

Overview of Key Issues Facing Low-Wage Immigrant Workers

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

As of November 2008, it is estimated there were about 37.7 million immigrants in the U.S.¹ Immigrants constitute nearly 16 percent of the nation’s nonfarm labor force.² Despite their high participation in the labor force, immigrant workers have suffered diminished rights under U.S. employment and labor laws. According to a 2004 Human Rights Watch report, “Federal laws and policies on immigrant workers are a mass of contradictions and incentives to violate their rights.”³ Immigrant workers are disproportionately represented in dangerous industries, such as construction, meatpacking, and poultry processing, and in hazardous occupations within those industries.⁴ Work fatalities among U.S. workers who are foreign-born are on the rise, and the rate at which foreign-born workers die as a result of workplace accidents far exceeds that of native-born

workers.⁵ There are approximately 7.8 million undocumented workers in the U.S. labor force,⁶ representing approximately five percent of U.S. workers and one out of every five low-wage workers.⁷

Immigration enforcement and racial profiling by U.S. Immigration and Customs Enforcement (ICE) against immigrant workers significantly increased under the presidential administration of George W. Bush. Since January 2006, record numbers of immigrants have been detained, families have been torn apart, and communities and businesses disrupted. For fiscal years 2007 and 2008, ICE reported that it detained over 9,000 workers in worksite enforcement actions.⁸ Many more lawfully present and U.S. citizen workers also were wrongfully arrested in ICE’s worksite enforcement actions.⁹ Under the Obama administration, military-style raids have stopped, but I-9 (employment eligibility verification form) audits have resulted in an even larger number of job terminations and economic disruption.

This article provides an overview of how the rights of immigrant workers under U.S. employment and labor

¹ Demetrios Papademetriou and Arron Terrazas, *Immigrants and the Current Economic Crisis* (Migration Policy Institute, Jan. 2009), www.migrationpolicy.org/pubs/lmi_recessionJan09.pdf (last visited Nov. 7, 2009).

² *Id.*

³ *Blood, Sweat, and Fear: Workers’ Rights in the U.S. Meat and Poultry Plants* (Human Rights Watch, 2004), www.hrw.org/reports/2005/usa0105/ (last visited Nov. 7, 2009).

⁴ Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics* (Pew Hispanic Center, June 2005). See *Fractures in the Foundation: The Latino Worker’s Experience in an Era of Declining Job Quality* (National Council of La Raza, 2009), www.nclr.org/content/publications/detail/59227/ (last visited Nov. 7, 2009).

⁵ See *Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs* (AFL-CIO, Aug. 2005),

www.aflcio.org/aboutus/laborday/upload/immigrant_risk.pdf.

⁶ *Id.*

⁷ Capps, Fix, Passel, et al., *A Profile of the Low-Wage Immigrant Work Force* (Urban Institute, 2003).

⁸ ICE arrested 4,077 workers on administrative immigration violations in fiscal year 2007 and 5,184 workers in fiscal year 2008. See *ICE Fiscal Year 2007 Annual Report*, http://www.ice.gov/doclib/about/ice07ar_final.pdf (last visited Nov. 7, 2009), and *ICE Fiscal Year 2008 Annual Report*, www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf (last visited Nov. 7, 2009).

⁹ For example, in the multi-state raid of Swift & Co. in Dec. 2006, ICE detained and arrested numerous lawfully present and U.S. citizen workers. The United Food and Commercial Workers International Union (UFCW) filed a lawsuit against ICE for the constitutional violations committed against lawfully authorized and U.S. citizen workers. For a copy of the complaint, contact NILC. Similarly, in a raid in Van Nuys, Calif., in Feb. 2008, more than one hundred lawfully present and U.S. citizen workers were detained. The Center for Human Rights and Constitutional Law filed Federal Tort Claims Act claims on their behalf.



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laws are under assault and the increased immigration enforcement mechanisms that are used against them. It then highlights the urgent need for legislative and administrative reform as a means to ensure that all workers, regardless of immigration status, are able to work free of exploitation and discrimination.

■ Rights & Remedies for Immigrant Workers

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

Equally troubling are the attempts by employers to use the discovery process in litigation to inquire into the immigration status of plaintiffs. It is critical to note that in many cases a worker's status enters the record unnecessarily. It is crucial to educate workers about the importance of remaining silent about such questioning and to let them know that they have affirmative rights if they were wronged, discriminated against, or are injured on the job. Similarly, advocates must do their best to ensure that immigration status information does not get into the record or pleadings.

Undocumented workers continue to be considered "employees" under the NLRA and thus enjoy protections from unfair labor practices, but if their rights are violated and they are fired, they are not entitled to back pay or reinstatement. This means that it is only after an employer has been found liable for violating the worker's rights that the worker's immigration status may be relevant to determine whether she is eligible for back pay that would compensate her for the wages she would have earned had she not been wrongfully termi-

nated, e.g., for union activities.¹⁰ However, in instances where the employer knows that the workers were undocumented at the hiring stage, back pay remedies under the NLRA may still be available for workers whose rights are violated because they engaged in union activities. For example, in a case where the employer knowingly violated federal immigration law by hiring workers without verifying their work authorization,¹¹ an administrative law judge (ALJ) awarded back pay to those workers who were fired in violation of the NLRA. The ALJ in *Mezonos* distinguished *Hoffman* by finding that *Mezonos* was a "wrongdoer" employer, unlike the employer in *Hoffman*, and that, unlike the worker in *Hoffman*, the workers in *Mezonos* had not committed any wrongdoing, and therefore a back pay award was not precluded. It is important to note that, although the employer attempted to inquire about the workers' immigration status, no evidence one way or the other was ever presented about the workers' status. The case remains currently pending on review before the National Labor Relations Board.

All workers, regardless of their immigration status, continue to be protected by the Fair Labor Standards Act (FLSA) and state wage-and-hour laws for "work already performed."¹² Not surprisingly, however, employers continue trying to argue that *Hoffman* prohibits workers from getting paid at all. For example, in *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604 (2007), *cert. denied*, 128 S.Ct. 1222 (2008),¹³ construction workers who performed welding work on a public contract job were not paid the required prevailing wage. When the workers sued for the difference between what they were paid and the prevailing wage rate, the employer cited *Hoffman* in arguing that, because the workers were allegedly undocumented, they were not entitled to receive the unpaid prevailing wage. The trial court agreed with the employer. However, on appeal, the court upheld California

¹⁰ *Id.*

¹¹ *Mezonos Maven Bakery, Inc. and Puerto Rican Legal Defense and Education Fund*, 29-CA-25476, Steven Davis, ALJ (Nov. 1, 2006). NILC is co-counsel on *Mezonos* with the Immigration Law Clinic at the New York University School of Law and the AFL-CIO.

¹² See, e.g., *Flores v. Albertsons, Inc.*, 2002 WL 1163623, at 5 (C.D. Cal. Apr. 9, 2002) (holding that *Hoffman* does not prevent recovery of paid wages under FLSA).

¹³ NILC filed an amicus curiae brief on behalf of the Asian Pacific American Legal Center, Bet Tzedek Legal Services, California Rural Legal Assistance, Inc., Legal Aid Foundation of Los Angeles, and Legal Aid Society - Employment Law Center, and represented the plaintiffs in the proceedings before the U.S. Supreme Court. A copy of the briefs can be obtained from NILC.

law in ruling that immigration status is irrelevant to claims for unpaid prevailing wages.¹⁴

Undocumented workers continue to be protected by the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Equal Pay Act, and Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, national origin, gender, or religion. The Equal Employment Opportunity Commission (EEOC), however, states that *Hoffman* precludes back pay remedies under these statutes.

While federal and state labor and employment laws protect all workers regardless of immigration status, employers continue to raise the issue of immigration status during the discovery phase in the litigation of these claims. It therefore is important to take measures to protect workers making such claims. One strategy is to seek a protective order from the court, similar to the one obtained in *Rivera, et al. v. NIBCO, Inc.*, prohibiting such inquiries or retaliation.¹⁵ In *Rivera*, the Ninth Circuit stated, “[T]he chilling effect that the disclosure of plaintiffs’ immigration status could have upon their ability to effectuate their rights . . . outweighed NIBCO’s interests in obtaining the information.”¹⁶ The court found that were such discovery to be permitted, “countless acts of illegal and reprehensible conduct would go unreported.”¹⁷

¹⁴ Cal. Lab. Code Sec. 1171.5(a) states in pertinent part: “All protections, rights and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who have been employed, in the state.” The employer appealed the decision to the California Supreme Court, which refused to hear the case, and then filed a petition before the U.S. Supreme Court, which was also denied.

¹⁵ For a copy of the *Rivera* protective order, see www.nilc.org/immsemplymnt/rivera/rivera_p_order.pdf. The EEOC also prevailed in a case where it sought and obtained a protective order that prohibited the discovery of the immigration status and tax return information of workers who were suing their former employer for discrimination and retaliation. *Assif Asgar-Ali v. Hilton Hotel Corp.*, 798 N.Y.S. 2d 342 (2004). For an in-depth discussion on litigating discrimination claims on behalf of immigrant workers in the post-*Hoffman* era, see Christopher Ho and Jennifer C. Chang, “Drawing the Line After *Hoffman Plastic Compounds, Inc. v. NLRB*: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond,” 22 *Hofstra Lab. & Emp. L.J.* 473 (2005).

¹⁶ *Rivera v. NIBCO, Inc.*, 364 F. 3d 1057 (9th Cir. 2004).

¹⁷ *Id.* Other courts have similarly granted protective orders barring inquiry into immigration status. See, e.g., *Flores v. Amigon*, 233 F. Supp. 462, 465 n. 2 (E.D.N.Y. 2002); *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002).

■ Immigration Enforcement at the Worksite

Beginning in April 2006, ICE announced a multi-year plan intended to “secure America’s borders and reduce unlawful migration” into the U.S.¹⁸ This interior enforcement strategy resulted in stepped-up worksite enforcement efforts in the form of mass raids. Between 2006 and 2009, worksite raids took place all over the country, and thousands of workers were arrested and deported.¹⁹ While immigration worksite enforcement actions served as a mechanism for enforcing the employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA), in most cases it is workers who were targeted, not employers. Immigration worksite enforcement actions rarely resulted in ensuring fair labor standards in the workplace.

In April 2009, following the change in presidential administrations, DHS announced yet a new worksite enforcement strategy. DHS promised to “focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers.”²⁰ Since then, DHS has shifted its enforcement away from large-scale worksite raids. Additionally, on July 1, 2009, ICE announced the initiation of I-9 (employment eligibility verification form) audits on 652 employers across the nation.²¹

Worksite Audits and Investigations

To enforce the employer sanctions provisions of IRCA, ICE can conduct random or targeted investigations of employers, including reviewing and inspecting the employer’s I-9 forms as well as conducting investigations into the employer’s hiring practices. The penalties that can be imposed upon employers that are found

¹⁸ For more information on the SBI’s interior enforcement strategy, see “ICE Announces a New Interior Enforcement Strategy,” *Immigrants’ Rights Update*, May 23, 2006, www.nilc.org/immsemplymnt/wkplce_enfrcmnt/wkplcenfrc022.htm (last visited Nov. 7, 2009).

¹⁹ For more information on some of the major worksite raids and their aftermath, see *Raids on Workers: Destroying our Rights: A Comprehensive Analysis and Investigation of ICE Raids and their Ramifications* (National Commission on ICE Misconduct and Violations of 4th Amendment Rights, June 18, 2009), <http://tinyurl.com/ykn7cot> (last visited Nov. 7, 2009).

²⁰ For more information, see “DHS Issues ‘New’ Worksite Enforcement Guidelines That Are Simply More of the Same” (NILC news release, Apr. 30, 2009), www.nilc.org/immsemplymnt/wkplce_enfrcmnt/wkplcenfrc027.htm (last visited Nov. 7, 2009).

²¹ For more information, see “ICE Launches Initiative to Step-Up Audits of Businesses’ Employment Records” (ICE news release, July 1, 2009), [www.employerlawreport.com/uploads/file/ICE_1-9\(1\).pdf](http://www.employerlawreport.com/uploads/file/ICE_1-9(1).pdf) (last visited Nov. 7, 2009).

to have violated the law include cease-and-desist orders, civil penalties for each offense of employing unauthorized workers, civil penalties for failure to fill out and maintain I-9 forms correctly, debarment, and criminal penalties.²² To initiate an investigation, ICE needs a lead and articulable facts that would give ICE reasonable suspicion that the employer is violating the law. Articulable facts cannot be based solely on a worker's ancestry, but they can include race or ancestry when coupled with other facts, and the reasonable suspicion must be based on information that an "objective reasonable" person would find suspicious and not the "subjective impression of a particular officer" or the individual bias of the officer.²³ Articulable facts that could lead to a worksite investigation include the officer's knowledge of high concentration of undocumented workers in the area, the industry or type of employment involved, the worker's excessive nervousness or if the worker appears to be too indifferent or too cool around the ICE officials, and the inability of the workers to speak English.

Under the law, employers are to be provided with at least three days' notice prior to an inspection of the I-9 forms by officers of ICE, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), or the U.S. Department of Labor (DOL).²⁴ However, ICE does not need a warrant to inspect or conduct an I-9 audit. Any refusal or delay in presentation of the I-9 form for inspection is a violation of federal immigration law.²⁵ In addition, if the employer does not comply with a request to present the I-9 forms, ICE may compel production of them and any other relevant documents by issuing a subpoena.

Oftentimes, an anonymous tip, along with a review of the I-9 forms, will trigger an immigration worksite enforcement action. For example, the Swift & Company raid, also known as "Operation Wagon Train," that took place on Dec. 12, 2006, was a six-state worksite enforcement investigation into allegations of criminal identity theft by the targeted workers. This worksite investigation was triggered after ICE discovered that undocumented workers were employed at the Swift plants after reviewing the company's I-9 forms.²⁶ The

initial Swift investigation, however, focused on criminal identity theft — i.e., on the workers and not the employer — because Swift was an employer that had been participating in DHS's Basic Pilot employment eligibility verification program.²⁷

Anonymous tips sparking worksite investigations oftentimes come from the employers themselves, who call on immigration authorities to conduct worksite investigations in order to retaliate against workers who are organizing to improve standards and working conditions or who have otherwise exercised their workplace rights.²⁸ While an internal guidance exists for ICE to follow when it receives anonymous tips about undocumented workers at a particular worksite where there is a pending labor dispute, all too often ICE conducts such worksite enforcement actions during a union organizing campaign or other labor dispute.

Advocates should be aware of the internal guidance formerly known as INS Operations Instruction (OI) 287.3a, Questioning Persons During Labor Disputes,²⁹ which provides guidance to immigration agents who are contemplating enforcement activity at worksites where a labor dispute is in progress. This internal guidance provides questions ICE agents should ask individuals who contact them with information concerning undocumented workers. The guidance requires that whenever information received from any source creates suspicion that an immigration enforcement action might involve agents in a labor dispute, a reasonable attempt should be made by the immigration enforcement agents to determine whether a labor dispute is in progress at the worksite they are thinking about investigating or raiding. The guidance lists several sources that the agents can contact to determine whether a labor dispute is in progress: the National Labor Relations Board (NLRB), DOL, state

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

²³ *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985).

²⁴ See 8 C.F.R. § 274a.2(b)(2)(ii).

²⁵ Failure to present the Form I-9 is a violation of the retention requirements. See 8 U.S.C. § 1324a(b)(3).

²⁶ See *Swift & Company v. Immigration and Customs Enforcement*, et al., Case No. 2-06CV-314-J, Memorandum of Points and Authority in Support of Plaintiff's Motion for Preliminary Injunction and Expedited Hearing (N.D. TX Nov. 28, 2006); see

also Roger Tsai, "The IRCA – Twenty Years Later," 12 *Bender's Immigration Bulletin*, Apr. 1, 2007.

²⁷ "Lockdown in Greeley," *The Nation*, Feb. 26, 2007. For more information on DHS's Basic Pilot program (now known as "E-Verify"), see *Basic Information Brief: DHS Basic Pilot/E-Verify Program* (NILC, Mar. 2008),

www.nilc.org/immsemplymnt/ircaempverif/e-verify_infobrief_2008-03-13.pdf (last visited Nov. 7, 2009).

²⁸ For more information, see Rebecca Smith, Ana Avendaño, and Julie Martinez Ortega, *ICEd Out: How Immigration Enforcement Has Interfered With Workers' Rights* (National Employment Law Project, AFL-CIO, and American Rights at Work Education Fund, Oct. 2009),

www.americanrightsatwork.org/dmdocuments/ARAWReports/icedout_report.pdf (last visited Nov. 7, 2009).

²⁹ OI 287.3a has been redesignated as 33.14(h) of the Special Agent Field Manual (SAFM) as of Apr. 28, 2000, but still carries the same weight.

departments of labor, or “other agencies/entities enforcing labor/employment laws.”

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

Moreover, we have now entered an era in which immigration enforcement at the workplace is no longer limited to worksite raids or I-9 audits and investigations. The expansion of electronic employment eligibility verification systems — in which employers are given access to the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases to check the employment eligibility and Social Security numbers (SSNs) of all workers — is among the most pressing workplace enforcement concerns immigrants face today.

Social Security Number Verification Systems

In recent years there has been an explosion in the number of employers using Social Security number verification systems to try to verify the employment eligibility of their workers. The most commonly used programs include SSA’s “no-match” letter program and the Social Security Number Verification Service (SSNVS). While it is clear these systems were not created to verify workers’ employment eligibility, employers nevertheless misuse them for that purpose, with harmful consequences to workers.

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

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

Over the years, through workplace and community organizing, immigrant rights advocates and labor have successfully prevented employers from firing workers based on no-match letters. In the union context, several labor arbitrators have issued decisions in favor of the union finding that firing workers because of no-match letters violates the just cause provisions of collective

bargaining agreements. However, employers continue to misuse the letters in ways that undermine the rights of low-wage workers nationwide.³⁰

The most recent, and failed, attempt by the federal government to use no-match letters to enforce immigration law was in 2007. On Aug. 15, 2007, DHS published a final rule regarding what employers should do in order to benefit from a “safe harbor” protection upon receipt of a no-match letter from SSA. DHS claimed that if an employer followed the “safe harbor” procedures set forth in the final rule, it would not use the no-match letter as evidence that the employer had “constructive knowledge” that it had hired undocumented workers. The rule was scheduled to go into effect on Sept. 14, 2007, and SSA planned to send no-match letters to approximately 140,000 employers — affecting over 8 million workers — beginning Sept. 4, 2007. These no-match letters would have included new language referring to the DHS rule and an insert DHS letter for employers. The DHS rule basically sought to turn the no-match letter into an immigration enforcement tool.

NILC, along with the Immigrants’ Rights Project of the ACLU, the AFL-CIO, Altschuler Berzon, LLP, and the San Francisco and Alameda Central Labor Councils, filed a lawsuit in federal court in San Francisco to block the implementation of the DHS regulation. On Oct. 10, 2007, the court granted a preliminary injunction preventing DHS from implementing the rule and blocking SSA from sending the new no-match letters with the DHS insert. DHS issued supplemental versions of the no-match rule in March and October 2008, which also remained under injunction. After a stay in the litigation, on Oct. 7, 2009, DHS announced the rescission of the DHS no-match rule. That rescission and elimination of the DHS rule became effective Nov. 6, 2009.

While the rescission of the rule is a move welcomed by worker advocates, the danger of employer misuse of no-match letters continues. Because of the known inaccuracies in the SSA database, SSA no-match letters cannot be considered reliable evidence that those who are subjects of the letters lack employment eligibility. Of the 17.8 million errors in SSA’s database, 12.7 million (or over 70 percent) pertain to U.S. citizens. In addition, according to SSA there may be several reasons why information submitted for a worker may not match SSA’s records, including typographical errors, a change in the worker’s name due to marriage or divorce, the fact that a name is a compound one, and many other innocent rea-

³⁰ For more information on SSA “no-match” letters, including advocacy tips, see NILC’s toolkit materials at www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm.

sons. In addition, due to continued confusion about the status of the rescinded rule, many employers nevertheless are currently implementing it, resulting in increased discrimination against immigrant and citizen workers who are or “appear” to be foreign-born.

Employers who, in attempting to follow this non-existent rule, wrongly terminate employment-eligible workers upon receipt of a no-match letter could be subject to liability for violating state and federal labor and employment laws. Despite the fact that the rule never went into effect, it provided employers with an added tool to discriminate and retaliate against workers for exercising workplace rights, such that employers used and continue to use the no-match letters to justify firing workers who have complained about their working conditions or otherwise have exercised their workplace rights.

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

The Social Security Number Verification Service.

The Social Security Number Verification Service (SSNVS) is a service that allows employers to verify the SSNs of their employees via the Internet.³¹ After running a small pilot program, the SSA expanded the program to all employers in 2005. According to SSA, the SSNVS will verify SSNs and names solely to ensure that records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Forms W-2 (Wage and Tax Statement). The SSNVS does *not* confirm whether an employee has valid authorization to work in the U.S. It is only a reflection of whether the employer’s records match SSA’s records.

The SSNVS allows employers to match their record of employee names and SSNs with SSA’s records once an official employer-employee relationship has been created, such as when an employee accepts a job offer, and when the employer is preparing and submitting W-2 forms. SSA no-match letters, on the other hand, are sent by SSA after an employer has submitted W-2 forms and the agency is unable to match an employee’s name and SSN. An employer may verify its workers’ SSNs through the SSNVS even if it never received no-match letters in which they are named.

³¹ See *Basic Information Brief: Social Security Number Verification Service (SSNVS)* (NILC, Nov. 2009).

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

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

The misuse of programs such as the no-match letter program and SSNVS by employers continues to harm workers, authorized and unauthorized alike, and to provide an additional tool for employers to retaliate unjustly against workers.

E-Verify

E-Verify (formerly known as the Basic Pilot program) is a voluntary Internet-based program that allows employers to electronically verify workers’ employment eligibility by accessing information in databases maintained by the SSA and U.S. Citizenship and Immigration Services (USCIS), the latter a bureau within DHS.³² The program was created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and has been operating since 1997. The program is currently authorized until Sept. 20, 2012.³³ According to DHS, over 160,000 employers (out of the country’s over 7.5 million) are currently enrolled in the program.

Numerous entities, including those that researched and wrote two independent reports commissioned by the

³² For more information, see NILC’s “Employment Eligibility Verification” webpage, www.nilc.org/immsemploymnt/ircaempverif/index.htm#eevs.

³³ Department of Homeland Security Appropriations Act of 2010, Tit. IV, PL 111-83, 123 Stat 2142, 2164-2165 (2009).

former Immigration and Naturalization Service in 2002 and by DHS in 2006, the U.S. Government Accountability Office (GAO), and SSA's Office of the Inspector General (SSA-OIG), have found that E-Verify has significant weaknesses, including (1) its reliance on government databases that have unacceptably high error rates and (2) employer misuse of the program to take adverse action against workers.³⁴ Database errors are not distributed evenly, however: foreign-born workers (including those who have become U.S. citizens) are *30 times* more likely than native-born U.S. citizens to be incorrectly identified as not eligible for employment. The reports also found that employers take adverse action against workers whose information cannot be immediately confirmed by the system by firing or suspending them, in violation of the rules of the memorandum of understanding participating employers agree to, which provides that workers will have a limited time to contest and correct the information. For example, according to a 2007 report, 22 percent of employers restricted work assignments, 16 percent delayed job training, and 2 percent reduced pay.³⁵

DHS has been engaged in aggressive outreach to employers to register them for the system. In Sept. 2009, the agency finalized a rule requiring all federal government contractors and vendors to participate in E-Verify, which represents approximately 168,000 new businesses that would access the system.³⁶ In Congress, there are a number of bills pending in the House of Representatives and the Senate that would make E-Verify mandatory for some or all employers. Any expansion of E-Verify will increase the number of immigrant and other low-wage workers who will face difficulties gaining employment, because of the inaccuracies in the government databases and delays in entering information regarding new immigrants.

■ Legislative Priorities and Opportunities for Immigrant Workers

Immigrant workers and their families face a number of significant challenges, including increased immigration enforcement at the worksite, perilous work conditions, nonpayment of wages, retaliation for exercising legal rights, and differential treatment based on immigration status. This vulnerability of immigrant workers not only directly affects the workers themselves, but it is a weakness undermining the broader labor market. When some workers are easy to exploit, the conditions of all workers suffer because of race-to-the-bottom competition and because opportunities for collective action by workers are undermined. It is only as a result of the ability of immigrant workers to exercise their labor rights and increased enforcement of our labor laws, under which employers can be penalized at the local, state, and federal levels, that unscrupulous employers will think twice about recruiting and exploiting undocumented workers.

NILC has drafted a number of recommendations in our 2010 "Proposals to Strengthen the Labor, Employment, and Civil Rights of all Workers within Comprehensive Immigration."³⁷ With the likelihood of an immigration bill being debated in early 2010, this presents a key opportunity to ensure that immigration enforcement does not undermine labor law enforcement and to ensure that all workers have the same access to labor, employment, and civil rights protections. By itself, making it possible for undocumented immigrants to legalize their status would eliminate a key barrier that currently prevents immigrants and their coworkers from improving their working conditions. But unless legalization is accompanied by provisions strengthening labor and civil rights protections, employers will continue to have an incentive to recruit and exploit immigrant workers to avoid those responsibilities. Strengthening these laws would significantly reduce employers' incentive to circumvent immigration laws to employ immigrant workers at lower wages and in substandard conditions, and at the same time it would result in improving the working conditions of *all* workers.

Opportunities also exist to improve labor conditions for all workers at the state and local levels. For example, in 2007 Illinois passed a law that provides antidiscrimination and privacy protections for workers whose

³⁴ For a summary of NILC's concerns, see *Facts About E-Verify* (NILC, Oct. 2009), www.nilc.org/immsemplymnt/ircaempverif/e-verify-facts-about-2009-10.pdf (last visited Nov. 7, 2009).

³⁵ *Findings of the Web-Based Basic Pilot Evaluation* (Westat, Sept. 2007), www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf (last visited Nov. 7, 2009).

³⁶ For more information, see *Summary of Final Rule: Federal Acquisition Regulation, Employment Verification* (NILC, Aug. 2009), www.nilc.org/immsemplymnt/ircaempverif/e-verify-FAR-summary-2009-08-31.pdf (last visited Nov. 7, 2009).

³⁷ See *Proposals to Strengthen the Labor, Employment, and Civil Rights of all Workers within Comprehensive Immigration Reform* (NILC, Nov. 2009), www.nilc.org/immsemplymnt/cir/immigrant-worker-priorities-2009-11-04.pdf (last visited Nov. 7, 2009).

employers use E-Verify. Other affirmative proposals include ensuring that enforcement of state labor, employment, and civil rights statutes that protect workers is conducted regardless of the workers' immigration status, prohibiting state labor agencies from sharing immigration status information obtained in the course of a labor complaint or labor investigation with federal immigration authorities, and making it an unlawful employment practice under state law to discriminate against an employment-authorized worker in the hiring, terms and conditions, or termination of employment based on national origin or citizenship/immigration status.³⁸

³⁸ For more ideas about how to strengthen labor protections for immigrant workers, see *From Anti-Immigrant to Pro-Worker : What Can States and Cities Do about Immigration and Workers' Rights* (National Employment Law Project, Jan. 2009), www.nelp.org/page/-/Justice/fromantiimmigrant2009.pdf (last visited Nov. 7, 2009).