

Strengthening Our Country and Promoting Shared Prosperity

Workers' Rights Priorities for Immigration Reform 2013

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In 2013, the National Immigration Law Center will be fighting for a roadmap to first-class citizenship for the 11 million aspiring Americans living and laboring in our communities. First-class citizenship would mean that all Americans have the tools and opportunities necessary to become full participants in our democracy. We must ensure that new Americans have equal access to economic supports; quality health care; workplace protections, including the ability to organize to improve working conditions without fear of deportation; as well as the freedom to live free from fear of detention and deportation policies that tear apart families and devastate local communities and businesses.

Getting legal status is insufficient. We must work towards first-class citizenship. Shifting from an approach of exclusion and punishment to a focus on inclusion and full integration will enable economic growth and ground our national policy in the values we cherish. As part of this effort, NILC will be playing a lead role in advocating for legislative changes that would improve the lives of low-wage immigrant workers. Below you will find a description of the workers' rights priorities that will guide us in our fight for immigration reform. These priorities are based on our longstanding experience in defending and advancing the rights of low-income immigrant workers and on feedback provided by immigrants' rights and anti-poverty organizations across the country. We asked for your input on our draft priorities, and you answered! Your feedback has and will continue to inform our current formulation of our priorities.¹

Immigration Reform and Immigrant Workers

For the first time in years, Democrats and Republicans alike are talking seriously about immigration reform.² But in past immigration reform discussions, the needs of low-wage

¹ This document does not fully address the abuses experienced by workers laboring in the U.S. on temporary visas, nor does it address labor protections needed in any future immigration programs that may be enacted. While any immigration reform proposal must include such reforms, our legislative priorities are based on NILC's areas of expertise and are focused on changes to the Immigration and Nationality Act (INA) as part of an immigration reform bill.

² For example, President Barack Obama has acknowledged that his "biggest failure" last term was not "getting comprehensive immigration reform done," while, post-election, Senator Lindsey Graham (R-SC) stated that it is "important for our country to solve illegal immigration once and for all." Elise Foley,

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immigrant workers and their families have been overlooked, *in spite of* the poverty wages and rampant workplace violations experienced by many immigrant workers.³

Worksite enforcement of immigration law compounds workers' vulnerability, as it undermines the vindication of labor and employment laws and standards. When U.S. Immigration and Customs Enforcement (ICE) conducts an enforcement action at a worksite where workers are involved in a labor dispute, it chills workers from organizing or reporting workplace mistreatment.⁴ These dynamics weaken the ability of federal and state agencies tasked with the enforcement of labor and employment laws, such as the Department of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board, to effectively enforce workplace laws. In addition, unscrupulous employers use "immigration compliance" tools, such as verification and reverification of employees' work authorization, to retaliate against workers who complain about mistreatment and to undercut workers' efforts to organize.⁵

An immigration reform bill should create a pathway to first-class citizenship for low-wage immigrant workers and help create a more prosperous nation by vigorously enforcing labor laws and ensuring immigrant workers' rights to organize are protected on the job.

Workers' Rights Priorities

As Congress considers legislation to reform our immigration system, NILC will be advocating for the inclusion of the following priorities in the final bill to ensure that all workers' interests are protected:

- Make the **U visa** a more effective tool for immigrant workers suffering from violations of labor and civil rights.
- Create **workers' rights protections** as part of any mandatory **electronic employment eligibility verification system** (EEVS).

"Obama: Immigration reform inaction was 'biggest failure,'" *Huffington Post*, Sept. 20, 2012, www.huffingtonpost.com/2012/09/20/obama-immigration-reform-univision_n_1901240.html; Cameron Joseph, "Graham: Immigration reform must be dealt with 'once and for all,'" *The Hill*, Nov. 8, 2012, <http://thehill.com/blogs/ballot-box/senate-races/266915-graham-immigration-reform-must-be-dealt-with-once-and-for-all>.

³ The U.S. Department of Labor (DOL), for example, has found wage and hour violations in more than half of the businesses they have investigated in low-paying industries with high concentrations of immigrant workers such as construction, garment assembly, poultry processing, and retail. *Thou Shalt Not Steal: A Toolkit on Wage Theft* (Interfaith Worker Justice, Nov. 2010), available from www.iwj.org/blog/wage-theft-toolkit-20, p. 5.

⁴ See Rebecca Smith, et al., *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights* (AFL-CIO, American Rights at Work Education Fund, National Employment Law Project, Oct. 2009), www.americanrightsatwork.org/dmdocuments/ARAWReports/icedout_report.pdf, pp. 10–11.

⁵ Written Statement of Emily Tulli, Worker Rights Policy Attorney, National Immigration Law Center, submitted to the House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Hearing on ICE Worksite Enforcement: Up to the Job?, Jan. 26, 2011, www.nilc.org/document.html?id=360, p. 5.

- Ensure that federal immigration enforcement **does not interfere with the enforcement of labor law.**
- Ensure workers' rights are protected during **employer compliance activities.**
- **Prohibit workplace discrimination** and ensure that all workers' **labor and civil rights are protected.**
- **Ensure the efficacy and transparency of the Department of Homeland Security.**

Below we provide background information about each of the priorities listed above.

Make the U visa a more effective tool for immigrant workers suffering from violations of labor and civil rights.

Too often, immigrant workers who complain about illegal working conditions face retaliation and abuse from employers. Many workers are too afraid to confront their employers about labor and employment violations, resulting in workplaces where illegal employment practices flourish — and degrading working conditions for all workers. It is essential to change how the U.S. Department of Homeland Security (DHS) conducts worksite immigration enforcement and to make the U visa a more effective tool for law enforcement agencies.

- Include the key principles from the Protect Our Workers from Exploitation and Retaliation Act (POWER Act, H.R. 2169, S.1195). Expand the bill's language to ensure protection for workers experiencing violations of their labor and civil rights.
- Substantially increase the cap on the number of U visas available.

Create workers' rights protections as part of any mandatory electronic employment eligibility verification system (EEVS).

A mandatory EEVS is an outgrowth of a broken employer sanctions regime that weakens, rather than enhances, the collective strength of all workers. The mandatory use of E-Verify will impose new costs on employers, drive jobs into the underground economy, increase unemployment, and deprive the government of revenue.⁶ An expansion of E-Verify's use would exacerbate the already disproportionately high error rate for foreign-born workers.⁷ Given these realities, NILC remains opposed to the inclusion of a requirement in immigration reform that employers use E-Verify.

⁶ See *Expanding E-Verify Will Undermine Job Growth and Cripple Small Businesses* (NILC, Jan. 2011), www.nilc.org/document.html?id=327.

⁷ See *Findings of the E-Verify Program Evaluation* (prepared by Westat and submitted to the U.S. Dept. of Homeland Security, Dec. 2009), available at http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%202012-16-09_2.pdf, p. 210 (analyzing the E-Verify system's higher error rate for foreign-born as compared to U.S. born workers).

However, given the fact that requiring employers to use an EEVS was included in both the Senate’s “Bipartisan Framework for Comprehensive Immigration Reform”⁸ and President Obama’s immigration proposal,⁹ a final immigration reform bill may, unfortunately, include an E-Verify mandate. Any mandate must, at a minimum, address the program’s database error rates, lack of worker protections, lack of due process, insufficient privacy protections, and the significant amount of employer misuse of the program.

Under the current system, a worker has a limited ability to challenge a tentative nonconfirmation (TNC), but no formal way to challenge an erroneous final nonconfirmation (FNC). The lack of a formal FNC review process is particularly troubling given the program’s high error rates, the disparate impact erroneous FNCs have on naturalized citizens and work-authorized immigrant workers, and employer noncompliance with program’s rules.¹⁰ In light of these glaring problems, any bill that mandates the use of EEVS should be reasonably implemented and contain strong worker protections.

- Phase in an EEVS at a reasonable rate, by size of employer, to the existing workforce only. Require that the program meet specified requirements regarding database accuracy, low error rates, privacy, and measurable employer compliance before implementation and each phase of expansion.
- Establish key worker protections, including:
 - Create an administrative and judicial review process to allow workers to contest and have remedies for erroneous FNCs.
 - Require employers to prominently post a notice about workers’ rights with regard to the EEVS in the languages regularly spoken in that workplace.
- Prohibit employer misuse of the EEVS by prohibiting the following abuses:
 - Termination of a worker’s employment based on a tentative nonconfirmation notice.
 - Denial of a workers’ employment benefits.
 - Interference with a worker’s ability to enforce her labor or civil rights.
 - Subjecting a worker to an unlawful employment practice as defined by 274B.
 - Screening of a worker prior to an offer of employment.
 - Verifying the employment eligibility of current workers beyond what is required under law.
 - Use of the EEVS selectively to exclude certain individuals from consideration for employment.

⁸ See the “Bipartisan Framework for Comprehensive Immigration Reform,” available at www.nytimes.com/interactive/2013/01/23/us/politics/28immigration-principles-document.html, p. 4.

⁹ See “Fact Sheet: Fixing our Broken Immigration System So Everyone Plays By the Rules” (White House, Jan. 29, 2013), www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules.

¹⁰ See *Facts About E-Verify* (NILC, Jan. 2011), www.nilc.org/document.html?id=325, pp. 3–4.

Ensure that federal immigration enforcement does not interfere with the enforcement of labor law.

Too frequently, worksite immigration enforcement has interfered with and undermined the ability of both workers and federal and state labor agencies to enforce labor and employment laws. Although DHS has policies and internal protocols to minimize the conflict between immigration and labor law enforcement, its implementation of those policies has been uneven and ineffective. Worksite immigration enforcement must be conducted and targeted in a manner that improves — rather than degrades — the workplace conditions of all workers.

- Codify the key principles of the 2011 memorandum of understanding between the Departments of Homeland Security (DHS) and Labor (DOL)¹¹ and ICE’s Operating Instruction 287.3,¹² and create incentives for agencies to comply with these new statutory requirements.
- Reform ICE practice during ICE worksite enforcement actions, including codifying ICE’s “Guidelines for Identifying Humanitarian Concerns among Administrative Arrestees When Conducting Worksite Enforcement Operations”¹³ to reflect the priorities outlined in ICE’s memo on “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs.”¹⁴
- Prior to the initiation of any ICE worksite enforcement action, require employers to disclose to ICE whether workers have made formal or informal complaints regarding their terms and conditions of employment within the past 12 months.
- Require that the notice of inspection (NOI) served on the employer during an I-9 audit contain language reflecting ICE’s commitments under the memorandum of understanding and the operating instruction (see the first item in this bulleted list), and require employers to give workers information explaining (1) that an I-9 audit is occurring at the worksite and (2) their affirmative protections under the law.¹⁵

¹¹ *Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, Dec. 7, 2011, www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf.

¹² ICE Operating Instruction 287.3a, “Questioning persons during labor disputes,” now designated as ICE Special Agents Field Manual section 33.14(h), 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.

¹³ Undated document issued by U.S. Immigration and Customs Enforcement in Nov. 2007, available at www.nilc.org/document.html?id=364.

¹⁴ Memorandum from John Morton, Director, ICE, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (June 17, 2011), www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

¹⁵ Information about the I-9 inspection process is available from U.S. Immigration and Customs Enforcement’s website: “Fact Sheet: Form I-9 Inspection Overview,” Aug. 1, 2012, www.ice.gov/news/library/factsheets/i9-inspection.htm.

Ensure workers' rights are protected during employer compliance activities.

Increasingly, unscrupulous employers are using their obligations under federal law to verify workers' identities and work authorization as a mechanism to retaliate against workers or to chill their exercise of workplace rights. In these cases, employers will launch an internal I-9 (employment eligibility verification form) audit or reverify their workforce in response to workers' complaints or collective action. These practices should be curbed by expressly limiting the circumstances in which reverification is permissible and that give rise to an employer's "constructive knowledge" of a worker's status.

- Limit the circumstances under which an employer may verify or reverify a worker's employment eligibility and require the employer to provide information regarding workers' rights during this process.
- Amend the definition of "constructive knowledge" to make clear that an employer's receipt of an Internal Revenue Service "no-match" letter, a Social Security no-match letter, information received based on an employer's misuse of the Social Security Number Verification System (SSNVS), or any information received as part of the employer's participation in employer-sponsored health insurance or the Small Business Health Options Program (SHOP) does not constitute constructive knowledge.¹⁶

Prohibit workplace discrimination and ensure that all workers' labor and civil rights are protected.

Current law leaves many immigrant workers who were discriminated against or wrongfully fired without an effective remedy. The Immigration and Nationality Act (INA) prohibits national origin and citizenship discrimination during the hiring process, but not during the employment relationship, and protects only certain employment-authorized workers. The Supreme Court's limitation of back pay for undocumented workers whose firing is wrongful under the National Labor Relations Act (NLRA) undermines effective enforcement of labor law. These gaps in antidiscrimination protections and in remedies for wrongful termination should be addressed.

- Amend INA 274B to prohibit national origin and citizenship status discrimination during the employment relationship, and expand the definition of "protected individual," lengthen the statute of limitations, and increase employer fines.
- Codify that all workers are eligible for back pay if they are fired in violation of the NLRA.

Ensure the efficacy and transparency of the Department of Homeland Security.

DHS's lack of transparency makes it extremely difficult to assess the agency's compliance with its own policies and internal protocols as well as with its purported priority of focusing

¹⁶ SHOP is a program created by the Affordable Care Act of 2010.

its enforcement efforts on employers who are violating labor or employment law. The law should mandate greater DHS disclosure of documents with public value.

- Mandate a review of all DHS raids to evaluate whether DHS is (1) effectively advancing its security mission with large scale operations; (2) protecting due process rights during worksite, home and roving raids; (3) evaluating the humanitarian impact of raids; and (4) evaluating whether investigations into labor law violations have been compromised due to the raids.
- Ensure that DHS publicly disseminates all documents with public value as defined by the bill.