

## 6<sup>th</sup> National Low-Income Immigrant Rights Conference

*December 6-8, 2007*

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## Immigrant Workers' Rights 101

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### Immigrant workers are a significant part of the U.S. workforce

- US is the largest immigrant receiving nation in the World – 28-30 million immigrants
- In 2000, the foreign-born population accounted for nearly 15% of the total U.S. civilian work-force.
- 1 in 5 low-wage workers are immigrants

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### Immigrant workers in the U.S.

- Among foreign-born men ages 20 to 64, the employment-to-population ratio in March 2003 was 83%, slightly higher than the 80% ratio for U.S.-born men in that age group.
- The labor-force participation of male undocumented immigrants is 94%, exceeding the rate of both native-born and work-authorized immigrant men.

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### But despite high participation in the workforce . . .

- 43% of immigrant and 44% of refugee families with full-time workers have incomes below 200% of poverty, in comparison to 26% of native-born
- Only 32% of immigrants have job-based health insurance.

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### Immigrants are critical to the growth of U.S. economy

- During the 1990s, the immigrant population in “new immigrant” states grew twice as fast as the immigrant population in the 6 traditional states that receive the greatest number of immigrants (CA, FL, IL, NY, NJ, TX).
- In 2002-04, the undocumented population was concentrated in the following states: Arizona, Colorado, Florida, Georgia, Illinois, Massachusetts, Maryland, New York, Texas, Virginia, and Washington.

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## Immigrants in the U.S. workforce

- The most rapid growth in the number of undocumented migrants has been in states that previously had relatively small foreign-born populations.
- New immigrants (who entered the U.S. between 2000 and 2004) contributed at least 67% of the growth in the civilian labor force over the past 3 years, exceeding their contribution to the labor force in the decade of the 1990s, which was a historical high for the U.S.

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## Immigrants in the U.S. workforce

- New immigration is likely to contribute between one-third and one-half of the growth of the labor force through 2030. Between 2010 and 2030, first and second generation immigrants together are projected to account for all growth in the US labor force.
- Between 1996 and 2003 the number of native born workers belonging to a union declined, while the number of foreign-born workers belonging to a union increased.

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## Exploitation of Immigrant Workers

- Low-wage immigrant workers are concentrated in agriculture, domestic workers, hotels, restaurants, construction, janitorial, etc. primarily due to:
- Strong demand & recruitment efforts by US employers seeking out low-wage workers
- Educational background
- Limited English proficiency
- Immigration status

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## Immigration Reform and Control Act of 1986 (IRCA)

- Employer Sanctions for Knowingly Hiring Undocumented workers
- Established I-9 Employment Eligibility Verification Process
- Created Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to Enforce Anti-discrimination Provisions

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## New Changes to I-9 process

- USCIS has issued a new I-9 form. Employers can no longer accept the following documents under "list A":
- (1) Certificate of United States Citizenship (Form N-560 or N-561);
  - (2) Certificate of Naturalization (Form N-550 or N-570);
  - (3) Form I-151, old version of the Alien Registration Receipt Card ("green card");
  - (4) Unexpired Reentry Permit (Form I-327);
  - (5) Unexpired Refugee Travel Document (Form I-571).

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## Resulting Discrimination from Employer Sanctions

- 1990 GAO Studies Found Widespread Discrimination:
- Against citizens and documented workers
- Against persons who appeared foreign
- Against persons with foreign accents

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## Prohibited Conduct Under the INA's anti-discrimination provisions

- Citizenship/immigration status
- National origin
- Document abuse
- Retaliation

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## Citizenship/Immigration Status Discrimination

- With Respect to Hiring, Firing, and Recruitment or Referral for a Fee
- Applies to all employers with 3 or more employees
- Protected Persons: U.S. citizens, nationals, asylees, refugees, temporary residents, and lawful permanent residents (LPR)
- Excludes LPRs who do not apply for citizenship within 6 months of eligibility

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## Workers Not Covered

- Non-Immigrant Visa holders, for e.g. temporary guest workers such as H-2A and H-2B workers
- Asylum applicants
- LPRs who have not applied for citizenship within 6 months of eligibility
- Undocumented workers

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## National Origin Discrimination

- Discrimination linked to person's place of birth, country of origin, ancestry, native language, accent, perceptions
- With respect to hiring, firing, recruitment or referral for a fee
- Covered employers: 4 to 14 employees (over 15 jurisdiction with EEOC)
- Protected persons: U.S. citizens & nationals, legal workers

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## Document Abuse

- Requiring workers to present "INS" or "USCIS" issued documents
- Requiring those who appear foreign to show documents proving status
- Greater scrutiny and rejection of valid documents from immigrants
- Covered employers: more than 3 employees
- Protected persons: U.S. citizens & nationals and all legal workers

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## Retaliation

- Unlawful to intimidate, threaten, coerce or retaliate against any worker to:
- Interfere with their rights under the anti-discrimination provisions; OR
- Because person intends to, or has, filed a charge or complaint, or testified, assisted or participated in an investigation or hearing

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## Filing a Charge with OSC

- Charge must be filed within 180 days of Discrimination
- Charge forms are available from the OSC website: [www.usdoj.gov/crt/osc](http://www.usdoj.gov/crt/osc)
- Charges may be filed in any language
- Workers or Advocates can file charges
- OSC Worker Hotline: 1-800-255-7688

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## REAL IMPACT OF EMPLOYER SANCTIONS

- Employers use employers as a justification to retaliate against worker organizing efforts and attempts by workers to improve working conditions.
- Employer sanctions gives employers another tool to stymie union organizing campaigns and depress wages & working conditions of all workers.

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## Immigrant Workers' Rights

- GENERAL RULE:
  - *All federal and state labor and employment laws protect all workers, regardless of their immigration status.*
- But, ....

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## *Hoffman Plastic Compounds v. NLRB*

122 S.Ct. 1275 (2002)

- Jose Castro fired for organizing.
  - Justice Breyer, “crude and obvious” violation of the NLRA.
- At hearing, Castro admits he is undocumented.
- NLRB awards back pay up to time of admission of undocumented status.
- Supreme Court reverses NLRB, in a 5-4 decision.

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## Hoffman Plastic Compounds

- U.S. Supreme Court denies back pay under the National Labor Relations Act (NLRA)
- Jose Castro admitted to being undocumented during compliance phase of the NLRB proceedings.
- The Court focused on the worker’s “serious illegal conduct” – i.e. use of false documents.
- Creates an unfair economic advantage for unscrupulous employers.

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**What is the status of undocumented workers' rights after Hoffman?**

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## Immigrants and their right to organize

- All workers have the right to organize to join & form a union.
- BUT... No back pay for any period of time that a worker lacks authorization to work.
- No reinstatement unless worker can show she is authorized at time of reinstatement.
- Limiting remedies for union organizing hurts all workers' right to organize.

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## Right to Organize

- **Advocacy Tip!**
- Immigration Status is not relevant during the investigation of an unfair labor practice. Do not allow the Board Agent to ask questions about the workers' immigration status.
- While immigration status may be relevant at the compliance phase, it also depends on the facts & circumstances of each case – such as where there is a “knowing” employer – and it therefore may not be necessary to reveal immigration status.

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### *Mezonos Maven Bakery, Inc. and Puerto Rican Legal Defense and Education Fund, 29-CA-25476, Steven Davis, ALJ (Nov. 1, 2006)*

- Where the employer knowingly violated federal immigration law by hiring workers without verifying immigration status, an Administrative Law Judge 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 “wrong doer” 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

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## Undocumented workers' rights despite Hoffman

- **Right to minimum wage & overtime.**
  - Fair Labor Standards Act; *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), cert. denied, 487 U.S. 1235, 101 L. Ed. 2d 934, 108 S. Ct. 2901 (1988); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), cert. denied, 489 U.S. 1101 (1989); *Flores v. Albertsons, Inc.*, 2002 WL 1163623, at 5 (C.D. Cal. Apr. 9, 2002)

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## Undocumented workers' rights

- **Right to be free from workplace discrimination, including retaliation.**
  - ADA, ADEA, Title VII, *Contreras v. Corinthian*, 103 F. Supp. 2d 1180 (N.D. Cal. 2000)
- **Right to a safe & healthy working environment.**
  - Occupational Safety and Health Act, Mine Safety Health Act, state workers' compensation

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## Current threats: Social Security No-Match letters

- Each year, SSA sends “no-match” letters to individuals whose name and/or SSNs listed in their employer's records do not match the SSA's records.
- The purpose of the SSA no-match letter is to inform workers that they are not getting credit for their earnings, which can affect their retirement, survivor, disability, or other benefits administered by SSA.

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## SSA No-Match Letters: Overview

- There are many reasons for no-match letters, including misspelled names, name changes, and database errors, and the letters themselves do not prove any wrongdoing by either employers or employees.
- The letter does not provide any indication that a person is undocumented.

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## SSA No-Match Letters: Overview

- SSA first attempts to send the letter to the workers' home address. When home addresses are unavailable or inaccurate, SSA sends no-match letters to employers.
- SSA also sends letters to employers when at least 10 employees, or if at least 1/2 of one percent of the total number of names and SSNs they reported to SSA during the year resulted in a "no-match."

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## SSA No-Match Letter: DHS Rule

- DHS finalized the rule on Safe Harbor Procedures for Employers upon receipt of a no-match letter from SSA.
- Rule was to go into effect: 9/14/07.
- SSA had planned on sending letters out as early as 9/4/07.
- DHS could use failure to follow "safe harbor" procedures as evidence that the employer had "constructive knowledge" that an employee is unauthorized to work.



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## ACLU-IRP, AFL-CIO, NILC and Others File Lawsuit

- AFL-CIO, et al. v. Chertoff, et al. filed on 8/29/07
- Court grants TRO on 8/31/07 blocking DHS from implementing the rule and SSA from sending no-match letters that refer to DHS rule and include DHS insert.
- Hearing on Preliminary Injunction held on October 1st. Injunction granted on October 10, 2007.

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## Responding to SSA No-Match

- Educate employers & workers about the intent of the letters;
- Conduct know your rights trainings;
- Include protective language in union contracts;
- Involve community (i.e. local resolutions);
- Campaigns at: Regional SSA offices, City Councils, involve Congress people.

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## Overview: Immigration Enforcement Tools

- Social Security Number Verification Service (SSNVS)
- E-Verify (formerly Basic Pilot program)
- IMAGE

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## Social Security Number Verification Service (SSNVS)

- Nationwide program – June 2005
- Allows employers to verify SSNs via web even if haven't received a no-match letter
- Employer applies for PIN/password, and enters employee name, DOB, SSN, gender
- Can verify 10 names – immediate response
- Can upload file w/ 250k 'ees – next day reply
- SSA informs whether a match or no-match
- SSNVS cannot confirm work authorization

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## Employers Can't Use SSNVS To...

- Prescreen job applicants
- Take adverse action against workers (similar to warning re no-match letters)
- Selectively or discriminatorily verify SSNs
- Conduct identity, credit or other background checks
- *Organize, Educate, Document, Advocate*

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## Basic Pilot/E-Verify Program

- Expanded nationwide in 12/2004 - Voluntary Employer signs MOU with DHS/SSA
- Fills out I-9 Form for new hires, and verifies with DHS and/or SSA
- Confirmation = authorized to work
- Tentative nonconfirmation = database cannot verify work authorization
- Employee given letter and has 8 days to contest
- No adverse action allowed during this period
- If worker does not contest = employer must fire
- Final nonconfirmation = employer must fire

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## Independent Evaluation Found:

- Employers abusing Basic Pilot program by using to prescreen job applicants
- Discriminating based on national origin and citizenship
- DHS/SSA databases inaccurate
- Insufficient time for workers to correct records
- Privacy violations

*Recommended against nationwide expansion*

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## THE "IMAGE" PROGRAM

- ICE Mutual Agreement Between Government and Employer (IMAGE)
- Is a joint government and private sector initiative that Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) introduced in July of 2006 to assist employers with maintaining the integrity of their worksite through "self-policing" and self-compliance of federal immigration law in their hiring and continued employment practices.

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## IMAGE: The Basics

- Voluntary program for employers.
- Per DHS, employers who participate in the IMAGE program can reduce unauthorized employment and the use of fraudulent identity documents by implementing DHS's "best hiring practices."
- Best practices include: I-9 audit, using SSNVS, registering for E-Verify, creating protocol for no-match, employee tip line.

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Resources & information

[nilc.org](http://nilc.org)

[nelp.org](http://nelp.org)

[cliniclegal.org](http://cliniclegal.org)

[lwiw.org](http://lwiw.org)

[stopnomatch.org](http://stopnomatch.org)