



Workers' Rights: Critical Labor Protections for Immigrant Workers During the COVID-19 Pandemic

April 15, 2020

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Presenters

- ▶ Joanna Cuevas Ingram, Staff Attorney, National Immigration Law Center
- ▶ Emily Tulli, Senior Attorney, Occupational Safety and Health Law Project
- ▶ Ingrid Nava, Associate General Counsel, SEIU Local 32BJ
- ▶ Rebecca Smith, Director of Work Structures, National Employment Law Project
- ▶ Jessie Hahn, Labor and Employment Policy Attorney, National Immigration Law Center

Outline

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- ▶ Safety and Health on the Job
- ▶ Using Collective Action to Improve Workplace Safety and Health
- ▶ Unemployment Insurance
- ▶ Paid and Unpaid Time Off from Work
- ▶ State/local responses springing up to address gaps left by federal response
- ▶ Q&A and Resources

Safety and Health on the Job

Emily Tulli, Senior Attorney, Occupational Safety
and Health Law Project

The logo features the text "OSH LAW PROJECT" in a bold, dark blue, serif font. Above the text is a dark blue curved line that dips down in the center, with a lighter blue curved line following its path. Below the text is a thick, dark blue curved line that also dips down in the center.

OSH LAW PROJECT

Established in 2014 as a project of the Public Welfare Foundation. As a public interest law firm, the organization works with nonprofit community, labor unions, and trial lawyers to ensure worker health and safety.

Emily Tulli, Senior Attorney, OSH Law Project

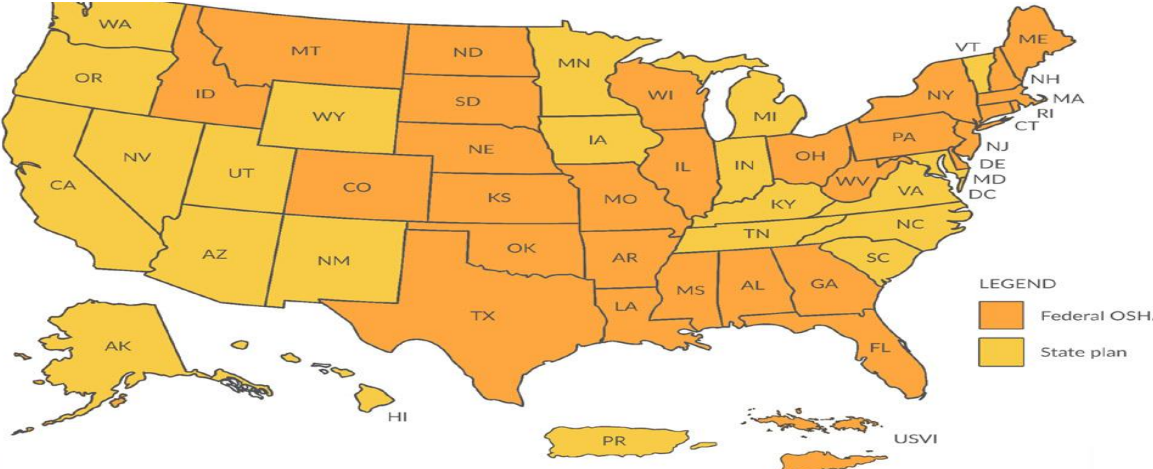


COVID & Immigrant Workers' Health and Safety: 3 Key Areas

- 💧 Enforce of healthy and safe laws (and significant limitations)
- 💧 Complaints to OSHA and beyond
- 💧 Anti-retaliation protection under health and safety law (and it's inadequacy)

Enforcement of Workplace Health and Safety

- Occupational Safety and Health Administration (OSHA) and the OSH Act.
- State agencies & “state-plan” states



Note: In Connecticut, Illinois, Maine, New Jersey, New York, and the U.S. Virgin Islands, federal OSHA covers private sector workers and state OSHA programs cover public sector workers.

Enforcement (cont'd)

- 💧 Rights to a safe and healthy workplace under the OSH Act
- 💧 Limitations & COVID enforcement issues including recent guidance
- 💧 Anti-retaliation protections of health and safety law

Complaints

- 💧 What to include in a complaint & how to file
- 💧 What to expect from OSHA
- 💧 Language & immigration status issues
- 💧 Note about workers with labor unions

Takeaways

- 💧 All workers are protected by health and safety law regardless of immigration status.
- 💧 Protection of workers' health and safety is critical, but **health and safety complaints are not a silver bullet.**
- 💧 Workers are in the strongest position when they have the protection of the NLRA in addition to the OSH Act.
- 💧 Change is possible! Advocate for changes at the state level and federal level.

Using Collective Action to Improve Workplace Safety and Health

Ingrid Nava, Associate General Counsel, SEIU
Local 32BJ

Using Collective Action to Improve Workplace Safety

- ▶ Ingrid Nava, Associate General Counsel SEIU Local 32BJ
- ▶ Justice at Work, Executive Board Member

Two Guiding Questions

- ▶ When and how can workers protest (take collective action) to improve health and safety in the workplace?
- ▶ If a worker, or a group of workers, refuse to work because they believe the work is unsafe – in what circumstances are the workers' jobs protected.

National Labor Relations Act (NLRA)

NLRA Section 7, 29 U.S.C. § 157, protects the right of **employees** to engage in “**concerted activity** ... for **mutual aid and protection**.” It is a violation of NLRA Section 8(a)(1), 29 U.S.C. § 158(1), for an employer “to interfere with, restrain, or coerce” employees in the exercise of Section 7 rights. The right to engage in concerted activities covers both union and non-union employees.

NLRA Cont.

WHO IS AN EMPLOYEE

- ▶ Private Sector workers

But not:

- ▶ Agricultural laborers,
- ▶ Domestic service workers
- ▶ Railway and Airline workers
- ▶ Supervisors, managers
- ▶ Independent Contractors

CONCERTED ACTIVITY/MUTUAL AID

- ▶ Best to have 2 + workers

“Activities” include:

- ▶ talking with one or more co-workers about wages and working condition (health/safety)
- ▶ circulating a petition,
- ▶ participating in a concerted refusal to work (strike/work stoppage)*
- ▶ Delegations to management,
- ▶ Petitioning to a government agency, or to the media about problems in your workplace
- ▶ * IF EMPLOYEES ARE SUBJECT TO A CBA WITH A NO STRIKE CLAUSE, SECTION 7 RIGHTS ARE THUS MODIFIED

Labor Management Relations Act (LMRA) Section 502 , 29 U.S.C. § 143

- ▶ “the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under” the NLRA.”

*In order to establish that a work stoppage is protected under Section 502, the General Counsel must demonstrate by a preponderance of the evidence that the employees **believed in good-faith** that their working conditions were abnormally dangerous; that their **belief was a contributing cause** of the work stoppage; that the employees' **belief is supported by ascertainable, objective evidence**; and that the **perceived danger posed an immediate threat** of harm to employee health or safety.*

TNS, Inc., 329 NLRB at 603 (1999) (emphasis added)

Occupation Safety and Health Act

29 CFR Section 1977.12

(b)

(1) On the one hand ... as a general matter there is no right to walk off the job because of potential unsafe conditions at the workplace.

(2) However, occasions might arise when an employee is confronted with a choice between ...tasks... or serious injury or death. [in that case if the worker refuses he could be protected from discharge or other adverse action]

Unemployment Insurance

Rebecca Smith, Director of Work Structures,
National Employment Law Project

Unemployment Insurance basics

- ▶ Available to workers who are unemployed through no fault of their own;
- ▶ Workers receive a portion of the wages they were earning;
- ▶ Administered by states
- ▶ Paid for by employer taxes (state UI) or, in disasters or recessions, federal funds (Disaster Unemployment Assistance)
- ▶ Workers must earn a certain amount during a “base period;”
- ▶ Workers must be able and available for work.

Immigrant Worker Eligibility – State Unemployment Insurance

- ▶ **Two general rules:**
 - ▶ Undocumented workers are not eligible:
 - ▶ Workers must have work authorization at the time they are receiving benefits and throughout the time they worked.
- ▶ **Specific categories of workers:**
 - ▶ Work authorization inherent in status:
 - Lawful permanent residents
 - Refugees
 - Asylees, and some applicants
 - Compact of Freely Associated States
 - ▶ Workers with Work Authorization:
 - DACA recipients;
 - TPS recipients and applicants
 - Applicants for cancellation of removal

Immigrant Worker Eligibility – Federally-funded Benefits

- ▶ DOL has considered federally-funded benefits differently and said only “qualified aliens” are eligible.
 - Lawful permanent residents
 - Refugees
 - Asylees
 - People granted withholding of removal;
 - Parolees for more than one year
 - Cuban/Haitian immigrants
 - Certain survivors of domestic violence

CARES Act Unemployment benefits

- ▶ Pandemic Unemployment Assistance (PUA)
 - ▶ Covers workers not eligible for regular UI: self-employed, part time workers, workers with insufficient wage history;
 - ▶ 39 weeks, retroactive to Jan 27
 - ▶ Covered conditions:
 - ▶ Covers workers , family members or providing care for someone diagnosed;
 - ▶ Providing care for a child or other household member who can't attend school
 - ▶ Quarantined or advised to self-quarantine
 - ▶ Forced to quit as a result of COVID-19
 - ▶ Work closed because of COVID-19

Additional CARES Act Programs

- ▶ Pandemic Unemployment Compensation (PUC)

- ▶ \$600 boost in weekly benefits
- ▶ Ends July 31st

- Pandemic Emergency Unemployment Compensation (PEUC)

- Available through 2020
- 13 weeks for workers who exhaust state UI benefits
- Same benefit level as state UI

Paid and Unpaid Time Off from Work & State/Local Responses

Jessie Hahn, Labor and Employment Policy
Attorney, National Immigration Law Center

Access to Paid Leave – Disparities by Income and Race/Ethnicity

- ▶ Among workers in the **lowest quartile of earnings** (making \$10.80/hour or less)
 - ▶ only 31% have access to Paid Sick Leave
 - ▶ Only 8% have access to Paid Family Leave
- ▶ **Racial & ethnic disparities** in access to Paid Leave
 - ▶ 49% of Latina/o workers have access to PSL (41% for Latina/o *immigrant* workers) as compared with 64% of non-Hispanic Whites
 - ▶ Workers who have been unable to take time off for family/medical reasons when they needed to:
 - ▶ 26% of Black workers
 - ▶ 23% of Latino workers
 - ▶ 13% of White workers

Paid and Unpaid Time Off from Work

▶ Paid Leave

- ▶ *None of this mandated federally prior to March 2020*

▶ Paid Sick Days

- ▶ For a worker's own illness, medical appointments, etc. or that of a family member; short term

▶ Paid Family Leave

- ▶ Worker's own off-the-job serious illness or injury or care for family member with serious health condition; Bonding with a child upon birth, adoption, etc.
- ▶ Longer term

▶ Unpaid Leave

▶ FMLA Leave (enacted by Congress in 1993)

- ▶ Job-protected leave for childbirth, adoption, to care for close relative or a workers own serious illness

New Federal Paid Sick Leave

- ▶ Families First Coronavirus Response Act (Mar 18, 2020)
- ▶ **80 hours**
- ▶ Paid at 100% wages for self-care; 67% for care for others
- ▶ Reasons for leave are **Covid-19 related**
- ▶ All employees covered, *regardless of immigration status*
- ▶ Only available for use **this year** (expires Dec. 31, 2020)
- ▶ Large (500+ employees) employers excluded
- ▶ Small (<50 employees) employers waiver for childcare-related leave

New Federal Paid Family Leave

- ▶ Families First Coronavirus Response Act (Mar 18, 2020)
- ▶ **12 weeks**
- ▶ ONLY covers child care due to **school/childcare closure**
- ▶ First 10 days unpaid; 67% of normal wages for remaining weeks
- ▶ All employees covered – min 30 days, *regardless of immigration status*
- ▶ Only available for use **this year** (expires Dec. 31, 2020)
- ▶ Large (500+ employees) employers excluded
- ▶ Small (<50 employees) employers waiver

State & Local Paid Leave Laws

- ▶ Prior to Covid-19, many workers already had paid leave protections on the state or local level
- ▶ **Paid sick leave:** 12 states and 23 localities
- ▶ **Paid family & medical leave:** 9 states (RI, CA, NJ, NY, D.C., WA, MA, CT, OR)
- ▶ Jurisdictions with Paid Sick Leave that cover **public health emergency** closures (some of these with respect to isolation/quarantine orders):
 - ▶ AZ, MI, NJ, OR, RI, VT, WA
 - ▶ Chicago/Cook County, New York City, Seattle, Minneapolis, Saint Paul, San Diego, Montgomery County, MD, Westchester County, NY
- ▶ **Immigrant eligibility** for state paid family & medical leave varies

Existing Federal Unpaid Family & Medical Leave

- ▶ Family and Medical Leave Act of 1993
- ▶ **12 weeks**
- ▶ Covers childbirth, adoption, to care for close relative or a workers own serious illness
- ▶ Job-protected but **unpaid leave**
- ▶ Covers only **larger employers** (those with 50 or more employees within a 75-mile radius)
- ▶ Covered employees:
 - ▶ Minimum one year with employer, AND
 - ▶ Minimum 1,250 hours worked in previous 12 months
 - ▶ *regardless of immigration status*

Immigrant Worker Considerations – Taking Leave

- ▶ Leave under FMLA & FFCRA are **protected against retaliation**, including discrimination
- ▶ Employers should **restore workers to their jobs** or equivalent positions upon return
- ▶ Under immigration law, employees on leave are “**continuing their employment**” and when they return there’s no requirement to re-verify their documents (it’s not a “hiring”)
- ▶ Re-verification may **violate state/federal anti-discrimination** and anti-retaliation laws

State & Local Responses to Gaps for Immigrants in Federal Programs

- ▶ state disaster relief funds
- ▶ alternatives to UI
- ▶ public/private partnerships
- ▶ housing/rental assistance
- ▶ efforts to protect workers' rights and help keep them in their jobs
- ▶ tax credits

Q&A - Resources

- ▶ **FAQ: Immigrant Workers' Rights and COVID-19** (NELP, NILC, OSH Law Project):
<https://www.nilc.org/issues/workersrights/faq-immigrant-workers-rights-and-covid-19/>
- ▶ **Understanding the Impact of Key Provisions of COVID-19 Relief Bills on Immigrant Communities** (NILC): <https://www.nilc.org/issues/economic-support/impact-of-covid19-relief-bills-on-immigrant-communities/>
- ▶ **Immigrant Workers' Eligibility for Unemployment Insurance** (NELP):
<https://www.nelp.org/publication/immigrant-workers-eligibility-unemployment-insurance/>
- ▶ **Worker Safety & Health During COVID-19 Pandemic: Rights & Resources** (NELP):
<https://www.nelp.org/publication/worker-safety-health-during-covid-19-pandemic-rights-resources/>
- ▶ **Stand Up Without Fear: Understanding the OSH Act's Retaliation Provisions** (OSH Law Project):
<http://www.oshlaw.org/wp-content/uploads/2020/02/stand-up-without-fear.pdf>

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Upcoming COVID-19 Webinar

Equal Opportunities to Thrive: Rebates, Taxes/SSN/ITIN, Food Security, and Access to Food Programs

Thursday, April 16 (10-11:30 AM PST)

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