

# Protecting the Rights of All Migrant Workers as a Tool to Enhance Development

*Submitted by*

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## INTRODUCTION: MIGRANT WORKERS IN THE UNITED STATES

The migrant population in the United States is huge and diverse, in terms of nationality, socio-economic status and legal status derived from the manner of entry. Because of its sheer size an examination of the treatment of the migrant population in the United States and the impact it has on development both in the United States and in the sending countries, is critical. This submission looks at good and bad practices – both on the part of the government and the judicial system as well as on the part of different non-governmental organizations. We conclude that the principle of equality and non-discrimination must be at the core of any strategy aimed at improving conditions for migrants, both in the host country and the sending countries.

The United States of America is the top migrant-receiving nation in the world, with the largest international migrant population in the world.<sup>1</sup> Between twenty-eight and thirty million migrants live in the United States.<sup>2</sup> While migrants make up less than eleven percent of the total population, they make up fourteen percent of the nation's labor force and twenty percent of the low-wage labor force.<sup>3</sup> According to the 2000 Census report, foreign immigration contributed significantly in generating both population and labor force growth in the U.S. during the 1990s.<sup>4</sup> Included in the country's migrant population are an estimated 9.3 million undocumented migrants,<sup>5</sup> approximately six million of whom are undocumented migrant workers.<sup>6</sup>

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<sup>1</sup> UNITED NATIONS. POPULATION DIV. DEP'T OF ECON. & SOC. AFFAIRS. INT'L MIGRATION 2002, at <http://www.un.org/esa/population/publications/ittmig2002/Migration%202002.pdf>. The term "migrant" is employed for all foreign born individuals in the United States, and not just those who are here on a temporary basis. Similarly, the term "migrant worker" is used here consistent with the definition in the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families

2. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THE FOREIGN-BORN POPULATION IN THE UNITED STATES 1 (2000).

3. URBAN INST., BRIEF NO. 4, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (November 2003), available at <[http://www.urban.org/UploadedPDF/310880\\_lowwage\\_immig\\_wkfc.pdf](http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf)>

4 Sum, Khatiwade, Harrington, et al., *New Immigrants in the Labor Force and the Number of Employed New Immigrants in the U.S. from 2000 through 2003: Continued Growth Amidst Declining Employment Among the Native Born Population*, Center for Labor Market Research (Dec. 2003), available at <[http://www.nupr.neu.edu/01-04/immigration\\_jan.pdf](http://www.nupr.neu.edu/01-04/immigration_jan.pdf)>

5. JEFFREY S. PASSEL, RANDY CAPPAS & MICHAEL FIX, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (Jan. 12, 2004), available at [http://www.urban.org/UploadedPDF/1000587\\_undoc\\_immigrants\\_facts.pdf](http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf). Mexicans comprise approximately 57 percent of that group, people from other Latin American countries comprise 23 percent, Asians comprise approximately 10 percent and 10 percent come from all other parts of the world. *Id.* at 1.

6. B. LINDSAY LOWELL & ROBERT SURO, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.—MEXICO MIGRATION TALKS 7 (2002), available at <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf>. See also JEFFREY S. PASSEL, BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE, available at <http://pewhispanic.org/files/reports/46.pdf>, noting that nearly 80-85% of the new migrants to the U.S. from Mexico are unauthorized.

Migrants, both documented and undocumented, work long hours at the lowest-paid and most dangerous jobs in the U.S. economy. In states with high percentages of migrants, three out of every four tailors, cooks, and textile workers are migrants.<sup>7</sup> Migrants are also over represented as taxicab drivers, domestic workers, waiters, parking lot attendants, and sewing machine operators.<sup>8</sup> One out of every five workers in the animal slaughter and processing industry, and approximately one out of every four workers in the landscaping industry is an unauthorized migrant.<sup>9</sup> The manufacturing sector employs nearly 1.2 million undocumented migrant workers, the services sector employs 1.3 million, and one million to 1.4 million undocumented migrant workers labor in our fields.<sup>10</sup>

The above industries that rely on migrants, particularly those that rely on unauthorized migrants, are known for frequent violations of wage, hour, and overtime payment laws. A 2000 U.S. Department of Labor survey found that 100 percent of poultry processing plants were noncompliant with federal wage and hour laws. Just under half of the garment-manufacturing businesses in New York City were found to be out of compliance with the Fair Labor Standards Act (governing minimum wage and overtime pay) in 2001. A survey in agriculture that focused on cucumbers, lettuce, and onions revealed that compliance with labor and employment laws in these industries was unacceptably low.

The net affect of high concentration of migrants in certain industries and low compliance records in those industries has resulted in a dramatic income gap between migrants and native-born workers. The average income per person born in the United States was \$24,300 in 2003, and legal migrants earned \$20,400, while unauthorized migrants earned just \$12,000 per person, less than half their native born counterparts.<sup>11</sup>

Furthermore, many of the industries in which migrant workers are over-represented involve dangerous working conditions. The rate of injury and death among migrant workers is alarmingly high. A recent investigation found that every day, a Mexican worker dies on the job in the United States.<sup>12</sup>

This paper seeks to identify the reasons behind the disparity in income and health between migrants and non-migrants in the United States, focusing on the need for protection of human rights of migrant workers in order to ensure development in both the country of employment and the migrant's home country. Part I will examine the overarching principle of equality and non-discrimination as applied to migrants,<sup>13</sup> which is clearly articulated in all major human rights treaties and provides an alternative framework for addressing the rights of migrants. It will then discuss good practices in the United States that provide recognition for the equal rights to all workers, migrants and nationals alike. Part II then looks at worst practices in the United States vis-à-vis the treatment of migrants, those that deny equal protection either as a matter of right, or as a matter of remedy. We conclude

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7. THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 215 (James P. Smith & Barry Edmonston, eds., 1997), National Academy Press (1997), available at <<http://www.nap.edu/books/0309063566/html/index.html>>

8. *Id.* at 215.

9 Passell, *supra* n.6, p. 29.

10. LOWELL & SURO, *supra* note at 7-8.

11 Passell, *supra* n. 6, p. 30.

12 Justin Pritchard, *A Mexican Worker Dies Each Day, AP Finds*, NEWSDAY (Mar. 14, 2004).

13 We focus on this fundamental human rights norm largely because the United States, as with the other large receiving countries, has not ratified the Convention on the Rights of All Migrants and their Families.

with advocacy efforts undertaken by and on behalf of migrant workers beyond litigation in state and federal courts, and with our ultimate recommendation that rights of migrants must be viewed under the principle of equality and non-discrimination, and the precepts put forth by the Inter-American Court's Advisory Opinion OC-18. Failure to equally protect the rights of all workers can only have a negative impact on development across the globe.

## **II. PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION AS APPLIED TO MIGRANTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM**

Respect for core human rights principals regarding equality and non-discrimination of migrants is essential to development in the communities in which the migrants live and work. The Convention on the Rights of All Migrant Workers and their Families is explicit in its mandate that migrants enjoy treatment not less favorable than nationals with respect to terms and conditions of work, including but not limited to pay, hours of work, holidays with pay, health and safety, etc.<sup>14</sup> The Convention also recognizes the right of migrants to participate in trade unions and other associations established "with a view to protecting their economic, social, cultural and other interests and the rights associated therewith,<sup>15</sup> and the right to social security,<sup>16</sup> without the full recognition of which development is hampered.

### **A. Inter-American Court's Advisory Opinion on the Legal Status and Rights of Undocumented Migrants**

In September of 2003, the Inter-American Court issued Advisory Opinion OC-18 on the Rights of Undocumented Migrants,<sup>18</sup> in which it held international principles of human rights prohibit discrimination on the basis of immigration status, using the term "discrimination" to refer to "any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights."<sup>19</sup>

The Court's decision made clear that countries have the right to decide under what conditions foreigners may enter its borders, but once a worker enters into an employment relationship, "the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment."<sup>20</sup> It then outlined the different labor rights which it said were fundamental and must be respected by member countries.<sup>21</sup>

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<sup>14</sup> U.N. CONVENTION ON THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES, Article 25.

<sup>15</sup> *Id.*, Art. 26.

<sup>16</sup> *Id.*, Art. 27

<sup>18</sup> THE LEGAL STATUS AND RIGHTS OF UNDOCUMENTED MIGRANTS, September 17, 2003, available at [http://www.corteidh.or.cr/serie\\_a\\_ing/serie\\_a\\_18\\_ing.doc](http://www.corteidh.or.cr/serie_a_ing/serie_a_18_ing.doc).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at para. 134.

<sup>21</sup> In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which

OC-18 provides an important precedent that may help counteract restrictions on the rights of migrant workers to protection under human rights law, and has been recognized in the observations and recommendations of the annual report from the Inter-American Court, approved by the OAS General Assembly on June 8, 2004.<sup>22</sup> Recently, the Human Rights Commission of the High Commission on Human Rights at the United Nations recognized the decision in its resolution 2005/47.<sup>23</sup>

### **B. Good Practices: Judicial and Administrative Recognition of Non-Discrimination towards Undocumented Migrant Workers in the United States**

Like migrant workers in all countries, undocumented workers seeking to enforce their labor rights in the United States face a number of barriers: poverty, geographic, cultural and linguistic isolation, and fear that complaints will result in their deportation. Unscrupulous employers use threats to turn workers into immigration authorities as a strategy to keep complaints to a minimum. Workers have an understandable fear that filing a complaint or even complaining informally to government authorities about labor code violations will result in their deportation, either because agency personnel will forward their information on to immigration authorities, or because their employer will do so. Employers who hire large numbers of undocumented workers often suddenly take an interest in compliance with immigration laws as soon as workers make a formal complaint, or an accident takes place. The result is a process that has a serious chilling effect on undocumented migrant workers contemplating whether to file a claim and on those who have courageously filed claims.

Worker advocates in the US believe that the only way to adequately enforce labor rights of all workers is to establish a clear “firewall” between labor enforcement and immigration enforcement; that is, to make it clear that a workers’ immigration status is never a subject of questioning in a labor dispute. In an attempt to ensure that “firewall” is in place, they have developed a number of tools within the court and administrative systems. In general, the policies represent a step forward in protecting migrant workers’ access to remedies for violation of labor rights. However, many of the policies are discretionary or weak, and no specific policy governs the rights of all workers in all situations. Thus, whether or not this protection exists depends in large part on the geographic location in which the worker worked, and the specific law that was violated. The US, as well as many other countries, has a long way to go before there is an absolute firewall between wage enforcement and immigration enforcement.

#### **1. Confidentiality and (non) Cooperation Policies of Administrative Enforcement Agencies**

Federal agencies have recognized that the failure to ensure equal access to labor law enforcement for undocumented migrants has a detrimental impact on all workers, nationals and migrants alike. As

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“[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

22OAS General Assembly. OBSERVATIONS AND RECOMMENDATIONS ON THE ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (June 8, 2004). AG/RES. 2043 (XXXIV-O/04). [http://www.oas.org/xxxivga/english/docs\\_approved/agres2043\\_04.asp](http://www.oas.org/xxxivga/english/docs_approved/agres2043_04.asp). These rights mirror those enumerated in the UN Convention on the Rights of All Migrant Workers and their Families.

23 Office of the High Commissioner for Human Rights. United Nations. Human Rights of Migrants. April 19 2005. [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-47.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-47.doc).

such, they instituted policies that offer some limited protection to undocumented migrants who make complaints or whose employers threaten to turn them in to immigration authorities if they complain.

**Department of Homeland Security (formerly Immigration and Naturalization Service).** Since the late 1990's U.S. immigration authorities have had a policy which gives some protection to workers when an employer threatens to turn them into immigration personnel, thought that protection is somewhat discretionary.

A Special Agents Field Manual for the agency says that when the agency receives information concerning the employment of undocumented or unauthorized aliens, officials must "consider" whether the information is being provided to interfere with employees' rights to organize or enforce other workplace rights, or whether the information is being provided to retaliate against employees to vindicate those rights.<sup>24</sup> If immigration authorities determine that the information may have been provided in order to interfere with employees' rights, "no action should be taken on this information without the review of District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol." SAFM 33.14(h). Unfortunately, because this policy grants discretion to the immigration authorities, it is viewed by many advocates as an unreliable protection.

**US Department of Labor: Enforcement of Wage and Hour Laws.** In 1998, the US Department of Labor (DOL) entered into a Memorandum of Understanding (MOU) with the INS (Immigration and Naturalization Service, which is now the Department of Homeland Security, or DHS) establishing that the labor agency will not report the undocumented status of workers if discovered during an investigation triggered by a complaint made by an employee when there is a labor dispute, nor will it inquire into a worker's immigration status while conducting a complaint-driven investigation.<sup>25</sup> Included among the MOU's stated goals are:

- reduce economic incentives for the employment of unauthorized workers and the consequential adverse effects on job opportunities, wages and working conditions of authorized U.S. workers by increasing employers' compliance with minimum labor standards;
- avoid the further victimization of unauthorized workers employed in the U.S. by employers which may seek to abuse the enforcement powers of the signatory agencies to intimidate or punish these workers; and,
- promote employment opportunities for legal authorized U.S. workers and improvements in their wages, benefits, and working conditions.

The principal federal law that protects workers' rights to be paid is the Fair Labor Standards Act (FLSA). FLSA protects most workers' rights to a minimum wage (currently set at a very low \$5.15 per hour), and to overtime pay of one and one half times the regular rate of pay for hours worked over 40 in one week. Following the Supreme Court's decision in *Hoffman* (discussed below), DOL has stated that it will fully and vigorously enforce the FLSA without regard to whether an employee

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<sup>25</sup> See DOL Memorandum of Understanding, [www.nilc.org/immsemploymnt/emprihts/MOU.pdf](http://www.nilc.org/immsemploymnt/emprihts/MOU.pdf). The DOL may, however, report the undocumented status of workers in an investigation not prompted by a specific complaint, i.e. a random investigation into an industry (such as poultry factories) known from wage and hour violations.

is documented or undocumented.”<sup>26</sup> Like the federal laws, most state labor and employment laws contain no provision that distinguishes between documented and undocumented workers.<sup>27</sup>

The Equal Employment Opportunities Commission (EEOC), which enforces a number of anti-discrimination laws in the United States, has a similar policy of enforcing the law on behalf of all persons who suffer workplace discrimination.<sup>28</sup>

**National Labor Relations Board.** After the U.S. Supreme Court’s decision in the *Hoffman* case discussed below, the National Labor Relations Board was faced with the task of determining when it is appropriate for an employer to inquire about a workers’ immigration status, when that worker has alleged a violation of his or her right to freedom of association. The Board said there is “no obligation to investigate an employee’s immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented.”<sup>29</sup> Thus, an employer should not be allowed to raise an issue of immigration status without a showing of relevancy and without showing that it obtained the information lawfully and independently of the proceeding. In a recent case, the NLRB stated that the fact that an employer had received a Social Security no-match letter (discussed below) is not evidence that a particular worker is in the country unlawfully.<sup>30</sup>

## 2. Protections Granted by Courts in Formal Legal Proceedings

When formal legal claims are filed in U.S. courts, both parties are allowed to ask a broad range of questions, and ask for a broad range of documents, from the other party in a process called “discovery.” The subject matter of discovery covers anything relevant to a claim or defense, or anything that might become relevant. Attorneys representing employers in claims brought by migrants are increasingly using the discovery process to inquire into a plaintiff’s immigration status, ostensibly to obtain information that is allegedly relevant to the damages claimed. But these measures clearly serve to intimidate the plaintiff into dropping the charges altogether, due to fear of retaliation and potential immigration consequences.

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26 U.S. Department of Labor, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division, available at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>. See also, U.S. Department of Labor, Hoffman Plastic Compounds, Inc, v NLRB, Questions and Answers (on file with authors).

27 Courts before the *Hoffman* decision usually held that labor protective laws such as state minimum wage and wage claim law and others apply equally to undocumented workers as they do to workers who are working legally in the country. See, *Nizmuddowlah v. Bengal Cabaret. Inc.*, 415 N.Y.S. 2d 685, 686 (N.Y.A.D. 1979)(recovery of wages must be allowed to prevent unjust enrichment); *Gates v. Rivers Construction*, 515 P.2d 1020, 1022 (Alaska, 1973)(employer who knew workers’ status should not be allowed to ignore his responsibility to pay wages); *Montoya v. Gateway Insurance Co.*, 401 A.2d 1102 (N.J. Super. A.D. 1979) *cert. denied* 408 A.2d 796 (1979)(illegal status does not prevent a plaintiff from recovering medical benefits and lost wages under insurance policy); *Peterson v. Neme*, 281 S.E. 2d 869 (Va. 1981)(undocumented alien could recover lost wages as an element of damages in a negligence action despite stipulation that it would have been illegal to work).

28 U.S. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Jun. 27, 2002) available at < <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.>

29 NLRB General Counsel, Procedures and Remedies for Discriminatees Who May Be Unauthorized Aliens after Hoffman Plastic Compounds, Inc. (Jul. 19, 2002) available at < <http://www.lawmemo.com/emp/nlrb/gc02-06.htm>.>

30 Tuv Tamm, 340 NLRB No. 86, 2003 WL 22295361 (Sep. 30, 2003).



A series of state and federal cases protect workers from having to disclose their immigration status in legal proceedings. The most recent decision, from an intermediate appellate court covering the western coast of the United States, is in a discrimination case called *Rivera v. NIBCO*<sup>31</sup> indicates that at least some courts understand this dynamic. As against the employers' argument that it "needed" disclosure of status in order to present its defense that the plaintiffs were not entitled to back pay after *Hoffman*, the Court weighed the plaintiffs' interest in non-disclosure, and said:

Granting employers the right to inquire into workers' immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.<sup>32</sup>

In a similar case for unpaid wages and overtime noted above, *Zeng Liu*,<sup>35</sup> the defendant made a discovery request for the disclosure of plaintiff garment workers' immigration status, but the federal court denied the request on the grounds that release of such information is more harmful than relevant.<sup>36</sup>

### III. FAILURES OF THE UNITED STATES IN ENSURING NON-DISCRIMINATION IN THE APPLICATION AND ENFORCEMENT OF LABOR AND EMPLOYMENT RIGHTS FOR ALL MIGRANTS

Despite some of the promising practices discussed above, while workers generally have equal *rights* under U.S. labor and employment laws regardless of immigration status, with some exceptions outlined here, equal remedies remain elusive and are denied in many circumstances. Because rights are often meaningless without a remedy, this failure is crucial.

#### A. Statutory Exclusions for Migrants

**Citizenship discrimination: No protection.** Federal law protects against discrimination on the basis of race, ethnicity, national origin, religion and gender. But, with limited exceptions, there is not protection against citizenship-based discrimination. The Immigration Reform and Control Act of

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<sup>31</sup> 364 F.3d 1057 (9<sup>th</sup> Cir. 2004).

<sup>32</sup> Additional examples include the recent decision in Michigan, *Galaviz-Zamora v. Brady Farms, Inc.*, 2005 WL 2372326 (W.D. Mich. 2005) and *Flores, et al. v. Albertsons*, 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002), where defendants used *Hoffman* to request immigration documents from janitors in federal court for unpaid wages under state and federal law. The court held *Hoffman* did not apply to claims of unpaid wages, noting that allowing such discovery was certain to have a chilling effect on the plaintiffs (i.e., would cause them to drop out of the case rather than risk disclosure of their status).

<sup>35</sup> 207 F.Supp.2d 191 (S.D. N.Y. 2002).

<sup>36</sup> See also, *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002); and *Flores v. Amigon*, 233 F.Supp.2d 462 (E.D. N.Y. 2002). For cases decided prior to *Hoffman*, see *In re Reyes*, 814 F.2d 168 (5th Cir. 1987), and *Romero v. Boyd Brothers Transportation Co.*, 1994 WL 507475 (D Ct. Va. 1994). In addition, in *Escobar v. Baker*, 814 F. Supp. at 1493, the court noted that the plaintiffs had refused to answer questions about their status and held that the status was irrelevant to claims under the Agricultural Worker Protection Act.

1986 prohibits employment of unauthorized migrants, and requires employers to inspect the documents presented by new employees to determine if employees are eligible to work in the United States. The documents most frequently used are the Social Security Number and driver's license. In recognition of the negative impact this could have on all persons looking foreign, Congress included provisions to protect citizens and certain categories of legally authorized migrants from discrimination on the basis of their citizenship status. But not only do those provisions not apply to undocumented migrants, they also exclude from protection legal migrants who fail to demonstrate their intent to become citizens in their failure to apply for citizenship within six months of becoming eligible to do so.

**Social Security Benefits: No entitlement.** Migrants who are not authorized to work in the United States are not eligible (along with many legally present migrants) for many federal public benefits, including Social Security retirement benefits. Many undocumented migrants in the United States obtain work by using false Social Security cards. Even though these workers have paid into the system by way of mandatory payroll withholdings, they are unable to benefit from the Social Security system if their earnings were not properly credited due to a discrepancy, or "no match," between the worker's social security number and his/her name.

**Unemployment Compensation: No entitlement.** In the United States, a cooperative federal/state program exists which compensates workers who have lost their job through layoffs or other reason that is no fault of their own. Under federal law, migrant workers must be in particular immigration categories in order to qualify for unemployment insurance. Under the law, the state will look at migrants' status at the time the work was performed, (the "base year") and at the time that the worker applied for benefits, (the "benefit year"). The basic principle, as interpreted by the federal Department of Labor is that states may not provide unemployment compensation benefits to a migrant worker unless s/he had valid employment authorization both at the time s/he earned the wages and at the time s/he is unemployed and looking for work.

**Agricultural Worker Protection Act: No coverage for certain seasonal migrant workers.** Finally, the federal Migrant and Seasonal Agricultural Worker Protection Act, a specialized law that covers terms and conditions of employment for agricultural workers, excludes certain seasonal migrants admitted under a federal program known as the H-2A visa program, from coverage. This exclusion applies to approximately 40,000 workers yearly.<sup>37</sup>

**Access to Legal Services: No entitlement for undocumented migrants and certain temporary migrant workers.** Through the Legal Services Corporation, Inc., the federal government provides funding for the provision of free legal aid to income eligible individuals. In 1996, Congress amended the law under which this money is granted prohibiting any legal aid program receiving federal funds from representing unauthorized migrants. Furthermore, the Legal Services Corporation-funded entities are prohibited from representing certain seasonal migrants coming under the H-2B visa program available to employers seeking unskilled laborers on a seasonal or temporary basis.

#### **B. Judicially-created Exclusions from Labor Protections for Undocumented Migrant Workers.**

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<sup>37</sup> 8 U.S.C.A. § 1324(b)(3); 29 U.S.C.A. § 1802(8)(B)(2), (10)(B)(iii).



Because the remedies issues are often the subject of debate in the courts, a migrant worker's rights frequently will depend on whether a federal or state court has issued a decision on a particular issue, and what the decision is. Even though many decisions have been in favor of workers, the patchwork nature of the legal system creates a great deal of uncertainty, and does not comply with the human rights requirement that all migrants, regardless of immigration status, be granted equal rights in employment as nationals.

While most federal and state laws in the U.S., including those offering protection for the exercise of freedom of association, anti-discrimination laws, laws protecting health and safety on the job, wage and hour protections, do not distinguish on the basis of the immigration status of a worker, unlawful immigration status sometimes becomes relevant in determining which *remedies* are available to redress the workplace violation.

### **Denial of Right to Freedom of Association.**

In the United States, a federal law called the National Labor Relations Act, controls workers' rights to freedom of association and collective bargaining. As discussed above, it has long been the case that migrant workers, regardless of their immigration status, were considered "employees" covered under the Act. Employer use of workers' immigration status to threaten, intimidate or remove workers in retaliation for their union activities was also held to constitute an unfair labor practice in violation of §8(a)(3) of the NLRA.<sup>38</sup>

Up until 2002, the federal agency that administers the National Labor Relations Act, the National Labor Relations Board, allowed undocumented migrant workers to receive "back pay;" that is, pay for the time that they would have been working for the company if they hadn't been fired illegally. But in 2002, the highest court in the country, the U.S. Supreme Court held, in a case called *Hoffman Plastic Compounds, Inc., v. NLRB*,<sup>39</sup> an undocumented migrant worker illegally fired from his job because he was engaged in a union organizing campaign was not entitled to reinstatement and was not eligible for "back pay."

Hoffman created an onslaught of litigation by employers claiming that it limits workers' rights in almost every area of labor and employment law. Fortunately, courts have rejected the most of the extreme expansions of the decision, as discussed in the cases above describing good practices.

Since the Hoffman decision, the National Labor Relations Board has stated that even though undocumented workers are still covered by the NLRA, they will not be entitled to back pay for any period of time during which they lacked work authorization, or to reinstatement when they are illegally fired, unless they can show that they now have lawful employment status.<sup>40</sup> This means that for undocumented workers, there is no effective remedy for violations of the right to freedom of association. The Committee on Freedom of Association at the International Labor Office found the

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38 See *Sure-Tan*, 467 U.S. 883, 891 (1984); *Del Rey Tortilleria, Inc.* 272 NLRB 1106 (1984), *enf'd.*, 787 F.2d 1118 (7th Cir. 1986) (employer's demand that employees present social security cards and green cards two days after union filed representation petition constituted unfair labor practice).

39 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)

40 NLRB General Counsel, *Procedures and Remedies for Discriminatees Who May Be Unauthorized Aliens after Hoffman Plastic Compounds, Inc.* (Jul. 19, 2002) available at < <http://www.lawmemo.com/emp/nlr/gc02-06.htm>.>

refusal to allow for a back-pay remedy violates fundamental labor rights, and has urged the US Congress to conform its internal law to international legal standards.<sup>41</sup>

### **Denial of Full Protection and Guarantees against Discrimination.**

Several national laws protect workers against discrimination on the job. These include the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Equal Pay Act, and Title VII of the Civil Rights Act (which prohibits employment discrimination based on race, national origin, gender, and religion). The Equal Employment Opportunities Commission (EEOC) is the federal agency that enforces workers' rights to be free from discrimination. States also have their own anti-discrimination statutes, which often provide broader protections than those available under the federal statutes.

The *Hoffman* decision has had spillover impacts on protections under the anti-discrimination laws. At the federal level, after *Hoffman*, while the EEOC reaffirmed that undocumented workers are covered by these federal employment discrimination laws, the EEOC's policy of pursuing back pay on behalf of undocumented workers has been rescinded.<sup>42</sup>

The issue of the availability of back pay under state discrimination laws has not been fully addressed by the state courts either since *Hoffman*. While back pay at the state level *may* remain unaffected, because there is some law supporting a state's ability to make its own policy choices in this area, there have been some state court decisions that have harmed undocumented workers. For example, both New Jersey and California courts have concluded that victims of discrimination who are undocumented have no right to certain forms of compensation.<sup>43</sup>

### **Denial of Guarantee to all Remedies available when Rights to Minimum Wage and Overtime Pay are Violated.**

The federal Department of Labor, while it has stated that it will continue to protect victims of wage violation after *Hoffman*, has not said whether it will seek back pay (pay for work that a worker would have done if s/he hadn't been illegally fired) for undocumented workers who suffer retaliation for asserting their wage and hour rights.<sup>44</sup>

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41 332nd Report of the ILO Committee on Freedom of Association Report, Case No. 2227, available at: <http://www.ilo.org/public/english/standards/reim/gb/docs/gb288/pdf/gb-7.pdf>, paras. 551-613.

42 U.S. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Jun. 27, 2002) available at <<http://www.eeoc.gov/policy/docs/undoc-rescind.html>>

43 See, *Morejon v. Terry Hinge and Hardware*, 2003 WL 22482036 (Cal.App. 2 Dist. 2003) A New Jersey court held that a worker claiming discriminatory termination under New Jersey's Law Against Discrimination (LAD) was not entitled to claim economic or non-economic damages because she could not be lawfully employed. In that case, the plaintiff had left work on maternity leave and her employer refused to reinstate her after the leave. In reaching its conclusion, the New Jersey Superior court recognized that there might be cases where "the need to vindicate the policies of the LAD ... and to compensate an aggrieved party for tangible physical or emotional harm" might lead to concluding that an individual should be able to seek compensation for that harm. *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. Super. A.D. 2004), cert. denied 849 A.2d 184 (2004).

44 Federal courts have held that *Hoffman* is not relevant to wages owed under the FLSA or the state wage and hour laws, and have made rulings favoring plaintiffs. *Flores v. Albertson's, Inc.*, (S.D.N.Y. 2002), *Renteria*, 2003 WL 21995190 (overtime pay available under FLSA); *Flores v. Amigon*, 233 F.Supp.2d 462 (E.D.N.Y. 2002)(overtime pay). 2002 WL 1162633 (C.D. Cal. 2002); and *Zeng Liu v. Donna Karan Intern., Inc.*, 207 F. Supp. 2d 191.

At the state level, while state courts have similarly continued to hold that migrants owed unpaid wages may claim those wages under state law after *Hoffman*, there have been some troubling results.<sup>45</sup> One court, sitting as a small claims court in New York, has placed limitations on workers' ability to recover unpaid wages after *Hoffman*. In *Ulloa v. Al's All Tree Service, Inc.*, 768 N.Y.S.2d 556 (N.Y. Dist. Ct. Sep. 22, 2003), the court limited a landscape worker to recovery of minimum wage only, not the contract wage the worker claimed was promised.<sup>46</sup>

### **Denial of Protection of Health and Safety on the job.**

The primary U.S. law that protects workers' rights to health and safety is the Occupational Safety and Health Act. This law contains no exclusion for undocumented migrant workers and the US Department of Labor has stated that the Department will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), as well as the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), and the Mine Safety and Health Act, without regard to whether an employee is documented or undocumented.<sup>47</sup> Again, though, the Department of Labor statement leaves open the issue of back pay for undocumented workers who suffer retaliation for asserting their health and safety rights.

Unfortunately, the ability of OSHA to conduct information sessions and trainings with regard to health and safety in the workplace recently suffered a serious setback, due to the Immigration Service's recent workplace raid conducted after posing as health and safety inspectors who were scheduling a "meeting" at a plant in North Carolina. Workers who came to hear about their rights to health and safety on the job were arrested and put in removal proceedings.<sup>48</sup>

### **Workers' Compensation (for workplace injuries).**

In the United States, all states have systems that cover medical benefits, wage loss, permanent disability and loss of life for workers who are injured in the job. The systems vary in their generosity from state to state. The process for an injured worker is to file a claim, which is decided by an administrative agency and which may be appealed to the courts.

In the onslaught of litigation that followed *Hoffman* -- workers' compensation cases in eleven states in three years -- state agencies and courts have generally decided that migrant workers, even those

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45In the first cases to emerge, courts held, just as they have in FLSA cases, that wages for work already performed was to be distinguished from traditional back pay disallowed in *Hoffman*. See, *Valadez v. El Aguila Taco Shop*, No. GIC 781170 (San Diego, Cal. Superior Ct. 2002) (holding that *Hoffman* does not affect an undocumented worker's right to recover unpaid wages under the California Labor Code); *De la Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002).

46This ruling appears to conflict with the policy of the New York Attorney General to continue recovering wages on behalf of undocumented workers after *Hoffman*. See Formal Opinion No. 2003-F3, Ability of Department of Labor to enforce wage payment laws on behalf of undocumented immigrants, available at <[http://www.oag.state.ny.us/lawyers/opinions/2003/formal/2003\\_f3.html](http://www.oag.state.ny.us/lawyers/opinions/2003/formal/2003_f3.html)>

47 Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman* Plastic decision on laws enforced by the Wage and Hour Division available at <<http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>> See also, U.S. Department of Labor, *Hoffman Plastic Compound, Inc. v NLRB*. Questions and Answers.

48 Immigration Agents. Posing as OSHA Trainers. Arrest Workers. Occupational Hazards (July 18, 2005. at [www.occupationalhazards.com/articles/13736](http://www.occupationalhazards.com/articles/13736)).

who are undocumented, continue to be entitled to workers' compensation benefits.<sup>49</sup> Most have granted undocumented migrants the full range of benefits that they claim, including both medical benefits and lost wages. However, in three states, Michigan, Pennsylvania, and Kansas, courts have said that undocumented workers are not entitled to compensation for lost wages because of injuries.<sup>50</sup>

### **Migrants and Vocational Rehabilitation.**

Vocational rehabilitation benefits are normally provided for workers who have been injured on the job as part of the overall workers' compensation benefits package. Vocational rehabilitation is granted so that an injured employee may be retrained to perform the same job, or to perform a different job at the same company. Courts in the states of Nevada and California have concluded that unauthorized workers are not entitled to vocational rehabilitation benefits under certain circumstances.<sup>51</sup>

### **Migrants and Death Benefits.**

Workers' compensation laws in many states bar the non-resident family members of workers killed on the job from receiving full benefits. In those states, whenever the family member is living outside the United States and is not a United States citizen, the family members do not receive the full death benefits award. There are several ways in which states limit compensation to nonresident alien beneficiaries. Some states limit compensation compared to the benefits a lawful resident would have received, generally 50% (Arkansas, Delaware, Florida, Georgia, Iowa, Kentucky, Pennsylvania, and South Carolina).<sup>52</sup> Some states restrict the types of non-resident dependents who are eligible as to receive benefits as beneficiaries (Arkansas, Delaware, Florida, Kentucky, and Pennsylvania). Other states limit coverage based on: the length of time a migrant has been a citizen (Wisconsin), the laws of the alien resident beneficiary's home country (Washington) or the cost of living in the alien resident beneficiary's home country (Oregon).<sup>53</sup> Alabama denies benefits to all foreign beneficiaries.<sup>54</sup> Although these laws do not explicitly discriminate on the basis of alienage alone, they disproportionately deny equal benefits to non-nationals, who are most likely to have beneficiaries who are non-resident aliens.

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49 *Tiger Transmissions v. Industrial Commission of Arizona*, No. 1 CA-IC 02-0100 (May 29, 2003); *Safeharbor Employer Services I Inc., v. Velazquez*, 860 So.2d 984 (Fla. App. 2003); *Wet Walls, Inc., v. Ledezma*, \_\_\_ S.E.2d \_\_\_ 2004 WL 614898 (Ga. App. 2004); *Medellin*, Board No. 03324300 (Mass. Dep. Of Industrial Accidents, Dec. 23, 2003); *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Ct. Apps. Mich. 2003); *Correa v. Weymouth Farms, Inc.*, 664 N.W.2d 324 (2003); *Ortiz v. Chief Industries, Inc.*, 2002 WL 31771099 (Neb. Work. Comp. Ct., 2002); *The Reinforced Earth Company v. Workers' Compensation Appeal Board (Astudillo)*, 810 A.2d 99 (Pa. 2002); *Silva v. Martin Lumber Company*, 2003 WL 22496233 (Tenn. Workers Comp. Panel, 2003) Appellant: \*\*\* v. Respondent: \*\*\*, 2002 WL 31304032 (Tex. Work. Comp. Com., 2002), *Design Kitchen and Bath v. Lagos*, 2005 WL 2179187 (Md. Ct. Apps. 2005).

50 *Sanchez v. Eagle Alloy*, 658 N.W. 2d 510 (Ct. Apps. Mich. 2003); *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A.2d 99 (Pa. 2002); *Doe v. Kansas Dep't of Human Resources*, 90 P.3d 940 (Sup. Ct. Kansas 2004).

51 *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (Nev. 2001); *Foodmaker v. Workers' Compensation Appeals Board*, 78 Cal. Rptr.2d 767 (Cal. Ct. Apps., Div. 2 1999).

52 Code of Ala. § 25-5-82 (2002); A.C.A. § 11-9-111 (2002); 19 Del. C. § 2333 (2001); Fla. Stat. § 440.16 (2002); O.C.G.A. § 34-9-265 (2002); Iowa Code § 85.31 (2002); KRS § 342.130 (2001); 77 P.S. § 563 (2002); S.C. Code Ann. § 42-9-290 (2001).

53 Wis. Stat. § 102.51 (2001); Rev. Code Wash. 51.32.140 (2002); ORS § 656.232 (2001).

54 A.C.A. § 11-9-111 (2002).

## **Claims for Personal Injury.**

In the United States, a state-based insurance system compensates workers who are injured on the job. In some limited circumstances, workers are allowed to sue third parties for lost wages and injuries on the job. Decisions have been uneven with respect to wage loss in tort cases since *Hoffman*. Courts in Kansas and Florida have held that lost wage claims are not allowed after *Hoffman*.<sup>55</sup>

## **C. IMMIGRATION ENFORCEMENT'S INTERFERENCE WITH WORKERS RIGHTS**

The good practices outlined in the Section above are often undercut by direct workplace enforcement against undocumented workers at their place of employment, the misuse by employers of government information stating that a workers' Social Security Number does not match government records, and the series of databases that are being used and developed to cross-match employee information in a wide variety of contexts. The system of focusing immigration enforcement in the workplace has created confusion among immigrant workers with respect to whether or not they can expect confidentiality if they have a complaint for violation of labor rights, and trust state and federal agencies whose purpose it is to ensure employers' compliance with all labor laws.

### **Social security No-Match letters.**

As a result of the employer sanctions provisions of the immigration laws, making it unlawful for an employer to hire an unauthorized migrant, it is prevalent among immigrant workers who lack work authorization to use a social security number that is either made up, or borrowed from a friend or family member, in order to get a job. The social security number is a nine-digit number that is used to keep track of payroll taxes, and eventually, old age, retirement and disability pensions.

The Social Security Administration, which administers the retirement pension system, has hundreds of billions of dollars in social security taxes that it cannot assign to an individual social security account because the numbers and names of the person from whom the taxes were deducted do not match up with the same number and name in their database. As a result, the agency sends a SSA no-match letter to notify an employer that he or she has submitted reports that contain names and Social Security numbers that do not match SSA records. The letter provides an attachment with the names and/or Social Security numbers that do not match. While often the number mismatch is not related to immigration status, the receipt of the letter causes employer to worry that they will be fined for hiring undocumented workers, even though this is not the case. It has become common for unscrupulous employers to fire workers based on the Social Security no-match letter, often without giving workers the opportunity to correct mistakes, sometimes holding onto the no-match letter until such time as the employer tries to assert a workplace right. The letters have also been used to undermine or eliminate organizing activity at worksites.

### **Electronic Verification Systems.**

Currently in the United States, a number of electronic systems exist for the use of employers to verify the immigration status of their workers. One system, called the Basic Pilot System, was adopted in

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<sup>55</sup>*Hernandez-Cortez v. Hernandez*, 2003 WL 22519678 (D. Kan. Nov. 4, 2003); *Veliz v. Rental Service Corp. USA* (313 F.Supp.2d 1317 (2003)). Courts in New York, California, and Texas have held that lost wages are recoverable. *Majlinger v. Cassino Contracting Company*, 2005 NY Slip Op 06785 (2005); *Hernandez v. Paicius*, 109 Cal.App.4th 452 (Cal. Ct. App. 2003); *Tyson Foods v. Guzman*, 116 S.W.3d 233 (Tex.App. Jul 31, 2003).

1996 as a pilot program operating in a few states. It grants employers certain legal benefits if they agree to electronically verify the documents presented by workers to show that they are eligible to work in the US. Congress mandated that an evaluation of the program be done, and the INS Basic Pilot Evaluation was published by the outside firms chosen to conduct the survey, Westat and Temple University Institute for Survey Research, in 2002.<sup>56</sup>

The conclusions of the outside evaluating firms were clear. The Basic Pilot involved pervasive problems in both design and implementation -- inaccuracies in the databases used, human error, and employer misuse and abuse -- that led to the recommendation that the Pilot not be expanded.<sup>57</sup> This recommendation was unequivocal; the evaluators concluded that some of the problems they identified "could become insurmountable if the program were to be expanded dramatically in scope."<sup>58</sup> Despite these conclusions, the Basic Pilot has been expanded nationwide in 2005.

### **Local Enforcement of Immigration Laws.**

Until recent years, it has been the practice in many cities and states that local police officials do not act as immigration agents, for several reasons. Turning local police into immigration agents is a dangerous trend that deters migrants from accessing or cooperating with the police for fear of immigration consequences. When migrants are afraid to file claims with administrative agencies, call the police, or go to court, they can not benefit from the protections of law enforcement. However, since 1996, the federal agency charged with immigration law enforcement has increased its cooperation with local police and other law enforcement agencies, both formally and informally both through the passage of federal laws authorizing state and local police to enforce the criminal provisions of federal immigration laws, and with a recent policy change authorizing state and local authorities to enforce even civil provisions of the laws. Generally in the US, a person who is unlawfully in the country has committed only a civil violation of the law, although there is a significant increase in criminal prosecutions of individuals in immigration proceedings on visa fraud grounds.<sup>59</sup>

## **CONCLUSION AND RECOMMENDATIONS**

In order to recognize development and the alleviation of poverty among migrants and all low-wage workers, non-discrimination must be the guiding principle in the enforcement of labor and employment rights. To achieve that goal, we need to ensure not only that the laws do not allow for discrimination, but we must also look towards creative modes of advocacy, such as worker organizing, education and engagement of the international human rights mechanisms. The following are examples of such advocacy:

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56 Summary and Detailed Reports available at, <http://uscis.gov/graphics/aboutus/repstudies/piloteval/PilotEvalComplete.htm>.

57 See, Findings of the Basic Pilot Program Evaluation (January 2002) (Summary Report), at 41.

58 Id.

59 In October, 2005 in Pennsylvania, a local district attorney (an office that usually has no part in immigration enforcement) ordered his detectives to investigate use of false social security numbers at a local plant. The investigation resulted in the arrest of 32 individuals on charges including "identity theft." Jose McDonald, *Thirty-two workers charged as undocumented immigrants Employees arrested at Molded Acoustical Products in Palmer*, THE MORNING CALL (October 13, 2005).



- Immigrant Worker Freedom Ride of 2003: immigrants joined with worker advocates, civil rights advocates and others in a nationwide bus tour demanding rights of all migrants. See <http://www.iwfr.org/>.
- In the regional trade arena, migrant apple pickers brought claims under the North American Free Trade Agreement labor side agreements.
- Worker advocates held a hearing at the Inter-American Commission of Human Rights, recommending the Commission issue a statement recognizing the application of Advisory Opinion OC-18 to the United States, conduct site visits and participate in a Congressional briefing through which the Commission could educate federal legislators. See <http://www.wcl.american.edu/clinical/workersrights.pdf?rd=1>

The Inter-American Court decision was a landmark in the protection of workers' rights in the member countries of the OAS. Because not all countries in the hemisphere (notably the United States as the primary receiving nation) have ratified the Migrant Workers' Convention, an alternative way to measure a country's compliance with the principles of equality and non-discrimination is by measuring the country's performance against the specific areas in which the Court said equal rights must be afforded. These fundamental rights include equal pay, health and safety protection, the right to freedom of association and indemnization. Countries' performance should be measured against these goals and a hemispheric-wide strategy developed to make the necessary changes to ensure that migrant workers, no matter when or how they came to a country, are offered full equality under labor laws. Only then can their contributions to receiving countries be fully established and fully appreciated.