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House Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law

Hearing on: Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System

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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. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the employment rights of low-income immigrants. NILC's extensive knowledge of the complex interplay between immigrants' legal status and their rights under U.S. employment laws is an important resource for immigrant rights coalitions and community groups, as well as national advocacy groups, policymakers, attorneys and legal aid groups, workers' rights advocates, labor unions, government agencies, and the media.

Overview

A nationwide electronic employment verification system (EEVS), coupled with increased enforcement of immigration law, is viewed by many as the key to curtailing the employment of unauthorized workers in the United States. However, an immigration enforcement-only approach, including the employer sanctions created under the Immigration Reform and Control Act (IRCA) of 1986 and the existing EEVS,[1] not only has failed to deter unauthorized employment, but has also had the unintended consequence of allowing employers to use employer sanctions to drive down the wages and working conditions of *all* workers.[2] Unscrupulous employers have the power and ability to threaten workers with deportation for exercising their labor rights and are infrequently held liable for labor law violations. They therefore have a powerful economic incentive to recruit, hire and exploit undocumented workers in order to lower the cost of doing business. This exploitation not only harms the undocumented workers, it harms U.S.-born workers who find their job opportunities, wages and working conditions undermined. It also undercuts any worksite enforcement system because the economic incentive to exploit immigrant workers far exceeds the cost of complying with immigration, labor, or employment laws.[3]

This problem is not solved solely by a legalization program, because even the most generous legalization policy will exclude some workers. For example, the *Comprehensive Immigration Reform Act of 2006* (S. 2611) that passed the Senate would have excluded a large number of workers who did

[1] The current EEVS is the Basic Pilot program which was created under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. It is currently used by approximately 16,000 employers. For more information, see BASIC INFORMATION BRIEF: DHS BASIC PILOT PROGRAM (National Immigration Law Center, March 2007), available at www.nilc.org/immsemplymnt/ircaempverif/basicpilot_infobrief_brief_2007-03-21.pdf.

[2] *See, for example,* Douglas S. Massey, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES: WHEN LESS IS MORE: BORDER ENFORCEMENT AND UNDOCUMENTED MIGRATION, April 20, 2007, available at http://judiciary.house.gov/media/pdfs/Massey070420.pdf, and Muzaffar Chishti, "Employer Sanctions Against Immigrant Workers," WORKINGUSA: THE JOURNAL OF LABOR AND SOCIETY, March-April 2000, available at https://www.ilw.com/articles/2001,0615-Chishti.shtm.

[3] *See, for example,* Jenny Schulz, "Grappling with a Meaty Issue: IIRIRA's Effect on Immigrants in the Meatpacking Industry," 2 J. GENDER RACE & JUST. 137, 145-46, 1998 (noting employer sanctions are ineffectively enforced because of the "cooperative" approach immigration has adopted toward employers resulting in employers escaping sanctions despite large-scale immigration raids) and Stephanie E. Tanger, "Enforcing Corporate Responsibility for Violations of Workplace Immigration Laws: The Case of Meatpacking," HARVARD LATINO LAW REVIEW, Vol. 9, 2006, available at http://www.law.harvard.edu/students/orgs/llr/vol9/tanger.pdf.

not meet the bill's requirements.[4] And, depending on how our legal immigration system is reformed, including if backlogs are reduced, it is likely that the powerful U.S. economy will continue to draw undocumented workers to this country. Additionally, it is not just undocumented workers who suffer abuses, but also documented workers.

NILC believes the solution lies in (1) reforming our immigration laws in a comprehensive and realistic way, one that also includes strengthening our labor, employment, and civil rights laws, and (2) vigorously enforcing these laws. We do not support an expansion of the employer sanctions scheme, including an EEVS, because of the way in which it has been used to circumvent and weaken workers' rights. However, because the concept of an EEVS enjoys almost universal support in Congress and therefore will almost certainly be incorporated into any comprehensive immigration reform bill, it is crucial that any proposed EEVS be designed so as to avoid negative consequences for workers — both immigrant and U.S.-born — and so that it includes basic worker protections that are necessary to deter employers from knowingly hiring undocumented workers.

It is in this context that we ask Congress to consider an approach to immigration worksite enforcement that doesn't rely *only* on enforcement of hiring sanctions, but also addresses the way in which immigration law often "trumps" labor law. Without addressing this problem, an enforcement-only policy will be counter-productive because it will not address the economic incentive that employers have to hire undocumented workers by any means possible, including moving into the underground economy, misclassifying workers as independent contractors, and using sham subcontracting arrangements.[5]

Reforms that should be included in any new or expanded worksite enforcement system are summarized below. Specific legislative recommendations relating to these reforms are included in the latter part of this testimony.

(1) **Fix the weaknesses of the Basic Pilot program before it is further expanded**. Numerous entities, including an independent report commissioned by the former Immigration and Naturalization Service, the Government Accountability Office, and the Social Security Administration's Office of the Inspector General, have found that the Basic Pilot program has significant weaknesses, including its reliance on government databases that have unacceptably high error rates and employer misuse of the program to discriminate against workers.[6] These

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[4] *See* "Senate Approves Sweeping but Flawed Immigration Reform Bill: The Comprehensive Immigration Reform Act of 2006 Program," National Immigration Law Center, May 30 2006, www.nilc.org/immlawpolicy/CIR/cir017.htm.

[5] *See* Jim McTague, "The Underground Economy: Illegal Immigrants and Others Working Off the Books Cost the U.S. Hundreds of Billions of Dollars in Unpaid Taxes," THE WALL STREET JOURNAL CLASSROOM EDITION, April 2005, http://wsjclassroom.com/archive/05apr/econ_underground.htm; Lora Jo Foo, "The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation," YALE LAW JOURNAL, 103 Yale L.J. 2179, May 1994, available at www.wiego.org/papers/FooImmigrantWorkers.pdf.

[6] FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION (Temple University Institute for Survey Research and Westat, June, 2002), available at www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9cc5d0676988d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=2c039c7755cb9010VgnVCM10000045f3d6a1RCRD; IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYER VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, Aug. 2005) (hereafter "GAO"), available at www.gao.gov/new.items/d05813.pdf; and CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of

weaknesses must be addressed before the system is expanded from its current 16,000 employers to over 7 million employers;

(2) **Ensure that immigration law complements labor law, rather than undermines it.** Under current law, employers seek out and hire undocumented workers to exploit them for their labor, and then threaten them with deportation when they exercise their labor rights. The employer generally pays no penalty for the labor violations. Holding employers liable for these labor law violations, and preventing them from using immigration law to "deport their problem" will reduce the economic incentive to seek out these vulnerable workers; and

(3) **Ensure that all workers have equal rights and remedies under labor and civil rights laws.** Studies conducted after the passage of IRCA found widespread discrimination as a result of employer sanctions.[7] Current antidiscrimination protections under the Immigration and Nationality Act (INA) do not provide all workers equal protection from discriminatory conduct, and not all workers have equal remedies for violations of labor and civil rights laws. Denying all workers the same rights and remedies creates an incentive for employers to seek out those who are most vulnerable.

Problem with current law

The failure of employer sanctions

Immigration enforcement at the worksite as a means to combat unlawful migration began in 1986 with the passage of IRCA, which for the first time made it unlawful for employers to "knowingly" hire unauthorized workers and created civil penalties (known as "employer sanctions") for those who do so. One of the goals of IRCA was to stem the flow of undocumented immigrants to the United States by removing the job magnet. This enforcement-only policy of the last 20 years, however, has been a resounding and obvious failure. Undocumented migration appears to have hit a plateau, but it has done so at an all time high, with 7.2 million unauthorized workers now employed in the U.S., representing almost 5 percent of the civilian labor force.[8]

Critics argue that the number of undocumented immigrants is high because employer sanctions have not been vigorously enforced. The theory is that if there were no employment market, unauthorized workers would not come, and those who are here would leave. However, there is no evidence that these types of measures would dry up the employment market. Rather, to the extent these measures are effective in initially reducing employment opportunities, their main effect has been to make the undocumented workers even more desperate for employment and willing to accept even more marginal, dangerous and exploitative jobs.[9]

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the Inspector General, Social Security Administration, Dec. 2006), (hereafter "SSA"), available at www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm.

[7] The most notable report was issued in 1990 by the General Accounting Office. *See* IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (General Accounting Office, March, 1990), available at http://archive.gao.gov/d24t8/140974.pdf.

[8] Jeffrey S. Passel, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (Pew Hispanic Center, March 2006), available at http://pewhispanic.org/files/reports/61.pdf.

[9] *See, for example,* K. M. Donato, J. Durand and D. S. Massey, "Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act," DEMOGRAPHY 29: 139-158. 1992.

A more desperate workforce has brought the opportunity for abusive employers to exploit their labor.[10] Exploitation of immigrant labor is certainly not a new phenomenon, but IRCA gave employers a powerful new tool to threaten workers with deportation under the guise of complying with the law. Under the employer sanctions system, employers often knowingly hire undocumented immigrants with the intent of exploiting their labor by, for example, placing them in unsafe working conditions, paying them a lower than market wage, or not paying them at all. If workers do file a labor complaint or join with their fellow workers to form a union, the employer will conveniently remember the requirements under IRCA and either threaten workers with deportation or actually call the U.S. Department of Homeland Security (DHS) to have the workers deported.[11] Oftentimes the workers are whisked into detention or out of the country before they have a chance to seek remedies for the labor violations, and employers pay no monetary penalty for their actions.

In addition to deterring undocumented immigration, IRCA also had the goal of protecting the jobs and wages of U.S. workers, and protecting noncitizens from discrimination.[12] These goals have also not been realized, as IRCA has resulted in the depression of wages and working conditions of all workers, and discrimination against those who look and sound "foreign."[13] Undocumented immigrants who are under the constant threat of deportation are forced to accept diminished working conditions. This, in turn, undermines 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.[14] For example, all of the workers at the Smithfield Packing Company in North Carolina suffered when the employer responded to a union campaign by threatening immigrant workers with being arrested by immigration authorities, in addition to committing many other egregious labor violations intended to interfere with the workers' organizing efforts.[15]

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[10] *See, for example,* Tanger, *supra* note 3.

[11] *See, for example,* Kate Bronfenbrenner, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING (Cornell University, submitted to the U.S. Trade Deficit Review Commission, Sept. 6, 2000), available at www.citizenstrade.org/pdf/nafta_uneasy_terrain.pdf, the report on a study that found that employers threatened to refer undocumented workers to the former Immigration and Naturalization Service (INS) in 52 percent of cases where undocumented workers were present in the unit; Judith Browne-Dianis, Jennifer Lai, Marielena Hincapie, and Saket Soni, AND INJUSTICE FOR ALL: WORKERS' LIVES IN THE RECONSTRUCTION OF NEW ORLEANS (Advancement Project, et al, July 2006), available at www.nilc.org/disaster_assistance/workersreport_2006-7-17.pdf; Muzaffar Chishti, *supra* note 2.

[12] The legislative history on protecting U.S. wages states: "It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law." *See* H.R. Rep. No. 99-682. However, this is exactly what has happened. The legislative history on antidiscrimination states the intent that IRCA ameliorate the "inadequacy of current law to protect individuals from the potential act of discrimination that may uniquely arise from the imposition of [employer] sanctions." *See* H.R. Rep. No. 99-682.

[13] *See* Massey, *supra* note 2, and GAO *supra* note 7.

[14] *See, for example.,* Amy M. Traub, PRINCIPLES FOR AN IMMIGRATION POLICY TO STRENGTHEN & EXPAND THE AMERICAN MIDDLE CLASS: 2007 EDITION (Drum Major Institute for Public Policy, 2007), available at http://drummajorinstitute.org/immigration/; Jennifer Gordon, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES (Fordham University School of Law, June 21, 2005), available at http://judiciary.house.gov/OversightTestimony.aspx?ID=431.

[15] BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (Human Rights Watch, 2004), www.hrw.org/reports/2005/usa0105/.

Despite IRCA's attempt to prevent discrimination, discriminatory hiring practices against those who look or sound "foreign" greatly increased after IRCA. A 1990 Government Accounting Office (now known as the Government Accountability Office) report found that the enactment of employer sanctions created "a serious pattern of discrimination." Overall, the GAO estimated that 19 percent of all employers began one or more discriminatory practices as a result of IRCA's enactment.[16]

Weaknesses of the Basic Pilot Program

The Basic Pilot program[17] was one of three pilot programs implemented by the 1996 immigration law and originally was available only to employers in the six states with the highest immigration populations at the time. The other two pilot programs were eventually discontinued. However, in December 2004 Congress extended the Basic Pilot to all 50 states, and it is now available to employers who voluntarily choose to participate in the program, although certain employers who have been found to unlawfully hire unauthorized workers or who have discriminated against workers on the basis of national origin or citizenship status may be required to participate. According to DHS, 16,000 employers are currently enrolled in the program.[18]

The intent of the Basic Pilot program was to toughen worksite enforcement by creating a system that was efficient, secure, and nondiscriminatory.[19] However, after 10 years, the program still has significant weaknesses that undermine its effectiveness. In creating the pilot programs in 1996, Congress required the former Immigration and Naturalization Service (INS) to have an independent evaluation conducted before the pilot programs could be extended. The INS selected two firms, the Institute for Survey Research at Temple University and Westat, to conduct the evaluation. The evaluation report issued in January 2002 identified several critical problems with the Basic Pilot program, including the facts that (1) the government databases on which it relies have unacceptably high error rates and (2) employers misuse the program to discriminate against workers.[20] It is our understanding that Westat has recently concluded an updated evaluation of the program, though the results of that study have yet to be released to the public. It will be important for Congress to review this study to assess if there have been any improvements since 2002, and what problems remain.

DHS and the Government Accountability Office (GAO) also issued reports in 2004 and 2005, respectively, that note the Basic Pilot's problems with data accuracy.[21] Most recently, the Social Security Administration's (SSA's) Office of Inspector General released a report in December 2006.[22]

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[16] GAO, *supra* note 7.

[17] For more information, NILC, *supra* note 1.

[18] Jock Scharfen, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES: PROBLEMS IN THE CURRENT EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT SYSTEM (USCIS, U.S. Dept. of Homeland Security, April 24, 2007), available at http://judiciary.house.gov/media/pdfs/Scharfen070424.pdf.

[19] Conference Report on H.R. 2202, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sept. 24, 1996.

[20] Temple University Institute for Survey Research and Westat, *supra* note 6. For a summary of NILC's concerns, *see* THE BASIC PILOT PROGRAM: NOT A MAGIC BULLET (NILC, Jan. 2007), available at www.nilc.org/immsemplymnt/ircaempverif/basicpilot_nomagicbullet_2007-01-11.pdf.

[21] *See* GAO, *supra* note 6, and REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM (U.S. Citizenship and Immigration Services, June 2004), available at www.aila.org/content/default.aspx?bc=1016%7C6715%7C16871%7C18523%7C11260.

[22] SSA, *supra* note 6.

The SSA report found many of the same problems as were identified in the 2002 report, including database inaccuracies and employer abuse of the program resulting in employment discrimination.

- Database inaccuracies.
  One of the most significant problems identified by the 2002 independent evaluation of the Basic Pilot program was that it was seriously hindered by inaccuracies and outdated information in SSA and INS databases. For example, a sizeable number of workers who were identified as not having work authorization were in fact authorized, but for a variety of reasons the databases did not have up-to-date information on them. While the database accuracy has somewhat improved since 2002 to 92 percent accuracy,[23] that still means that *8 percent* of authorized workers are being wrongly identified the first time around (referred to as a "tentative nonconfirmation"). If the program were to be expanded nationally to accommodate the over 50 million new hires per year,[24] that means that at least *4 million* workers per year may have to follow up with federal agencies to correct their records. We do not know how the new accuracy statistics break down by citizenship status; in 2003, when the accuracy rate for SSA was 88.4 percent, databases were able to automatically verify the status of 99.8 percent of native-born citizens, but *less than 50 percent* of work-authorized noncitizens.[25]

  While most tentative nonconfirmations eventually are favorably resolved, the process often requires costly and time-consuming manual reviews and, for the worker issued the tentative nonconfirmation, unpaid time off from work to follow-up with the appropriate federal agency. Additionally, an unknown number of work-authorized job applicants are not notified of tentative nonconfirmations or are wrongfully terminated by their employer before they even have the opportunity to prove that they are indeed authorized to work in the U.S. (For more information on this problem, see the section below regarding employer misuse of the program).

  Database errors affect all workers. In SSA's December 2006 report, it estimated that 17.8 million of its records contain discrepancies related to name, date of birth, or citizenship status.[26] Inaccuracies exist for a number of reasons, including name changes due to marriage or divorce, data input errors, and delays in data entry. Additionally, SSA does not have in its records the citizenship status of many naturalized citizens, so when they claim U.S. citizenship on their I-9 employment eligibility verification form, these workers receive a tentative nonconfirmation because their information does not match the SSA database.

- Employer misuse of the program
  The 2002 independent evaluation and the 2006 SSA report have also revealed that employers use the Basic Pilot program to engage in prohibited employment practices. For example, the law requires that employers first extend a job offer to a worker and then complete the employment eligibility verification process, including the Basic Pilot procedure. In violation of this requirement, many employers put workers through Basic Pilot *before* extending the job

[23] USCIS, *supra* note 18.

[24] JOB OPENINGS AND LABOR TURNOVER: FEBRUARY 2007 (United States Department of Labor, Bureau of Labor Statistics, February 2007), available at http://www.bls.gov/news.release/pdf/jolts.pdf.

[25] USCIS, *supra* note 21.

[26] SSA, *supra* note 6.

offer, to avoid the potential costs of hiring and training employees who are not eligible to work (a practice known as "pre-screening"). This practice is a problem because most workers who receive a tentative nonconfirmation are, in fact, authorized to work. If workers are not hired because of a tentative nonconfirmation and are never informed that there is a problem with their records, they not only are denied a job but also the opportunity to contest database inaccuracies.

- In 2002, among employees who received a tentative nonconfirmation from the Basic Pilot, 23 percent said that they were *not* offered a job.[27]
- Four years later in 2006, 42 percent of employees surveyed reported that employers used the Basic Pilot to verify their employment authorization *before* hire.[28]
- The 2002 evaluation found that 73 percent of employees who should have been informed of work authorization problems were not notified.[29]
- Additionally, 17 percent of employers admitted that they do not encourage employees to contest nonconfirmations — either because they believe that such action by an employee rarely results in a finding that the worker is in fact work-eligible, or because contesting a tentative nonconfirmation requires too much time.

Employers also take adverse employment action based on tentative nonconfirmations, which penalizes workers while they and the appropriate agency (DHS or SSA) work to resolve database errors. For example, the 2002 independent evaluation found that 45 percent of employees surveyed who contested a tentative nonconfirmation were subject to pay cuts, delayed job training, and other restrictions on working.[30] Some employers also compromised the privacy of workers in various ways, such as by failing to safeguard access to the computer used to maintain the pilot system, e.g., leaving passwords and instructions in plain view for other personnel to potentially access the system and employees' private information.

Although employers are prohibited from engaging in these practices under a memorandum of understanding that they sign with DHS, U.S. Citizenship and Immigration Services officials have told the GAO that their efforts to review and oversee employers' use of the Basic Pilot program have been limited by lack of staff.[31]

Limitations of labor and civil rights law

While all workers, regardless of immigration status, continue to be covered under labor and employment laws, a 2002 Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*,[32] has

[27] Temple University Institute for Survey Research and Westat, *supra* note 6.

[28] CONGRESSIONAL RESPONSE REPORT: EMPLOYER FEEDBACK ON THE SOCIAL SECURITY ADMINISTRATION'S VERIFICATION PROGRAMS (Office of the Inspector General, Social Security Administration, Dec. 2006), available at www.ssa.gov/oig/ADOBEPDF/A-03-06-26106.pdf.

[29] Temple University Institute for Survey Research and Westat, *supra* note 6.

[30] *Id.*

[31] Richard M. Stana, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CITIZENSHIP, COMMITTEE ON THE JUDICIARY, U.S. SENATE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER WORKSITE ENFORCEMENT EFFORTS (Government Accountability Office, June 2006), available at www.gao.gov/new.items/d06895t.pdf.

[32] Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 122 S.Ct. 1275 (2002).

had a dampening effect on immigrant workers' ability to exercise their rights. The *Hoffman* decision found 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). 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 workers who have filed complaints of discrimination, minimum wage and overtime violations, health and safety violations, and even personal injury cases.[33] A 2004 Human Rights Watch report noted that "[e]mployment law in the wake of *Hoffman Plastic* remains in flux, and immigrant workers' rights remain highly at risk."[34]

The *Hoffman* decision has actually undermined the employer sanctions system by creating a new economic incentive to hire undocumented workers: companies *benefit* if they hire undocumented workers because they perceive such workers as carrying reduced liability for labor law violations.[35] The decision also weakens the position of *authorized* workers confronting abuse or exploitation because their undocumented coworkers 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, such as by serving as a witness in a sexual harassment or discrimination claim. Businesses that take advantage of this situation can cut legal corners and thereby gain a competitive advantage over law-abiding employers.

Strong labor law protections for all workers can be meaningfully realized only if the law prohibits employers from using a worker's immigration status to interfere with these rights. The fear and division resulting from the *Hoffman* decision has had an adverse impact on all workers' rights, including the right to organize and bargain collectively.[36] *Hoffman* also has resulted in limiting workers' access to the legal system, particularly since many of the cases being litigated arise from defendants seeking discovery into the plaintiffs' immigration status, which serves to chill and intimidate immigrants from pursuing legal claims.[37]

Just as the Supreme Court's narrow decision in *Hoffman* has had a broader effect on all workers, IRCA's employer sanctions provisions resulted in discrimination against documented workers who

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[33] *See, e.g.,* cases where Hoffman has been expanded to deny immigrant workers basic employment and labor rights: Crespo v. Evergo Corp., N.J. Super. Ct. App. Div. No. A-3687-02T5 (Feb. 9, 2004) (denying victim of pregnancy discrimination back pay, economic damages for emotional distress); *R*enteria v. Italia Foods Inc., N.D. Ill., No. 092-C-495 (Aug. 21, 2003) (workers fired for filing an overtime pay), *see* www.nilc.org/immsemplymnt/emprights/emprights067.htm; Majlinger v. Casino Contracting, et al., 2003 N.Y. Misc. LEXIS 1248 (Oct. 1, 2003) (workers' compensation denied to injured worker), *see* www.nilc.org/immsemplymnt/emprights/emprights072.htm.

[34] *See* Human Rights Watch, *supra* note 15.

[35] *See, for example,* 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," HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL, Vol. 22:473, 2005, available at http://www.hofstra.edu/pdf/law_labor_Ho_Chang_vol22no2.pdf.

[36] *id.*

[37] *See* Rivera et al., v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004) (upholding a protective order prohibiting the disclosure of plaintiffs' immigration status noting that "while documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution").

appeared or sounded "foreign." The antidiscrimination protections in section 274B of the INA, which were added by IRCA, were enacted to address that discrimination. The intent of section 274B was to complement Title VII of the Civil Rights Act of 1964 by prohibiting discrimination that was uniquely created by the employer sanctions scheme and to cover employers exempt from Title VII.[38] For example, Title VII only covers national origin discrimination for employers with fifteen or more employees, and it does not prohibit citizenship status discrimination (such as "citizens only" hiring policies).[39] In response to a report by the Task Force on IRCA-Related Discrimination, section 274B was amended in 1990 to also protect against "document abuse."[40] The new provision prohibits an employer from requesting more or different documents from a worker than are required to complete the Form I-9 or from rejecting documents provided by the employee that reasonably appear to be genuine. Document abuse is the most common type of immigration-related unfair employment practice.

While the INA's antidiscrimination protections have been critical in protecting thousands of workers from discrimination, tens of thousands more workers are excluded from its protections and remedies because of the law's limitations. For example, in order to file a national origin or citizenship discrimination charge under 274B, a worker must be a "protected individual," which under current law is defined as including U.S. citizens and nationals, asylees, and refugees. It also includes lawful permanent residents (LPRs), but only those who are not yet eligible for naturalization and those who file for naturalization within six months of eligibility. All other employment-authorized workers are excluded. Additionally, while employers are prohibited from discriminating at the time of hiring, the law allows these same employers to discriminate against workers in the terms and conditions of employment, including workplace harassment, based upon citizenship/immigration status.

Unlike Title VII, which prohibits discrimination based on race or national origin in the hiring and firing stages, as well as in the terms and conditions of employment, section 274B does not prohibit discrimination based on citizenship with respect to an employee's terms and conditions of employment. The result of section 274B's limitations is that bad-apple employers can issue harder work assignments or pay lower wages to workers based on their citizenship/immigration status. Under existing law, employers may discriminate against documented workers by providing benefits to U.S. citizens and LPRs and denying those same benefits to refugees based upon their immigration status. And because the remedies are more restrictive than those afforded under other civil rights laws, they do not deter employers from engaging in such practices in the future.

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[38] In fact, IRCA's prohibition of national origin discrimination overlaps with the national origin jurisdiction of the Equal Employment Opportunity Commission (EEOC) established by Title VII. *See* 8 U.S.C. §1324b(a)(2)(B).

[39] "Since World War II and especially after the civil rights reforms of the 1960s and 70s the guarantee of equal protection under law had been expanded beyond racial and religious bigotry to prohibit discrimination implicating gender, national origin and age. As understood by the Supreme Court, however, in Espinoza v. Farah Mfg., 414 U.S. 86 (1973), discrimination based on citizenship (sometimes also referred to as alienage) was not legislatively prohibited. It was this omission in large part that Section 102 of IRCA was enacted to correct." United States v. Marcel Watch, 1 OCAHO No. 143 (Mar. 22, 1990). The Office of the Chief Administrative Hearing Officer (OCAHO) is part of the Executive Office for Immigration Review and is the agency that adjudicates administrative cases pursuant to sections 274A and 274B of the INA.

[40] REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON IRCA-RELATED DISCRIMINATION (U.S. Department of Justice, September 1990).

Recommendations for improving the electronic employment eligibility verification and worksite enforcement system

1. **The weaknesses of the Basic Pilot program must be addressed before it is made mandatory.** If the current flaws in the Basic Pilot are not addressed *before* it is expanded, it will prevent authorized workers from obtaining employment, cause certain businesses and industries to move into the unregulated underground cash economy, and create an incentive for employers and workers to circumvent the EEVS by misusing valid or counterfeit documents. Congress should learn from weaknesses of the Basic Pilot program in order to address them in any new EEVS. Without doing so, problems that currently affect only 16,000 employers will be greatly exacerbated when the system is expanded to the over 7 million employers in the country. Specific recommendations include:

   - **Phase-in with objective benchmarks.** Phase-in the EEVS at a reasonable rate, by size of employer, and provide for certification by the comptroller general that it meets requirements regarding database accuracy, low error rates, privacy, and measurable employer compliance with system requirements before implementation and each phase of expansion. Such a phase-in will hold the government accountable for these reasonable and essential outcomes, providing an incentive to invest in proper planning and design features. This provision was included in section 301(c)(11) of the STRIVE Act.[41]

   - **Application only to new hires.** Apply EEVS only to *new* hires, since the circularity in the workplace, with a turnover/separation rate of 40 percent (50-60 million employees) per year, means that eventually most people will be verified by the new system in a relatively timely manner without forcing employers to go through old records and reverify all existing employees. This limitation was included in the STRIVE Act and the Comprehensive Immigration Reform Act of 2006 (S. 2611).[42]

   - **Antidiscrimination protections.** Require EEVS to comply with existing antidiscrimination protections in the INA, and prohibit employers from misusing the system by (1) conducting employment eligibility verification before offering employment; (2) unlawfully reverifying workers' employment eligibility; (3) using it to deny workers employment benefits or otherwise interfere with their labor rights, or to engage in any other unlawful employment practice; (4) taking adverse action against workers whose status

[41] For a summary of the EEVS provisions in the STRIVE Act, *see* EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM IN THE STRIVE ACT OF 2007 (National Immigration Law Center, April 2007), available at www.nilc.org/immsemplymnt/cir/strive_eevs_2007-04-02.pdf.

[42] For a summary of the EEVS provisions in S. 2611, *see* COMPARISON OF EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM PROPOSALS IN THE BORDER PROTECTION, ANTITERRORISM, AND ILLEGAL IMMIGRATION CONTROL ACT OF 2005 (HR 4437) AND THE COMPREHENSIVE IMMIGRATION AND REFORM ACT OF 2006 (S 2611) (National Immigration Law Center, May 2006), available at www.nilc.org/immlawpolicy/CIR/eevs_side-by-side_2006-6-12.pdf. For an analysis of the EEVS provisions in S. 2611, *see* National Immigration Law Center, "Summary and Analysis: The Electronic Employment Eligibility Verification System Proposed by the Senate's Comprehensive Immigration Reform Act of 2006 (S 2611)," IMMIGRANTS' RIGHTS UPDATE, Aug. 17, 2006), available at www.nilc.org/immsemplymnt/ircaempverif/eev001.htm.

cannot initially be confirmed by the EEVS; or (5) selectively excluding certain people from consideration for employment due to the perceived likelihood that additional employment eligibility verification might be required, beyond what is required for other job applicants. Similar provisions were included in section 301(c)(3)(L) of the STRIVE Act and section 305 of S. 2611.

- **Due process protections against erroneous determinations.** Create due process protections that (1) allow workers to review and challenge the accuracy of the data in the EEVS; (2) require employers that participate in the EEVS to notify individuals that any information entered into the EEVS may be used for immigration enforcement; (3) require employers to provide detailed information about an individual's right to contest an EEVS finding, and the procedures for doing so; (4) clarify that an individual's failure to contest an EEVS finding does not constitute "knowledge" that an immigrant is undocumented under the current regulatory definition; and (5) create an administrative and judicial review process to challenge EEVS findings and that provides for remedies such as back pay and attorney's fees if it is determined that a worker was terminated due to DHS error. Similar language was included in sections 301(c)(3)(K), 301(c)(10), 301(c)(12)(A)(i), 301(c)(12)(C)(ii), 301(c)(19) of the STRIVE Act and sections 301(d)(8)(D), 301(d)(8)(E) and 301(d)(10) and (11) of S. 2611.

- **Privacy and identity theft protections.** Create privacy and identity theft protections that protect information stored in the system from misuse and sale or other commercial use; and create civil and criminal penalties for unlawful use of information in the EEVS. This language was included in sections 301(c)(5), 301(c)(8), 301(c)(12)(A)(iv), 301(c)(13), 301(c)(15) of the STRIVE Act and section 301(d)(12) of S. 2611.

- **Studies of and reports on EEVS performance.** Require independent studies and reports to assess the accuracy of the DHS and SSA databases on which the EEVS must rely, the privacy and confidentiality of information in the databases, and whether the EEVS program is being implemented in a nondiscriminatory manner. Required reports should also assess if the EEVS is meeting the needs of both workers and businesses. Similar language was included in section 301(c)(18) of the STRIVE Act and section 301(d)(14) of S. 2611.

- **Workable documentation requirements.** Proposals to further limit which documents are acceptable to establish employees' identity must be flexible enough to recognize the fact that not all work-authorized individuals have the same documents. Under no circumstances should a REAL ID–compliant driver's license or ID card be required. No state is currently in compliance with REAL ID, and indeed seven states thus far (Maine, Idaho, Montana, Washington, Arkansas, Hawaii, and North Dakota) have decided not to implement the law, or placed significant conditions on their participation.[43]

[43] For more information on states that have rejected REAL ID or that have proposals pending, *see* National Immigration Law Center, "Anti-REAL ID Measures Rejected in Five States So Far," IMMIGRANTS' RIGHTS UPDATE, April 25, 2007, available at www.nilc.org/immspbs/DLs/DL036.htm.

- **Only in the context of immigration reform.** Without legalizing the current undocumented population and providing an opportunity for immigrants to lawfully come to the U.S., the new system would start out with the insurmountable handicap of 8 million unauthorized workers and their employers seeking to uncover and exploit the weaknesses inherent in any system.

2. **Ensure that immigration law complements labor law, rather than undermines it.** Under current law, employers seek out and hire undocumented workers to exploit them for their labor, and then threaten them with deportation when they exercise their labor rights. The employer pays no penalty for the labor violations. Workers' rights to make labor claims must be protected, and the government should not take measures that discourage workers from making complaints about health and safety.

    - **Keep workers in U.S. to pursue claims against employers.** Preserve labor law enforcement opportunities by preventing workers from being removed from the country before labor agencies have an opportunity to interview them when labor law violations are discovered during an immigration enforcement action. This will prevent employers from using DHS to whisk them out of the country before the employers are held accountable. DHS internal guidance states that agents must "ensure to the extent possible that any arrested or detained aliens necessary for the prosecution of any violations are not removed from the country without notifying the appropriate law enforcement agency which has jurisdiction over these violations."[44] However, this guidance does not prohibit an immigration enforcement operation in the midst of a labor dispute, nor do all U.S. Immigration and Customs Enforcement (ICE) agents abide by it.

    - **Prevent retaliation for exercising labor rights.** When immigrants have been detained because their employer retaliated against them in the course of a labor dispute, grant them an opportunity to petition for visas and work authorization while they pursue the retaliation claim against that employer. DHS internal guidance states that "[w]hen information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with the rights of employees…."[45] While some regional DHS offices follow this guidance, others do not. When the guidance is not followed, immigrants are removed from the country and the employer suffers no penalty for violating labor law, allowing the employer to then hire a new group of undocumented workers it can exploit.

    - **No masquerading as health or safety personnel.** Stop ICE agents from masquerading as personnel from an agency or organization that protects health or public safety or provides domestic violence services. Doing so undermines the ability of health and public safety agencies to carry out their mission.[46] This provision was included in

[44] *See* section 33.14(h) of the Special Agent Field Manual as of Apr. 28, 2000; formerly cited as Operations Instruction 287.3a.

[45] *Id.*

[46] In 2005, in North Carolina, ICE officers lured immigrant workers to a mandatory health and safety training by posing as Occupational Safety and Health Administration (OSHA) personnel. The enforcement action in North Carolina resulted in

section 412 of the STRIVE Act.

3. **Ensure that all workers have equal rights and remedies under labor and civil rights laws.** Reports conducted after the passage of IRCA in 1986 found widespread discrimination as a result of employer sanctions.[47] Current labor and civil rights law does not provide all workers equal protection from discriminatory conduct. Not providing *all* workers the same rights and remedies creates an incentive to seek out those who are most vulnerable. Specific recommendations include:

   - **Employers liable regardless of immigration status of worker.** Clarify that an employer that violates labor or employment laws remains liable for back pay or other monetary damages regardless of the worker's immigration status. When certain workers are not eligible for monetary damages, it creates an economic incentive to hire undocumented workers because such workers carry reduced liability for labor law violations.

   - **Nondiscrimination in employment.** Prohibit citizenship and national origin discrimination under section 274B of the INA in all aspects of the employment relationship. The current prohibition is limited to discrimination in hiring, recruitment or firing. This results in employers being able to discriminate against workers who are legal immigrants because of their citizenship status. This provision was included in section 304 of the STRIVE Act.

   - **Protect employment-authorized workers.** Allow *all* employment-authorized workers to file a citizenship or national origin discrimination claim. Current law only protects U.S. citizens and nationals, asylees, refugees, and lawful permanent residents (LPRs) who are not yet eligible for naturalization and those who file for naturalization within six months of eligibility. Section 303 of STRIVE and section 305 of S. 2611 would slightly expand the definition of "protected individual" to also include all LPRs, immigrants granted temporary protected status, immigrants granted parole, and nonimmigrants admitted under the new H-2C program.

   - **More reasonable rules for combating immigration-related unfair labor practices.** Reform the rules governing unfair immigration-related labor practices by: (1) extending the time that the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has in which to file a complaint from 180 days to 2 years; (2) permitting back pay as a remedy; (3) giving administrative law judges the discretion to award other appropriate remedies that are available under other civil rights laws; (4) eliminating the provision requiring workers to prove that the employer "intended" to discriminate against them; and (5) increasing the fines for employers who are found to violate the law. These provisions were included in section 304 of the STRIVE Act.

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the detention of undocumented, documented and U.S. citizen workers, seriously compromising the ability of OSHA to protect all workers.

[47] GAO, *supra* note 7.

Conclusion

An enforcement-only approach (as embodied by a mandatory EEVS and misplaced reliance on increased immigration worksite enforcement) will never solve the problem of unauthorized employment. If anything, the lessons of IRCA have taught us that an enforcement-only approach actually creates incentives for employers to hire unauthorized workers. If Congress is serious about addressing this issue, it must be willing to consider an approach to worksite enforcement that does not rely *only* on enforcement of hiring sanctions, but also addresses (1) the weaknesses of the current Basic Pilot program; (2) the way in which immigration law often "trumps" labor law; and (3) the fact that currently all workers are not subject to the same labor and civil rights protections. If Congress does not address these issues, unscrupulous employers will continue to have a financial incentive to hire and exploit undocumented workers, legitimate employers will be placed at a competitive disadvantage, and both documented and undocumented workers will be increasingly subject to workplace abuses.