUS AND RIGHTS OF UNDOCUMENTED MIGRANTS, September 17, 2003, at http://www.corteidh.or.cr/serie_a_ing/serie_a_18_ing.doc.

²⁷ *Id.*

²⁸ *Id.* at para. 134.

²⁹ “In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which ‘[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ ”

OC-18 provides an important yardstick against which to measure a country's compliance with general international principles of non-discrimination, and is especially useful to measure the policies of countries that have not ratified the migrant worker's convention. The following section of this paper will outline the general barriers to enforcement of labor rights of migrant workers in irregular status within the United States, followed by specific rights, remedies and limitations of those rights, best practices to protect the human rights of unauthorized migrants within the United States.

IMMIGRATION ENFORCEMENT AND INTERFERENCE WITH WORKERS RIGHTS

Like migrant workers in all countries, unauthorized workers seeking to enforce their labor rights in the United States face a number of barriers: poverty, geographic, cultural and linguistic isolation, and fear that complaints will result in their deportation. Unscrupulous employers use threats to turn workers into immigration authorities as a strategy to keep complaints to a minimum. Workers have an understandable fear that filing a complaint or even complaining informally to government authorities about labor code violations will result in their deportation, either because agency personnel will forward their information on to immigration authorities, or because their employer will do so. Employers who hire large numbers of unauthorized workers often suddenly take an interest in compliance with immigration laws as soon as workers make a formal complaint, or an accident takes place. The result is a process that has a serious chilling effect on undocumented migrant workers contemplating whether to file a claim and on those who have courageously filed claims.

The continued stalemate around comprehensive immigration reform at the federal level, coupled with a weak economy, has made for an increase in both federal and state immigration enforcement, including the use of new enforcement tools. These have included direct workplace enforcement against unauthorized workers at their place of employment, and dramatic increases in immigration enforcement at the state level, including mandated use (and consequent misuse) by employers of faulty federal databases to verify workers' immigration status. Each of these has provided tools for unscrupulous employers to drive unauthorized migrants into ever more precarious employment. The government's decision to focus immigration enforcement in the workplace and a federal and state-mandated increase of enforcement responsibilities of new, untrained actors such as police and sheriff's departments and even state agencies, has created confusion among immigrant workers with respect to whether or not they can expect confidentiality if they have a complaint for violation of labor rights, and whether or not they can trust state and federal agencies whose purpose it is to ensure employers' compliance with all labor laws.

Local (non-Federal) Enforcement of Immigration Laws in the States and the Federal Secure Communities Program

Until recent years, it has been the practice in many U.S. cities and states that local police officials do not act as immigration agents, for several reasons. Turning local police into immigration agents is a dangerous trend that deters migrants from accessing or cooperating with the police for fear of immigration consequences. When migrants are afraid to file claims with administrative agencies, call the police, or go to court, they cannot benefit from the protections of law enforcement, and law enforcement loses important witnesses.

In the past several years, a number of both mandatory and voluntary measures have forced local police and administrative agency personnel to act as immigration agents. These have included the federal Secure Communities Program, a partnership between Immigration and Customs Enforcement (ICE) and local jails to identify and deport "criminal aliens," and a handful of individually-enacted state laws that mandate local police and even administrative agencies that administer labor laws to enforce immigration laws. While most of the harshest state laws have been enjoined by courts as illegal, the laws have created a climate in which an employer can easily retaliate against a worker who has complained about unlawful conditions on the job by calling in the local police, as well as immigration authorities.

Mandatory Electronic Verification Systems

The federal E-Verify program allows employers to confirm the immigration status of newly-hired workers by checking their identity data against government databases. The program has been in use on a pilot or voluntary basis for most employers since 2004, allowing both governmental and nongovernmental studies of its effectiveness to take place. These studies have found that the database is rife with errors and generates discriminatory hiring and screening practices by employers.³⁰ Employers who have contracts with the federal government, as well as at least some employers in thirteen U.S. states, are required to use the system. A federal bill is pending before the U.S. Congress that would require all employers to use the E-Verify system.

If enacted, the federal bill would give unscrupulous employers a tool to either force unauthorized workers into more dangerous "off the books" employment, or to discharge workers who complain about job conditions, on the pretext that the employer has discovered that a worker is working without authorization.

SUBSTANTIVE LEGAL RIGHTS OF MIGRANTS IN IRREGULAR STATUS WITHIN THE U.S. AND THEIR LIMITATIONS

Freedom of Association and Collective Bargaining

Rights. In the United States, a federal law called the National Labor Relations Act controls workers' rights to freedom of association and collective bargaining. It has long been the case that migrant workers, regardless of their immigration status, were considered "employees" covered under the Act. Employer use of workers' immigration status to threaten, intimidate or remove workers in retaliation for their union activities was also held to constitute an unfair labor practice in violation of §8(a)(3) of the NLRA.³¹

³⁰ For more information on the E-verify program, see, NELP, E-Verify: Hurting Workers, Businesses and our Economic Recovery, 2011, at <http://www.nelp.org/page/-/Justice/2011/EVerifyHurtingWorkersBusinessandourEconomicRecovery.pdf?nocdn=1>

³¹ See *Sure-Tan*, 467 U.S. 883, 891 (1984); *Del Rey Tortilleria, Inc.* 272 NLRB 1106 (1984), enf'd., 787 F.2d 1118 (7th Cir. 1986) (employer's demand that employees present social security cards and green cards two days after union filed representation petition constituted unfair labor practice).

Limitations and Barriers. In 2002, the United States Supreme Court decided in a case called *Hoffman Plastic Compounds, Inc., v. NLRB*,³² that an undocumented migrant worker illegally fired from his job because he was engaged in a union organizing campaign was not entitled to reinstatement and was not eligible for “back pay” -- that is, compensation for work he would have performed had the employer not illegally terminated him. More recently the National Labor Relations Board (NLRB) has held that this is the case even if the employer knew the worker’s immigration status at the time of hire.³³

Health and Safety on the Job

Rights. The primary U.S. law that protects workers’ rights to health and safety is the Occupational Safety and Health Act. This law contains no exclusion for unauthorized migrant workers and the U.S. Department of Labor has stated that the Department will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), as well as the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), and the Mine Safety and Health Act, without regard to whether an employee is documented or undocumented.³⁴

Limitations and Barriers. The Department of Labor statement leaves open the issue of whether or not undocumented workers who suffer retaliation for asserting their health and safety rights can recover back pay.

Fair Wages for Work Performed

Rights. The principal federal law that protects workers’ rights to be paid is the Fair Labor Standards Act (FLSA). FLSA protects most workers’ rights to a minimum wage (currently set at a very low \$7.50 per hour), and to overtime pay of one and one half times the regular rate of pay for hours worked over 40 in one week. The Department of Labor has stated that it will “fully and vigorously enforce the FLSA without regard to whether an employee is documented or undocumented.” Like the federal law, most state wage and hour laws contain no provision that distinguishes between documented and undocumented workers.

Discrimination on the Job

Rights. Several national laws protect workers against discrimination on the job. Title VII of the federal Civil Rights Act (Title VII) protects workers’ rights to be free from discrimination based on several factors: sex, color, race, religion and national origin.³⁵ The Age Discrimination in Employment

³² *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002)

³³ *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. No. 47 (2011). The Board’s decision reversed an earlier judge’s decision, which had said that employers could be required to pay back pay if they knew their workers were undocumented. *Mezonos*, 2006 WL 3196754 (N.L.R.B. Div. of Judges) (Nov. 1, 2006).

³⁴ U.S. Dep’t of Labor, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastic decision on laws enforced by the Wage and Hour Division, at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>. See also, U.S. Dep’t of Labor, *Hoffman Plastic Compound, Inc. v NLRB*, Questions and Answers.

³⁵ 42 U.S.C.A. § 2000e *et. seq.*

Act (ADEA) protects workers' rights to be free from discrimination based on age.³⁶ The Americans with Disabilities Act (ADA) protects workers' rights to be free from discrimination based on disabilities.³⁷ The Unfair Immigration-Related Employment Practices Act protects certain immigrants from discrimination based on national origin and citizenship.³⁸ States also have their own anti-discrimination statutes, which often provide broader protections than those available under the federal statutes.

Limitations and Barriers. Immigrants without work authorization are excluded from the protection of the Unfair Immigration-Related Employment Practices Act, which protects against discrimination based on citizenship and national origin in employment.³⁹

Even before the *Hoffman* decision, one federal court of appeals had held that pursuant to the 1986 Immigration Reform and Control Act, at least in the hiring context, no one is entitled to Title VII protection unless he or she was authorized for employment.⁴⁰ The *Hoffman* decision has had spillover impacts on protections under the anti-discrimination laws. Both New Jersey and California courts have concluded that victims of discrimination who are undocumented have no right to certain forms of compensation.⁴¹ One court has allowed an employer to force a worker to disclose her immigration status because that status could affect her eligibility for compensation for the mental distress she suffered as a result of sexual harassment.⁴²

Social Security Benefits

Barriers and Limitations. Migrants who are not authorized to work in the United States are not eligible (along with many legally present migrants) for many federal public benefits, including Social Security retirement benefits. Many undocumented migrants in the United States obtain work by using false Social Security cards. Even though these workers have paid into the system by way of mandatory payroll withholdings, they are unable to benefit from the Social Security system if their earnings were not properly credited due to a discrepancy, or "no match," between the worker's social security number and his/her name.

³⁶ 29 U.S.C.A. § 621 *et. seq.*

³⁷ 42 U.S.C.A. § 12101 *et. seq.*

³⁸ 8 U.S.C.A. § 1324b.

³⁹ 8 U.S.C.A. § 1324b(a)(3).

⁴⁰ *Egbuna v. Time Life Libraries, Inc.*, 153 F.3rd 184 (4th Cir. 1998), cert. denied, 119 S.Ct. 1034 (1999).

⁴¹ *See, Morejon v. Terry Hinge and Hardware*, 2003 WL 22482036 (Cal.App, 2 Dist. 2003) A New Jersey court held that a worker claiming discriminatory termination under New Jersey's Law Against Discrimination (LAD) was not entitled to claim economic or non-economic damages because she could not be lawfully employed. In that case, the plaintiff had left work on maternity leave and her employer refused to reinstate her after the leave. In reaching its conclusion, the New Jersey Superior court recognized that there might be cases where "the need to vindicate the policies of the LAD ... and to compensate an aggrieved party for tangible physical or emotional harm" might lead to concluding that an individual should be able to seek compensation for that harm. *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. Super. A.D. 2004), cert. denied 849 A.2d 184 (2004).

⁴² *EEOC v. Evans Fruit Co.*, 2011 WL 1884477 at *1 (E.D.Wash. 2011).

Unemployment Compensation

Barriers and Limitations. In the United States, a cooperative federal/state program exists which compensates workers who have lost their job through layoffs or other reason that is no fault of their own. Under federal law, migrant workers must be in particular immigration categories in order to qualify for unemployment insurance. The basic principle, as interpreted by the federal Department of Labor is that states may not provide unemployment compensation benefits to a migrant worker unless she had valid employment authorization both at the time she earned the wages and at the time she is unemployed and looking for work.

Workers' Compensation

Rights. In the United States, all states have systems that cover medical benefits, wage loss, permanent disability and loss of life for workers who are injured in the job. The systems vary in their generosity from state to state. The process for an injured worker is to file a claim, which is decided by an administrative agency and which may be appealed to the courts. Generally, state laws include "aliens" in the definition of workers covered by the system. State courts and administrative agencies in Arizona, California, the District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee and Texas have recently held that undocumented workers are covered under state compensation systems.⁴³

Limitations and Barriers. In several states, including California, Michigan, Nevada, Nebraska, New York, Oregon, and Pennsylvania, courts have said that injured undocumented workers are not entitled to the full range of remedies, such as retraining, or payment for job loss.⁴⁴

⁴³ *Gamez v. Industrial Comm.*, 141 P.3d 794 (Ariz. Ct. App, 2006) reconsideration denied (Aug 28, 2006), review denied (Mar 13, 2007); *Farmers Bros. Coffee v. Worker's Comp. Appeals Bd.*, 133 Cal.App.4th 533 (Cal.App. 2 Dist. 2005); *Cagnoli v. Tandem Staffing and Specialty Risk Services*, 914 So.2d 950 (Fla. 2005) reh. denied (Dec 14, 2004); *Safeharbor Employer Services I Inc., v. Velazquez*, 860 S.2d 984 (Fla. App. 2003) rev. denied by *Safeharbor Employer Services I Inc., v. Velazquez*, 873 So.2d 1224 (Fla. Apr. 22, 2004); *Earth First Grading et al. v. Gutierrez*, 606 S.E.2d 332 (Ga. Apps. 2004) cert. denied (Mar 28, 2005); *Wet Walls, Inc., v. Ledezma*, 598 S.E.2d 60 (Ga. App. 2004) cert. denied (Sep. 7, 2004); *Economy Packing Co. v. Illinois Workers' Compensation Com'n*, 387 Ill.App.3d 283, 289-290, 901 N.E.2d 915 (Ill. App. Ct. 2008); *Doe v. Kansas Dep't of Human Resources*, 90 P3d 940 (Kan. 2004); *Design Kitchen and Baths, et.al. v. Lagos*, 882 A.2d 817 (Md. 2005) opinion after grant of cert. *Design Kitchen and Baths v. Lagos*, 388 Md. 718, 882 A.2d 817 (Md. Sep 12, 2005); *Medellin*, No. 033242-00 (Mass. Dep't of Indus Accidents, Dec. 23, 2003); *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Ct. Apps. Mich. 2003), order accepting review vacated by 684 NW2d 342 (2004); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (MN, 2003); *Ortiz v. Cement Products, Inc.*, 708 NW2d 610 (Neb., 2005); *XYZ Cleaning Contractors*, 2006 WL 1221568 (NY Worker's Compensation Board April 28, 2006); *Rajeh v. Steel City Corp et. al.*, 813 NE2d 697 (Oh. Apps. 2004); *Cherokee Industries, Inc., v. Alvarez*, 84 P3d 798 (Okla., 2003) cert. denied Jan. 20, 2004; *The Reinforced Earth Company v. Worker's Compensation Appeal Board (Astudillo)*, 810 A.2d 99 (Pa. 2002); *Curriel v. Environmental Management Services*, 655 S.E.2d 482, (S.C., 2007); *Silva v. Martin Lumber Company*, 2003 WL 22496233 (Tenn. Worker's Comp.Panel, 2003) *Appellant: *** v. Respondent: ****, 2002 WL 31304032 (Tex.Work.Comp.Comm., 2002); *Asylum Co. v. D.C. Dep't of Empl. Servs.*, 10 A. 3d 619 (D.C. 2010).

⁴⁴ *Foodmaker, Inc., v. Worker's Comp. Appeals Board*, 78 Cal.Rptr.2d 767 (1999); *Del Taco v. Worker's Comp. Appeals Bd*, 79 Cal. App.4th 1437 (2000); *Liberty Mutual Ins., Co. v. Worker's Comp Appeals Bd.*, 2002 WL 14515 (Cal. App. 2002);

In addition, it has become much more difficult in recent years for unauthorized migrants to claim the workers' compensation benefits to which they are entitled, since most states require a valid Social Security Number (which can legally only be obtained by workers with work authorization) in order to apply for workers' compensation. Other state courts have blocked benefits for workers who have used a false Social Security Number in order to get a job, a common practice among unauthorized workers.

Claims for Personal Injury

In the United States, apart from the workers' compensation system, in some limited circumstances, workers are allowed to sue third parties for lost wages and injuries on the job. Courts in different states have reached different results about whether an unauthorized worker can receive compensation for wages she would have earned if she had not been injured at work. In Texas, Washington, and Pennsylvania, courts have said workers are eligible for this compensation.⁴⁵ In California, Colorado, Florida, Kansas, Illinois, Massachusetts, New Hampshire, New York, New Mexico and Ohio, courts have placed limitations on eligibility.⁴⁶

Access to the Courts

Limitations and Barriers. When formal legal claims are filed in U.S. courts, both parties are allowed to ask a broad range of questions, and ask for a broad range of documents, from the other party in a process called "discovery." The subject matter of discovery covers anything relevant to a claim or defense, or anything that might become relevant. Attorneys representing employers in claims brought by migrants are increasingly using the discovery process to inquire into a plaintiff's immigration status, to obtain information that is allegedly relevant to the damages claimed. But these measures clearly serve to intimidate the plaintiff into dropping the charges altogether, due to fear of retaliation and potential immigration consequences.

Tarango v. State Indus. Ins. System, 117 Nev. 444 (2001); *Ortiz v. Cement Products, Inc.*, 708 N.W.2d 610 (2005); *Carreon v. Commerce and Industry Ins. Co.*, 2010 WL 291812, *3 (Or.App. 2010); *Ramroop v. Flexo-craft Printing, Inc.*, 866 N.Y.S.2d 586 (N.Y. 2008); *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Ct. Apps. Mich. 2003); *the Reinforced Earth Company v. Workers' Compensation Appeal Board (Astudillo)*, 810 A.2d 99 (Pa.2002).

⁴⁵ *Tyson Foods, Inc. v. Guzman*, 2003 WL 21773844 (Tex.App. Jul 31, 2003); *Contreras v. KV Trucking, Inc.* 2007 WL 2777518 (E.D. Tex. 2007); *Salas v. Hi-Tech Erectors* (168 Wash. 2d 664 (2010); *Bordejo v. Exclusive Builders, Inc.*, 2011 WL 3667570 (M.D.Pa.).

⁴⁶ *Davila v. Grimes*, No. 2:09-CV-407, 2010 WL 1737121 (S.D. Ohio, Apr. 29, 2010); *Zuniga v. Morris Materials Handling, Inc.*, 2011 U.S. Dist. LEXIS 14352 (N.D. Ill. 2011); *Pontes v. New England Power Company*, 2004 Mass. Super. LEXIS 340 (Mass.Super. Aug 17, 2004); *Balbuena v. IDR Realty, LLC*, 845 N.E.2d 1246, 6 N.Y.3d 338 (N.Y. 2006); *Rosa v. Partners in Progress, Inc.*, 868 A2d 994 (N.H. 2005); *Cruz v. Bridgestone/Firestone North America*, 2008 WL 5598439 (D.N.M. Aug. 29, 2008) *Hernandez-Cortez v. Hernandez*, 2003 WL 22519678 (D. Kan. Nov. 4, 2003); *Veliz v. Rental Service Corporation, USA, Inc.* 2003 U.S. Dist. LEXIS 24924 (M.D. FL, Orlando Div. 2003); *Romero v. CHIP*, 321 F.3d 145 (D.C. 2007); *Silva v. Wilcox*, 2009 WL 4070875, *5, *6 (Colo.App. 2009).

In many of the circumstances listed above, employers have aggressively sought to force workers to disclose their immigration status. While in most cases involving simple claims for wages that have not been paid for work performed, courts have refused to allow this practice, some courts have forced workers to talk about their immigration status in order to pursue claims. At present, whether a worker is obligated to do so will depend on the attitude of the particular judge in her case, as well as the specific remedy she is seeking.

PROMISING DEVELOPMENTS WITH RESPECT TO PROTECTIONS OF UNAUTHORIZED MIGRANTS' LABOR RIGHTS

Numerous instances have been documented in which unscrupulous employers or their surrogates have used immigration status as a means of undermining workers' exercise of their labor rights.⁴⁷ Worker advocates in the U.S. believe that the only way to adequately enforce labor rights of all workers is to establish a clear "firewall" between labor enforcement and immigration enforcement; that is, to make it clear that a workers' immigration status is never a subject of questioning in a labor dispute.

Federal (and some state) agencies have recognized that the failure to ensure equal access to labor law enforcement for undocumented migrants has a detrimental impact on all workers, nationals and migrants alike. As such, they instituted policies that offer some limited protection to undocumented migrants who make complaints or whose employers threaten to turn them in to immigration authorities if they complain.

In general, the policies represent a step forward in protecting migrant workers' access to remedies for violation of labor rights. However, many of the policies are discretionary or weak, and no specific policy governs the rights of all workers in all situations. The US, as well as many other countries, has a long way to go before there is an absolute firewall between wage enforcement and immigration enforcement.

U.S. DOL – ICE Memorandum of Understanding. The U.S Department of Labor and the Department of Homeland Security entered into a new Memorandum of Understanding in March 2011, memorializing their agreement that Immigration and Customs Enforcement (ICE) would not conduct enforcement in workplaces where DOL has an ongoing investigation.⁴⁸

ICE Operating Instruction. ICE has also clarified that its internal Operating Instruction (which binds it to stay out of other agency investigations and complaints) is still binding on the agency. This 1990s policy says that when the agency receives information concerning the employment of undocumented or unauthorized aliens, officials must "consider" whether the information is being provided to interfere with employees' rights to organize or enforce other workplace rights, or whether the

⁴⁷ Smith R, Avendaño A, ICED OUT: How Immigration Enforcement Has Interfered with Workers' Rights, National Employment Law Project, AFL-CIO, 2009, at http://www.nelp.org/page/-/Justice/ICED_OUT.pdf?nocdn=1.

⁴⁸ http://www.nelp.org/page/-/Justice/2011/DHS-ICE-DOL_MOU_Final_3-31-2011.pdf?nocdn=1.

information is being provided to retaliate against employees to vindicate those rights.⁴⁹ Unfortunately, because this policy grants discretion to the immigration authorities, it is viewed by many advocates as an unreliable protection.

U Visa Certifications by the Department of Labor, Equal Employment Opportunity Commission, National Labor Relations Board and some state agencies. Under a federal law enacted in 2000, a noncitizen crime victim who assists law enforcement in the investigation or prosecution of the crime may be eligible for a special type of temporary visa called a U visa. In the past year, a number of labor agencies, including DOL, EEOC and the NLRB, have adopted protocols for certifying such victims for U visas. The visas cover only a narrow category of workers, and must be approved by the Department of Homeland Security, but are nonetheless an additional tool for protecting immigrant workers who are also victims of crime.⁵⁰

ICE Prosecutorial Discretion Memorandum. On June 17, 2011, Immigration and Customs Enforcement (ICE) issued a memorandum instructing its enforcement staff to exercise favorable discretion for individuals engaged in protected activity, including union organizing, complaints to authorities about employment discrimination, and plaintiffs in lawsuits related to civil rights or liberties violations.⁵¹ While the memorandum is too recent for its impact to be fully developed, it reaffirms that individual ICE agents and attorneys have the power in individual cases and under certain circumstances, including presumably in cases of employer retaliation, to decide not to pursue deportation against unauthorized workers.

CONCLUSION AND RECOMMENDATIONS

Currently in the United States, rights afforded migrant workers in irregular status do not comply with international human rights principles of non-discrimination. Whether a worker has enforceable labor rights varies considerably from place to place, from federal law to state law, and depending on the particular remedy that the worker seeks. This patchwork, coupled with a background of harsh enforcement tactics that have brought a broad range of authorities into enforcement of immigration laws, has made it ever more difficult for migrant workers in irregular status to enforce their existing labor rights and has created a two-tiered labor force.

At the same time, some promising new policies and practices have emerged that protect unauthorized migrants from retaliation. However, even these policies lack cohesiveness.

Formerly INS Operating Instruction. 287.3(a), now designated as Special Agent Field Manual 33.14(h)
<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>.

⁵⁰ See, U.S. Dep't of Labor, Department of Labor U Visa Process and Protocols Question – Answer, at <http://www.dol.gov/opa/media/press/whd/whd20110619-ga.pdf>; EEOC Procedures for U Nonimmigrant Classification Certification, 2008, at http://iwp.legalmomentum.org/immigration/u-visa/government-memoranda-and-factsheets/U%20VISA_EEOC%20Certification%20Memo_7.3.08.pdf; Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings. Office of the General Counsel, June 7, 2011, at <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b>.

⁵¹ John Morton Director, U.S. Immigrations and Customs Enforcement, Memorandum: “Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs.” Policy Number: 10076.1. June 17, 2011, at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

The United States must address the existence of 8 million unauthorized workers and the precarious work situations in which they find themselves. At the same time, the United States' experience can inform this body's General Comments. We recommend that the Committee on Migrant Workers closely examine the contours of the principle of non-discrimination, and include in its comments guidance on the rights of migrants in irregular situations, the remedies available to them for violation of those rights, access to administrative and judicial processes, and protections against retaliation, including provision of permanent visas to victims of retaliation.