

Statement by the National Immigration Law Center on “Evaluating a Temporary Guest Worker Proposal”

**Senate Committee on the Judiciary Subcommittee on Immigration,
Border Security and Citizenship**

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The National Immigration Law Center (NILC) is a nonpartisan national legal advocacy organization that works to protect and promote the rights of low-income immigrants and their family members. NILC staff specializes in the immigration, employment and public benefits laws and policies affecting low-income immigrants. In addition to litigation, NILC’s staff members provide publications, technical assistance and training to a broad constituency of legal aid agencies, health care and social service providers, community groups, attorneys, and community and labor organizers.

NILC is very encouraged by the fact that both the President and the Senate have decided to address the need for comprehensive immigration reform. The renewed attention to the issue confirms our belief that there is an unstoppable momentum towards comprehensive immigration reform and legalization of currently undocumented workers. This momentum is based on our economic needs, the reality of a shrinking world and increased trade, demographic change, increased civic participation by immigrants, and the inherently undemocratic and unstable nature of our current immigration system. The only question is the pace and nature of the reforms to come.

We strongly believe that any comprehensive immigration reform proposal must protect U.S. workers--including immigrants--from employers who seek to misuse guestworker or other immigration provisions to gain an unfair advantage over their workers. To accomplish this, any proposal should provide equal labor rights for immigrant workers, ensure that immigrant workers are paid the same wages and benefits and enjoy the same conditions as others, and provide adequate mechanisms and sufficient resources to enforce these requirements. For example, immigrant whistleblowers should be protected from retaliation and deportation, and workers should be able to sue businesses that fail to adhere to the law. In addition, immigrant workers should retain the ultimate weapon that others use to protect their rights at the workplace: they should be able to quit work and move to a new employer without adverse immigration consequences.

We assume that these large issues will be addressed comprehensively by others. We therefore will focus our testimony on the Supreme Court decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), in which the Court restricted the remedies available to an undocumented worker whose employer violates worker protection laws. Any comprehensive immigration reform proposal should include repeal of this decision which has adversely affected working conditions for U.S. workers.

Background

On March 27, 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds, Inc. v. NLRB*, that undocumented workers who are illegally fired for engaging in union organizing activities are not entitled to receive back pay wages, the only monetary remedy available under the National Labor Relations Act (NLRA). Although the *Hoffman* decision was limited to undocumented workers' right to back pay under the NLRA, the decision has been extended by administrative agencies to other contexts and has frequently been cited by employers in defense of employment and labor law violations.

The *Hoffman* decision established a loophole permitting companies to evade basic worker protection laws with relative impunity if they hire undocumented workers. This has created perverse incentives that undermine both labor and immigration law.

- ◆ The decision undermines immigration law by making undocumented workers *more* attractive to employers than they were pre-*Hoffman* because such workers carry reduced liability for labor law violations.
- ◆ The decision weakens the position of *authorized* workers confronting abuse or exploitation because their undocumented co-workers have fewer legal avenues for redress of labor violations, including unlawful retaliation, and therefore they have far less incentive to participate in efforts to improve conditions.
- ◆ Businesses that take advantage of this situation can cut legal corners and thereby gain a competitive advantage over law abiding employers.

The *Hoffman Plastic* decision has likely caused working conditions to further deteriorate in some of America's most arduous and dangerous jobs by making workers who expose unsafe or other exploitive conditions more vulnerable. Even before the decision, rates of injuries and deaths of Hispanic workers engaged in hazardous employment were extremely high and rising. From 1999 to 2000, construction fatalities involving Hispanic workers increased by 24 percent, while Hispanic employment was up only 6 percent.

The Significance of Undocumented Workers in the U.S. Economy

The size and placement of the undocumented workforce means that the *Hoffman* decision threatens the employment rights of US low wage workers, particularly those in the most high risk industries where workers most need to enforce labor protections. According to a recent analysis of census figures by the Urban Institute, there are 9.3 undocumented immigrants in the country, 6 million of whom are in the labor force – representing about 5 percent of U.S. workers. The labor-force participation rate of undocumented men exceeds that of men who are legal immigrants or U.S. citizens.

These undocumented immigrant workers are not spread evenly throughout the nation. Almost two-thirds of the undocumented population lives in the traditional immigrant states (California, Texas, New York, Florida, Illinois and New Jersey), but the most rapid growth of the undocumented population since the mid-1990s has been outside these states.

Within states, immigrants are grouped into occupations, and consequently into communities so that almost every state now includes cities and workplaces with significant numbers of

undocumented workers. A report of the Pew Hispanic Center estimates that more than 1 million undocumented immigrants are employed in manufacturing and another 1 million in services. Six hundred thousand more work in construction, and 700,000 work in restaurants. It is estimated that one-half of the some 250,000 U.S. poultry workers are undocumented. Some of the highest concentrations are in business services (24 percent of the workforce), restaurants (9 percent), and non-durable manufacturing (over 7 percent). The estimated 1 to 1.4 million undocumented workers in agriculture account for about 58 percent of that workforce.

Many of these same industries are known for low wages, dangerous conditions, and frequent violations of labor laws. A U.S. Department of Labor (DOL) survey found that 100 percent of all poultry processing plants were non-compliant with federal wage and hour laws. Another DOL survey found that two-thirds of all garment manufacturing businesses in New York City can be characterized as “sweatshops,” and a DOL survey in agriculture, focused on cucumbers, lettuce and onions, revealed that compliance in these commodities was “unacceptably low.”

Injuries and deaths of foreign-born workers engaged in hazardous employment are extremely high and increasing. In 2002, according to the Department of Labor Bureau of Labor Statistics, although the number of fatalities involving Hispanic workers has slightly decreased, the number of fatalities involving foreign-born workers is on the rise. New York has the nation's highest rate of immigrants killed in the workplace, with foreign-born workers accounting for 3 out of every 10 deaths. In 2001, there were 49 farm fatalities in California. The Washington State Department of Labor and Industries reports 59 fatalities from 1997-2001 in farm and forestry, an industry dominated by immigrant workers from Mexico. Poultry workers have an illness and injury rate that is more than twice the national average.

Immigrant workers are concentrated in the lowest wage, highest risk occupations. Removing a significant remedy when their labor rights are violated seriously undermines the rights of all workers in those industries. These workers already face difficult barriers finding out how to exercise their rights, overcoming their fear of coming forward, and protecting themselves from retaliation once a complaint is filed. Many U.S. employers hire undocumented immigrant workers because they assume these workers will be less likely to complain about unpaid or unfair wages or unsafe working conditions. The *Hoffman* decision makes this assessment more realistic, thereby making immigrant workers more attractive to businesses that exploit workers and suppressing wages and investment in safe working conditions those by businesses. This, in turn, puts competitive pressure on employers who treat workers decently, pushing them to reduce labor costs and violate immigration and labor laws.

Any Comprehensive Immigration Reform Should Include Repeal the Hoffman Plastic Decision

The decision in *Hoffman* was based on statutory interpretation, not constitutional considerations, and the Supreme Court specifically noted that Congress has the authority to change the law if it is unhappy with the results. Repealing the decision would restore the pre-*Hoffman* environment under which the remedy for violating U.S. labor laws was determined by the conduct of the employer who violated the law rather than the status of the victim. Unscrupulous employers should not be allowed to shield themselves behind immigration laws to circumvent their legal responsibilities.