

SOLUTIONS, NOT SCAPEGOATS: ABATING SWEATSHOP CONDITIONS FOR ALL LOW-WAGE WORKERS AS A CENTERPIECE OF IMMIGRATION REFORM

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I.

INTRODUCTION

Across the country, low-wage workers are all too frequently paid less than the minimum wage, denied overtime pay, and retaliated against for speaking up about their treatment. In particular, immigrant workers in the United States work exceedingly hard, often in situations of wage exploitation, discrimination, and exposure to life-threatening dangers on the job. Because of their recent arrival in the United States, undocumented immigrants can face especially staggering obstacles to obtaining even the basic necessities for survival, leaving them vulnerable to exploitation by unscrupulous employers.

Protection of the labor rights of undocumented workers has not been central to the national debate on immigration reform. Instead, the major focus of discussion has been border security, and the tenor of the debate has often demonized immigrant workers, with some commentators making frequent references to an “illegal immigrant invasion.”¹ To the extent that workers are discussed, the question has

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1. See, e.g., Pre-Election Focus in Congress on National Security, USA TODAY, Sept. 5, 2006, available at http://www.usatoday.com/news/washington/2006-09-05-congress-returns_x.htm; Lisa Porteus, Illegal Worker Debate Heats Up, FOXNEWS.COM, Nov. 30, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,176951,00.html; Rachel L. Swarns, House Votes to Toughen Mexico Border Security, INT'L HERALD TRIB., Dec. 17, 2005, at 7; Carl Hulse & Rachel L. Swarns, Senate Passes Bill on Building Border Fence, N.Y. TIMES, Sept. 30, 2006, at A10; Lou Dobbs Tonight (CNN television broadcast Mar. 21, 2005), transcript available at

often been whether undocumented workers currently in the country will have a path to legalization and citizenship, or be relegated to a guestworker program.² Discussions of employment have centered on enhanced employer sanctions that would require employers to verify workers' status through an electronic verification system.³

Rather than embarking on an expanded guestworker program which repeats the mistakes of the past, or counting on electronic verification systems to be a "silver bullet" to deter unlawful hiring of undocumented immigrants, Congress should consider a far more potent "employer sanction" in order to abate sweatshop conditions for all workers. Immigration reform must mean that all workers in this country—regardless of immigration status—are covered by and able to vindicate all labor and employment rights. Immigration reform should be pursued in tandem with labor law reforms that ensure that low-wage workers have a voice on the job, an enforceable minimum wage, and protection against unsafe working conditions. Such a focus would protect and advance the labor rights of all working people, whether United States- or foreign-born, and reduce the currently existing powerful incentives for employers to seek out and abuse undocumented workers. In this area, Congress could learn much from the experiences of the states in raising, indexing, and enforcing their minimum wages, and in addressing rampant misclassification of workers as independent contractors.

As a corollary to guaranteeing minimum labor standards for all workers, guestworker programs should not be the centerpiece of immigration reform. As discussed later in this article, these programs have been fraught with abuse of U.S. workers and foreign workers alike. Instead, before approving a vast new guestworker program, Congress should review current programs and correct past mistakes.

<http://transcripts.cnn.com/TRANSCRIPTS/0503/21/ldt.01.html>; Mark K. Matthews, Lawmaker Fights Immigrant 'Invasion,' STATELINE.ORG, Sept. 1, 2005, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=51723>. Perhaps the best clue to the range of the debate in the then Republican-controlled House is the list of titles of the field hearings held in the summer of 2006. See EAGLE FORUM, HOUSE IMMIGRATION FIELD HEARINGS SCHEDULE (2006), <http://www.eagleforum.org/alert/2006/08-02-06.html> (focusing on border security, the cost of illegal immigration, and guest-workers). See also Jonathan Weisman & Shailagh Murray, GOP Plans Hearings on Issue of Immigrants, WASH. POST, June 21, 2006, at A1.

2. See, e.g., Bill Ong Hing, *Guest Workers Program With a Path to Legalization*, PERSPECTIVES ON IMMIGRATION, Apr. 2006, http://www.aifl.org/ipc/2006_april_perspective.shtml.

3. See EAGLE FORUM, HOUSE IMMIGRATION FIELD HEARING SCHEDULE (2006), <http://www.eagleforum.org/alert/2006/08-02-06.html> (focusing on the hearing topic for July 31, 2006).

Two basic principles should guide its review: a guestworker program should be designed to ensure that U.S. workers (including newly-legalized workers) get first crack at decent jobs at decent wage levels. If U.S. workers are not available, the programs should ensure they protect the basic human rights and labor rights of guestworkers themselves. The existing programs that center on low-wage temporary workers—the H-2A and H-2B programs—have fallen far short of this goal.

A comprehensive legalization program that allows currently undocumented workers to be full participants in civil and economic society is the most important piece of legislation on immigration and labor that Congress could pass. Possessing legal status would allow workers to make claims for compensation for workplace injuries, challenge unhealthful and substandard conditions, organize, or simply vote with their feet. However, all low-wage workers would benefit from additional protection of and enforcement of their labor rights, and correction of the many abuses that have existed under current guestworker programs.

This article analyzes the failures of law and policy that have left many full-time workers in poverty, proposes an agenda for change for both U.S. and immigrant workers, and notes the areas in which some of the bills considered in the 109th Congress succeeded (and failed) in considering these core labor principles.

II.

PROBLEM: LABOR RIGHTS NEGLECTED

A. *The Collapsing Wage Floor*

In 2004, 7.8 million individuals in America were classified as “working poor,” spending at least twenty-seven weeks per year in the labor force (working or looking for work), but still earning less than the federal poverty threshold.⁴ Three in five of these workers were employed full time, many of them in service industries, natural resources, and construction.⁵ The following table presents a snapshot of low-wage occupations in the United States.

4. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, A PROFILE OF THE WORKING POOR, 2004, at 1 (2006), <http://www.bls.gov/cps/cpswp2004.pdf>.

5. *See id.* at 1–3.

DISTRIBUTION OF WORK AMONG OCCUPATIONAL GROUPS BY LEVEL
OF WAGES, SELECTED YEARS FROM 1983 TO 2002

Occupational Group	Percentage of Work Paid Low Hourly Wages						Percentage of All Work That Is Paid Low Hourly Wages			Percentage of All Work in Group		
	1983		1992		2002		1983	1992	2002	1983	1992	2002
	Percent	Rank	Percent	Rank	Percent	Rank						
Food Service	14.6	1	14.4	1	15.0	1	4.2	4.2	4.3	70	70	69
Sales Workers, Retail and Personal Service	12.5	2	12.4	2	12.0	2	4.5	4.4	4.4	55	57	55
Other Administrative Support, Including Clerical	7.0	4	7.7	3	8.1	3	7.4	8.6	8.4	19	18	19
Machine Operators and Tenders, Excluding Precision	7.4	3	6.7	4	4.5	5	6.1	4.8	3.4	24	28	26
Cleaning and Building Service	5.4	6	5.4	5	5.0	4	2.6	2.5	2.2	41	44	44
Farm Workers and Related Occupations	5.4	5	5.0	6	4.2	7	1.8	1.7	1.5	60	60	55
Other Handlers, Equipment Cleaners, Helpers, and Laborers	3.8	9	3.8	7	3.9	8	2.2	2.0	1.9	34	39	42
Health Service	3.8	8	3.6	9	4.3	6	1.8	1.9	2.1	42	40	41
Personal Service	3.0	10	3.7	8	3.9	9	1.1	1.4	1.5	55	54	51
Motor Vehicle Operators	2.8	13	3.5	10	3.4	10	3.3	3.5	3.5	17	20	19
Total	65.6	n.a.	66.2	n.a.	64.3	n.a.	34.9	34.9	33.2	n.a.	n.a.	n.a.

Source: Congressional Budget Office based on the Bureau of the Census's Current Population Surveys.⁶

Foreign-born workers form a large share of the working poor in America: in 2002, 17.9 million out of a total of 125.3 million workers in the U.S. were foreign-born, but foreign-born workers made up 8.6 million out of a total of 43.1 million low-wage workers (defined as making less than 200% of the state prevailing minimum wage).⁷ Two-thirds of the undocumented workforce, or about four million workers, are low-wage workers making less than twice the minimum wage.⁸ Immigrant workers represent 44% of low-wage employees in private households, 44% of agricultural workers, and 24% of service workers.⁹

6. CONG. BUDGET OFFICE, CHANGES IN LOW-WAGE LABOR MARKETS BETWEEN 1979 & 2005, at 17 (2006), available at <http://www.cbo.gov/ftpdocs/76xx/doc7693/12-04-LaborForce.pdf>.

7. See RANDY CAPPS ET AL., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 2 (Urban Inst. Immigrant Families and Workers Facts and Perspectives, Brief No. 4, 2003), available at <http://www.urban.org/publications/310880.html>.

8. See JEFFREY S. PASSEL ET AL., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (2004), available at <http://www.urban.org/url.cfm?ID=1000587&renderforprint=1>.

9. See CAPPS ET AL., *supra* note 7, at 7.

The federal minimum wage of \$5.15 per hour (about \$10,700 per year for a full-time, full-year worker) is crushingly low. Over half of the states have partly filled in the gap with state-level increases, including six new states—Arizona, Colorado, Missouri, Montana, Nevada, and Ohio—that both raised their state minimum wage by ballot initiative in the November 2006 election and tied further increases to the cost of living.¹⁰ To its credit, the incoming Congress indicated early that one of its top priorities for the 110th Congress was to raise the minimum wage. After a lengthy stall in the Senate, a modest increase—from \$5.15 to \$7.25 over two years—was included as part of the funding for the war in Iraq.¹¹

But merely increasing the minimum wage is less than half the battle. For many workers, there is a gap between coverage by minimum wage laws and compliance with minimum wage laws. Many employers of low-wage workers, especially in industries in which immigrant workers are overrepresented, are also frequent violators of wage and hour laws. Recent government studies find as many as 50 to 100% of garment, nursing home, and poultry employers in violation of the basic minimum wage and overtime protections of the Fair Labor Standards Act.¹² The Bureau of Labor Statistics found that 2.2 million

10. Editorial, *The Minimum They Should Do*, S.F. CHRON., Nov. 30, 2006, at B8; EMPLOYMENT STANDARDS ADMIN., WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, MINIMUM WAGE LAWS IN THE STATES—Jan. 1, 2007, available at <http://www.dol.gov/esa/minwage/america.htm>; LIANA FOX, STATE MINIMUM WAGES ON THE BALLOTS (2006), http://www.epi.org/content.cfm/webfeatures_snapshots_20061025.

11. See Fair Minimum Wage Act of 2007, Pub. L. No. 110-028 §§ 8101–04. 121 Stat. 188–89 (2007). See also Editorial, *The Minimum They Should Do*, S.F. CHRON., Nov. 30, 2006, at B8; Press Release, Senator Edward Kennedy, Kennedy, Schumer, Clinton Join Leaders and Activists to Celebrate State Minimum Wage Wins and Fight for Federal Increase (Nov. 16, 2006), http://kennedy.senate.gov/newsroom/press_release.cfm?id=b2191140-999e-4224-b96d-d183b7e26592. The Senate's consideration of the bill was stalled by a long series of amendments that would privilege small business, grant tax breaks to businesses that outsource workers to professional employee organizations, and incorporate some of the employer sanctions provisions included in bills pending in the 109th Congress.

12. See U.S. DEP'T OF LABOR, YEAR 2000 POULTRY PROCESSING COMPLIANCE REPORT 3 (2000), (indicating 100% noncompliance among the investigated poultry processing plants); Bureau of Nat'l Affairs, U.S. Dep't of Labor, *Close to Half of Garment Contractors Violating Fair Labor Standards Act*, 1996 DAILY LABOR REPORT 87 (indicating that about 47% of garment contractors and manufacturers were found to be in violation of the Act); DAVID WEIL, COMPLIANCE WITH THE MINIMUM WAGE: CAN GOVERNMENT MAKE A DIFFERENCE? 11 (2004), http://www.soc.duke.edu/sloan_2004/Papers/Weil_Minimum%20Wage%20paper_May04.pdf (indicating that 54% of garment contractors surveyed were not in compliance); U.S. DEP'T OF LABOR, COMPLIANCE HIGHLIGHTS: 1999 SALAD BOWL REPORT 1, 3 (1999) (on file with NYU Journal of Legislation and Public Policy) (indicating that compliance levels were “unacceptably low” in agriculture industries specializing in cucumbers, lettuce,

hourly workers were paid at or below the federal minimum wage in 2002.¹³

Nor has enforcement of the wage and hour rights of low-wage workers kept up with the frequency of violations. In the face of wholesale violations in particular industries, resources dedicated to enforcement have been falling for many years. For example, from 1975–2004, the budget for U.S. Wage and Hour Division (WHD) investigators, tasked with investigation and enforcement of the nation's minimum wage laws, decreased by 14% (to a total of 788 individuals nationwide) and completed enforcement actions decreased by 36%, while the number of workers covered by statutes enforced by the WHD grew by 55%.¹⁴ In fiscal year (FY) 2004, there was approximately one federal Wage and Hour investigator for every 110,000 workers covered by Fair Labor Standards Act (FLSA).¹⁵ By 2007, the U.S. Department of Labor's (DOL) budget dedicated to enforcing wage and hour laws will be 6.1% less in real dollars than before President Bush took office.¹⁶

For certain workers, the DOL's WHD's processes make it difficult for workers to register their complaints. In 2004, 78% of all WHD enforcement was complaint-driven, a system that means that government does not hear from workers in the industries that have the most wage and hour violations.¹⁷ The U.S. General Accounting Office (now called the "Government Accountability Office" or GAO) observed in a September 2002 report that workers do not complain due to language, education and skill levels, fear of retribution, or, for

and onions); U.S. DEP'T OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, NURSING HOME 2000 COMPLIANCE SURVEY FACT SHEET, <http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm> (indicating that 60% of nursing homes surveyed were not in compliance). In addition, a 2005 nongovernmental survey of hundreds of New York City restaurants found that more than half were violating overtime or minimum wage laws. See RESTAURANT OPPORTUNITIES CENTER OF NEW YORK AND THE NEW YORK CITY RESTAURANT INDUSTRY COALITION, BEHIND THE KITCHEN DOOR: PERVERSIVE INEQUALITY IN NEW YORK CITY'S THRIVING RESTAURANT INDUSTRY, EXECUTIVE SUMMARY 3 (2005), available at <http://www.rocny.org/documents/ROC-NY-ExecSummary.pdf>.

13. See Bureau of Nat'l Affairs, *Workers are Paid at or Below Minimum Wage in 2002*, BLS Says, 173 LAB.REL.RPTR. 16, 16 (2003).

14. Annette Bernhardt & Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, (Brennan Ctr. for Justice at NYU Sch. of Law, Econ. Policy Brief No. 3, 2003).

15. There are nearly eighty-eight million people covered by FLSA. *Id.* at 2.

16. Judd Legum et al., *Labor—Bush Priorities Hurt Workers, Help Employers*, The Progress Report (Ctr. for Am. Progress Action Fund, Wash., D.C., June 14, 2006).

17. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 59, 61, 72 (2006).

some, fear of deportation, and because government agencies do not find out about violations, they are unable to do their job with respect to day laborers.¹⁸

For other workers, the federal minimum wage and overtime laws simply do not apply. Workers left out of minimum wage protection include home health care workers subject to FLSA's "companionship exemption," who are not covered by minimum wage at all.¹⁹ Agricultural workers and live-in domestic workers are not covered by overtime rules.²⁰ Tipped employees' wages can be reduced by as much as half, to \$2.13 per hour, due to tips they supposedly receive.²¹ As a result of the DOL's regulatory changes to the administrative overtime exemptions under FLSA, six million workers may have lost their right to overtime pay since 2004.²²

For still other workers, employers have opted to self-exempt from wage and hour laws by passing off their workplace responsibilities to subcontractors²³ or misclassifying workers as independent contractors.²⁴ In general, independent contractors constitute a small proportion of the American workforce, hiring out their special skills to various companies.²⁵ Because independent contractors are thought of as being in business on their own, employers are not required to pay a variety of payroll taxes (including social security and unemployment insurance).²⁶ These workers are not protected under employment

18. U.S. GEN. ACCOUNTING OFFICE, GAO 02-925, *WORKER PROTECTION: LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE* 14 (2002).

19. See 29 U.S.C. § 213(a)(15) (2000).

20. 29 U.S.C. § 213(b)(12) (2000); 29 U.S.C. § 213(b)(21) (2000).

21. 29 U.S.C. § 203(m) (2000). See also U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #29: FAIR LABOR STANDARDS ACT AMENDMENTS OF 1996, <http://www.dol.gov/esa/regs/compliance/whd/whdfs29.htm>.

22. ROSS EISENBREY, *LONGER HOURS, LESS PAY 1* (Econ. Policy Inst., Briefing Paper No. 152, 2004), available at http://www.epinet.org/content.cfm/briefingpapers_bp152.

23. See NAT'L EMPLOYMENT LAW PROJECT, *SUBCONTRACTED WORKERS: THE OUTSOURCING OF RIGHTS AND RESPONSIBILITIES 1* (2004), available at <http://www.nelp.org/docUploads/subcontracted%20work%20policy%20update%5F072704%5F065405%2Epdf>.

24. See NAT'L EMPLOYMENT LAW PROJECT, *1099'D: MISCLASSIFICATION OF EMPLOYEES AS "INDEPENDENT CONTRACTORS" 1* (2005), available at <http://www.nelp.org/docUploads/independent%20contractor%20misclassification%2Epdf>.

25. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, *EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION* 11 (July 2006) (finding that "independent contractors" are 7.4% of today's workforce). Some number of those listed by the GAO as "independent contractors" are in fact misclassified employees, making the overall percentage even smaller.

26. IRS, PUBL'N No. 15-A, *EMPLOYER'S SUPPLEMENTAL TAX GUIDE 6* (2007); IRS, PUBL'N No. 15, (CIRCULAR E), *EMPLOYER'S TAX GUIDE 7* (2007).

laws.²⁷ In an era of non-enforcement, these advantages often lead employers to misclassify employees (whose work is controlled by their employer) as independent contractors in order to cut their labor costs.²⁸

In 2000, the DOL commissioned a study of employer tax evasion in the unemployment insurance system.²⁹ That study found eighty thousand workers lost benefits annually because of employer misclassification of workers as independent contractors.³⁰ Of the nine states audited in the study, the percentage of employers that had misclassified some of their workforce ranged from a low of 9.15% in New Jersey to a high of 42% in Connecticut.³¹ DOL audits of unemployment systems generally identify a large percentage, about 42% of employers, who are required to correct their classifications of workers as independent contractors rather than employees.³² In 2004, the DOL audited only 1.7% of employers, but those audits resulted in a 5% increase in wages unreported to state agencies.³³

These violations have an impact on individual workers, who find it difficult or impossible to recover from their employers for wage and hour violations, or to receive unemployment or workers' compensation benefits.³⁴ The employer-backed Employer Policy Foundation estimated that workers would receive an additional \$19 billion annually if employers obeyed workplace laws.³⁵ Violations of the law also have an impact on federal revenue: the GAO estimated that misclassification of employees as independent contractors alone reduces federal income tax up to \$1.6 billion in 1984.³⁶ Coopers & Lybrand (now PriceWaterhouse Coopers) estimated in 1994 that proper classification of workers would increase tax receipts by \$34.7 billion over the period from 1996 to 2004.³⁷ A recent analysis of workers' compensation and

27. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 24, at 7–8.

28. See NAT'L EMPLOYMENT LAW PROJECT, 1099'D, *supra* note 23, at 1–2.

29. PLANMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS (2000), available at <http://wdr.doleta.gov/owsdrr/00-5/>.

30. *Id.* at iv.

31. *Id.* at 56.

32. See U.S. DEP'T OF LABOR, UI PERFORMS CY 2004 ANNUAL REPORT 38 (2006), available at <http://www.ows.doleta.gov/unemploy/uipar.asp>.

33. *Id.* at 38–39.

34. See NAT'L EMPLOYMENT LAW PROJECT, *supra* note 24, at 1.

35. See Craig Becker, *A Good Job for Everyone*, LEGAL TIMES, Sept. 6, 2004.

36. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-89-107, TAX ADMINISTRATION: INFORMATION RETURNS CAN BE USED TO IDENTIFY EMPLOYERS WHO MISCLASSIFY EMPLOYEES 1 (1989).

37. COOPERS & LYBRAND, PROJECTION OF THE LOSS IN FEDERAL TAX REVENUES DUE TO MISCLASSIFICATION OF WORKERS 26 (1994).

unemployment compensation data in New York found that noncompliance with payroll tax laws means as many as 20% of workers' compensation premiums—\$500 million to \$1 billion—go unpaid each year.³⁸

B. Risky Business

In 2005, over 5700 workers were killed on the job in the United States, and nonfatal workplace injuries and illnesses occurred at a rate of 4.6 cases per 100.³⁹ The trends are particularly bad for immigrant workers, who hold the most dangerous jobs.

Among at-risk workers, the DOL's Bureau of Labor Statistics (BLS) found in 2005 that the highest work-related fatality rates were in the construction, transport and warehousing, and agriculture sectors.⁴⁰ Immigrant workers are employed in these and other high-risk sectors, and their rates of injury and death are alarmingly high.⁴¹ Fatal injuries to immigrant Latino workers increased 11% from 2003 to 2004, with a fatality rate among Latino workers 19% higher than the fatal injury rate for all U.S. workers.⁴² In 2005, deaths among Latino workers reached an all-time high at 917, and workplace fatalities to foreign-born Latino workers rose to 625, up from 596 in 2004.⁴³

38. FISCAL POLICY INST., *NEW YORK STATE WORKERS' COMPENSATION: HOW BIG IS THE COVERAGE SHORTFALL?* 2 (2007).

39. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *CENSUS OF FATAL OCCUPATIONAL INJURIES SUMMARY, 2005*, available at <http://www.bls.gov/news.release/cfoi.nr0.htm>; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *WORKPLACE INJURY AND ILLNESS SUMMARY*, available at <http://www.bls.gov/news.release/osh.nr0.htm>. These numbers do not, of course, take into account injuries that go unreported. Underreporting is a serious issue for many workers who fail to report injuries either because of a fear of retaliation or because of economic incentives that employers offer them. Lenore S. Azaroff et. al., *Occupational Injury and Illness Surveillance: Conceptual Filters Explain Underreporting*, 92 AM. J. PUB. HEALTH 1421, 1421–22 (2002).

40. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *NAT'L CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2005*, at 3 (2006), available at <http://www.bls.gov/news.release/pdf/cfoi.pdf>.

41. See OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, *OSHA STRATEGIC MANAGEMENT PLAN 2003–2008*, at 6, available at <http://www.osha.gov/StratPlanPublic/strategicmanagementplan-final.html> (“Immigrant and ‘hard-to-reach’ workers and employers are also becoming more prevalent. Many immigrants are less literate, unable to read English instructions, and work in some of the most inherently dangerous jobs.”).

42. Scott Richardson, *Fatal Work Injuries Among Foreign-Born Hispanic Workers*, MONTHLY LABOR REVIEW, Oct. 2005, at 63, 65–66, available at <http://www.bls.gov/opub/mlr/2005/10/ressum.pdf>.

43. BUREAU OF LABOR STATISTICS, *supra* note 40, at 5.

These injuries and accidents come at a staggering cost. The nation's largest workers' compensation insurance company, Liberty Mutual Insurance, collects data on the causes and costs of compensable work injuries and illnesses.⁴⁴ Its 2005 Workplace Safety Index calculated that workplace injuries cost U.S. employers \$50.3 billion in direct costs, and between \$150.0 billion and \$301.1 billion annually in indirect costs.⁴⁵

The Occupational Safety and Health Administration (OSHA) has too few resources to adequately protect worker safety and health. At current staffing levels, it would take the OSHA 117 years to inspect the workplaces under its jurisdiction.⁴⁶ In the meantime, penalties for serious violations of the Occupational Safety and Health Act (OSH Act), those that pose a substantial probability of death or serious physical harm, carry an average penalty of only \$883.⁴⁷ According to a *New York Times*' analysis of OSHA data, "companies whose willful acts kill workers face lighter sanctions than those who deliberately break environmental or financial laws."⁴⁸ But in recent years, OSHA's budget has favored voluntary and educational efforts over enforcement involving civil and criminal penalties.⁴⁹

Just as is the case with the protection of the FLSA, not all workers are covered under OSHA. For example, domestic workers are excluded from OSHA, and Congress prohibits OSHA from inspecting farms with ten or fewer employees.⁵⁰ For employees in industries excluded from OSHA's protection, workplace health and safety is completely dependent on whether employers know how to address risks on the job and have to will to protect them, since no government agency has the responsibility to enforce their rights to a healthful workplace.

44. AFL-CIO, *DEATH ON THE JOB: THE TOLL OF NEGLECT* 6 (2006), available at www.aflcio.org/issues/safety/memorial/upload/death_on_the_job_2005.pdf.

45. *Id.* at 1.

46. *Id.* at 6.

47. *Id.* at 7.

48. *Id.* at 8 (citing David Barstow, *When Workers Die: U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003).

49. *Id.* at 15.

50. 29 C.F.R. 1975.6 (2006). A yearly appropriations rider prohibits OSHA from inspecting these farms. See, e.g., OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, *STANDARD INTERPRETATIONS: FARMING APPROPRIATIONS RIDER* (July 22, 1992), available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20764, and U.S. Depts. of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, H.R. 2264, 105th Cong. (1998).

C. Targets for Abuse

If the worker safety and non-payment of wages picture is grim for all workers, it is especially so for undocumented workers. These workers are vulnerable to workplace abuse, discrimination, and exploitation, just like other low-wage workers. They face, as well, very real daily fear of being turned over to immigration authorities, making them even less likely to raise complaints about workplace violations.⁵¹

In a report on wage and hour protection, health and safety protection, and day laborers, the GAO stated that “immigrants to the United States, especially newer ones, are more willing to accept lower wages and substandard work that offers few benefits or protections, which makes them attractive to unscrupulous employers who may exploit them as a cheap source of labor.”⁵² This means that workplaces with immigrants are more vulnerable to abuses without redress.

Everyone from judges and commentators to government investigators acknowledges these vulnerabilities.⁵³ Meanwhile, these workers’ labor rights have deteriorated. Their ability to exercise freedom of association and to bargain over terms and conditions of employment was severely undermined by the Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, which held that an undocumented worker fired in “crude and obvious” violation of the National Labor Relations Act (NLRA) is nonetheless ineligible for a backpay award under the NLRA.⁵⁴ Following *Hoffman*, undocumented workers are deprived of the most effective remedy—and the only monetary remedy—available in the NLRA scheme. Backpay is the only out-of-pocket cost that an employer incurs by illegally firing a worker, since the National Labor Relations Board (NLRB) has no authority to award punitive damages or any other remedy that would punish employers.⁵⁵ Since there is no effective remedy for retaliation after *Hoffman*, undocumented workers are less likely to take the risk of job loss that often comes with attempts to organize a union.

Worse still, since *Hoffman*, state supreme courts in Pennsylvania, New Hampshire, and Michigan have limited undocumented workers’ access to compensation for time lost from work due to work injuries,

51. See, e.g., *Rivera v. NIBCO*, 364 F.3d 1057, 1065 (9th Cir. 2004). For more stories of immigrant workers subject to workplace abuse and threats of retaliation, see ANAIS SENSIBA & SHAUN YAVROM, EMPLOYMENT RIGHTS ARE HUMAN RIGHTS (2005), available at <http://www.nelp.org/docUploads/workersrights1205%2Epdf>.

52. U.S. Gen. Accounting Office, *supra* note 18, at 11.

53. See, e.g., *Rivera*, 364 F.3d at 1065; U.S. Gen. Accounting Office, *supra* note 18, at 14.

54. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–53 (2002).

55. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–12 (1940).

and New York has said that undocumented status can be a factor in determining damages.⁵⁶ The highest state court in New Jersey has allowed a decision to stand that women who are victims of sex discrimination are not entitled to remedies for unlawful termination.⁵⁷ Recently, in Kansas, workers injured on the job who file claims for workers' compensation are being prosecuted criminally, and then deported for having used invalid Social Security Numbers to get jobs.⁵⁸ While section 11(c) of the OSH Act protects workers from retaliation if they seek safe and healthful conditions on the job,⁵⁹ there is a lack of clarity as to how OSHA will approach 11(c) cases and back pay remedies as a result of the *Hoffman* decision.

Because the low-wage workforce includes such a high percentage of immigrant workers, and because all low-wage workers—but most particularly, low-wage undocumented workers—are so vulnerable to unredressed workplace violations, the labor rights not only of immigrant workers, but of all low-wage workers, are inextricably tied to immigration reform. This means that for immigration reform to succeed, it must be accompanied by significantly enhanced enforcement of labor rights of all workers.

56. See *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 516, 521 (Mich. Ct. App. 2003) (finding that undocumented workers are covered by Michigan workers' compensation law and are entitled to full medical benefits if injured on the job but that their right to wage-loss benefits ends at the time that the employer "discovers" they are unauthorized to work); *Reinforced Earth Co. v. Workers' Comp. Appeal Board (Astudillo)*, 810 A.2d 99, 108–09 (Pa. 2002) (holding that although undocumented worker is entitled to medical benefits after experiencing a workplace injury, illegal immigration status might justify terminating workers' compensation benefits for temporary total disability); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000–02 (N.H. 2005) (holding that undocumented worker asserting tort claim for workplace injury could only recover lost wages at the wage level of his country of origin unless he could prove his employer knew about his irregular immigration status at the time of hiring); *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 362 (2006) (holding that immigration status can be a factor to reduce benefits received by an undocumented worker's family in a wrongful workplace death claim).

57. *Crespo v. Evergo Corp.*, 841 A.2d 471, 477 (N.J. Super. Ct. App. Div. 2004), cert. denied, 849 A.2d 184 (N.J. 2004) (holding that an undocumented worker suing for discriminatory termination could not recover either economic or non-economic damages absent egregious circumstances during the period of employment such as extreme sexual harassment).

58. See *Did Injury Claim Prompt Cessna Raid?*, 9 IMMIGRATION NEWS BRIEFS 21 (2006); see also BRENT I. ANDERSON, THE PERILS OF U.S. EMPLOYMENT FOR FALSELY DOCUMENTED WORKERS (AND WHATEVER YOU DO, DON'T FILE A WORK COMP CLAIM), paper submitted to American Bar Association, Labor and Employment Law Workers' Compensation Committee Midwinter Meeting (March 2006) (on file with New York University Journal of Legislation and Public Policy).

59. 29 U.S.C.A. § 660(c) (2000).

III.

CURRENT IMMIGRATION REFORM PROPOSALS AND LABOR
STANDARDS: FALSE SOLUTIONS AND
FAILED POLICIES

In the 109th Congress, little attention was paid to broad, effective protection of the labor rights of low-wage workers. Most of the public debate, with respect to immigrant workers in particular, focused on two methods for reducing the hiring of undocumented workers: stepped up sanctions against employers who hire undocumented workers, including more workplace raids; and a guestworker policy that would replace the existing undocumented population with documented, temporary guestworkers.⁶⁰ Before embarking on expanded employer sanctions or guestworker programs, it is important to review the history of the existing programs.

A. False Solution: Broadening an Employer Sanctions Regime that has Become Sanctions Against Workers

Passed in 1986, the Immigration Reform and Control Act (IRCA) established an amnesty program for illegal immigrants who had already worked and lived in the United States.⁶¹ The law also made it unlawful for any employer to knowingly hire a worker who is not authorized to work in the United States (“employer sanctions”),⁶² under the theory that low prospects for employment would reduce illegal immigration.

IRCA’s employer sanctions regime included an “employment verification system” intended to deny employment to aliens who are not lawfully present in the United States, or who are not lawfully authorized to work in the United States.⁶³ IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.⁶⁴

Under IRCA, if an immigrant job applicant is unable to present the required documentation, she cannot legally be hired.⁶⁵ IRCA also makes it a crime for an unauthorized alien to present fraudulent documents to his or her employer.⁶⁶ Unauthorized immigrants who use or attempt to use fraudulent documents to subvert the employer verifica-

60. See *supra* text accompanying notes 1–3.

61. 8 U.S.C. § 1255a (1994).

62. 8 U.S.C. § 1324a(a) (1994).

63. 8 U.S.C. § 1324a(b) (1994).

64. 8 U.S.C. § 1324a(b)(1)(B) (1994).

65. 8 U.S.C. § 1324a(b)(1)(A) (1994).

66. 8 U.S.C. § 1324c(a) (1994).

tion system established by IRCA are subject to fines and criminal prosecution.⁶⁷

1. *Discrimination Under Current Immigration Law*

The language of the verification requirements provides employers with a “gaping loophole” that they exploit by hiring immigrants whom they know have presented fraudulent documents.⁶⁸ Under IRCA, employers are only required to accept documents that appear on their face to be genuine.⁶⁹ This has meant that an employer can ignore documents it suspects are invalid, allow the worker to use documents that belong to another person, or even take part in procuring documents for the worker.⁷⁰ “In effect, employers who are willing to comply just enough to avoid appearing to disregard the law totally, but who in fact continue to rely on unauthorized labor, are insulated from the law’s sanctions provisions.”⁷¹

At the same time, Congress was concerned that the creation of employer sanctions under IRCA created a risk that employers would overreact and refuse to hire foreigners, discriminating against individuals who “looked or sounded foreign.”⁷² To counterbalance this anticipated discrimination, Congress also created a prohibition against unfair immigration-related employment practices, such as discrimination based on national origin or citizenship status.⁷³ However, immigrants without work authorization are excluded from the protection of the Act, which protects against discrimination based on citizenship and national origin in employment. In fact, the law protects only workers who are lawful permanent residents and intending to become citizens.⁷⁴ Moreover, the law punishes only employers who misuse immigration status and intend to discriminate.⁷⁵ An undocumented

67. *Id.*; 18 U.S.C. § 1546(b) (2000).

68. William J. Murphy, Note, *Immigration Reform without Control: The Need for an Integrated Immigration-Labor Policy*, 17 SUFFOLK TRANSNAT’L L. REV. 165, 177–78 (1994).

69. 8 U.S.C. § 1324a(b)(1)(A) (1994).

70. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1016–17.

71. *Id.* at 1017.

72. Natalie Prescott, *Immigration Reform Fuels Employment Discrimination*, 55 DRAKE L. REV. 101, 105 (2006).

73. 8 U.S.C. § 1324b (1994).

74. 8 U.S.C. § 1324b(a)(3) (1994).

75. *Robison Fruit Ranch, Inc. v. United States*, 147 F.3d 798, 801–02 (9th Cir. 1998). The statute was amended in 1996 to impose a burden upon employees to show that a request for additional documents or a refusal of legally acceptable documents was “made for the purpose or with the intent of discrimination,” ostensibly in order to

worker whose employer turns her in to immigration authorities after she files a workers' compensation claim is frequently unprotected, as are employees whose employer suddenly wants to investigate their immigration status after they file a complaint about workplace conditions.⁷⁶

IRCA's anti-discrimination provisions have not stopped discrimination against authorized foreign-born workers and people of color. In 1990, the GAO issued a report in which it determined that federal employer sanctions had resulted in a widespread pattern of discrimination by employers.⁷⁷ For example, the GAO found higher rates of discriminatory verification practices "in areas having high Hispanic and Asian populations."⁷⁸ In the course of developing the report, the GAO conducted a hiring audit of a sample of employers using matched Anglo and Latino testers. According to the report, the results of the audit "showed that the Hispanic testers were three times as likely to encounter unfavorable treatment when applying for jobs as were closely matched Anglos."⁷⁹ Similarly, the U.S. Commission on Civil Rights stated in a report that "we find clear and disturbing indications that IRCA has caused at least a 'pattern of discrimination,' if not widespread discrimination."⁸⁰

While some may believe that computerized electronic verification systems will lead to greater accuracy and less discrimination, that has not been the experience with pilot programs for electronic verification. On September 30, 1996, President Clinton signed the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁸¹ Among its provisions, IIRIRA required the Immigration

excuse employers who are simply trying to comply with the law. 8 U.S.C. § 1324b(a)(6) (2000).

76. In *Rivera v. NIBCO*, 364 F.3d 1057, 1073–74 (9th Cir. 2004), the Ninth Circuit provided some measure of protection to some workers who file discrimination complaints by refusing to allow the employer to ask questions about immigration status in formal discovery.

77. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 4 (1990).

78. *Id.* at 6.

79. *Id.* at 47. See also Cynthia Bansak & Steven Raphael, *Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?*, 54 INDUS. & LAB. REL. REV. 275, 277 (2001) ("Results from the employer survey indicate that a substantial minority of employers engage in illegal discriminatory practices such as only examining the documents of applicants who are foreign-looking, or not hiring applicants with a foreign appearance . . .").

80. U.S. COMM'N ON CIVIL RIGHTS, THE IMMIGRATION REFORM AND CONTROL ACT: ASSESSING THE EVALUATION PROCESS iii, 20 (1989).

81. Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

and Naturalization Service (INS, now the Department of Homeland Security, or DHS) and the Social Security Administration (SSA) to test and evaluate pilot programs for electronic verification of employees' work authorization.⁸² The pilot program currently in existence is known as the "Basic Pilot Program."⁸³ The 1996 law also required an independent evaluation of the program, which was published in 2002.⁸⁴ 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.⁸⁵ 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."⁸⁶

In 2003, Congress enacted the Basic Pilot Program Extension and Expansion Act of 2003, requiring the Secretary of Homeland Security to expand the (still-voluntary) Basic Pilot to all fifty states and to submit a report on the program to Congress by June 2004.⁸⁷ In its report to Congress, DHS identified problems in the SSA and DHS databases as contributing to the problem of excessive rates of tentative non-confirmations for foreign-born workers.⁸⁸ While it reports improvements in accuracy, the rates of confirmation for foreign-born work-authorized people are still very low. DHS reports an improvement in SSA confirmation rates for foreign-born non-citizens from 37.2% to only 48.8%.⁸⁹ This means that over half of all foreign-born non-citizens, when verified electronically, receive initial non-confirmations. The rate for foreign-born citizens improved from 83.6% to 88.6%.⁹⁰ In other words, more than one out of every ten foreign-born U.S. citizens, when electronically verified, receives an initial non-confirmation.

A serious consequence of the problems identified by the evaluators was discrimination and violations of employees' rights: "[t]he

82. *Id.* §§ 401–405.

83. *Id.* § 403.

84. WESTAT AND TEMPLE UNIV. INST. FOR SURVEY RESEARCH, FINDINGS OF THE BASIC PILOT PROGRAM EVALUATION, SUMMARY AND DETAILED REPORTS (2002) [hereinafter SUMMARY REPORT and DETAILED REPORT].

85. SUMMARY REPORT, *supra* note 84, at 41–42.

86. *Id.* at 41.

87. DEP'T OF HOMELAND SEC., REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM 1 (2004).

88. *Id.* at 3.

89. *Id.* at 4–5.

90. *Id.*

current Basic Pilot system jeopardizes employee rights as defined by fair information standards and does not solve the discrimination problem widely believed to have been created by employer sanctions.”⁹¹ Moreover, the evaluators identified as a possible consequence of the program “growth in the underground economy, which could lead to worker exploitation and related problems.”⁹²

One of the causes of this discrimination identified by the evaluators was employer misuse of the system. Forms of employer abuse included: engaging in pre-screening of employees that denies not only some jobs, but also the opportunity to resolve inaccuracies in federal records;⁹³ taking adverse action against employees receiving tentative non-confirmation of their immigration status, including not allowing workers to continue working while they straightened out their records, cutting pay for those with tentative non-confirmations, or delaying training;⁹⁴ failing to inform employees of their rights;⁹⁵ failing to maintain employees’ privacy;⁹⁶ and failing to safeguard pilot system information—for example, allowing others to access the computers or system.⁹⁷

2. *The Growth of an Underground Economy*

Employer sanctions have also contributed to expansion of an “underground economy” in which employers seek out and hire undocumented workers, expecting them to work for lower wages and working conditions and to remain silent about violations of workplace rights out of fear of losing their job or being reported to immigration authorities. Since undocumented workers do not have access to unemployment insurance or other social safety net benefits, they are forced to work at the best job possible as soon as possible.⁹⁸ Some employers often actually use the “employer sanctions” scheme as a means to threaten undocumented workers with possible deportation if they do complain about workplace conditions or try to enforce rights. For example, reported cases include the following: a worker who was injured on the job and then turned into immigration by his employer.

91. DETAILED REPORT, *supra* note 84, at 199.

92. *Id.* at 196.

93. SUMMARY REPORT, *supra* note 84, at 19.

94. *Id.*

95. *Id.* at 20.

96. *Id.* at 19.

97. *Id.*

98. PIA ORRENIUS & MADELINE ZAVODNY, DID 9/11 WORSEN THE JOB PROSPECTS OF HISPANIC IMMIGRANTS? 5 (Fed. Reserve Bank of Dallas, Research Dep’t Working Paper 0508, 2006).

The employer then argued, based on employer sanctions, that he was not entitled to wage loss benefits in worker's compensation.⁹⁹ In another case, an undocumented worker injured his left hand requiring two surgeries and other medical treatment; his employer contested his worker's compensation claim based on his immigration status.¹⁰⁰ Some employers do retaliate against workers: In one reported case, an Indian worker was recruited to work in the United States and promised a place to live, tuition for his education, and an eventual business partnership with the defendants. He received no pay at all for three years, and the day after he settled his claims of back pay against his employer, he was arrested by immigration authorities on his employer's report.¹⁰¹

In advance of Congressional consideration of immigration reform in 2007, the U.S. government also stepped up its worksite enforcement program. The enforcement budget has increased 42% since President Bush took office.¹⁰² The U.S. Immigration and Customs Enforcement (ICE, the DHS division in charge of immigration enforcement) reports that its worksite arrests in FY 2006 of approximately four thousand individuals were more than seven times greater than the total number of arrests in worksite enforcement cases by the INS in 2002, its last full year of operation.¹⁰³

While both Republicans and Democrats take a public "get-tough" stance on unlawful hiring of undocumented workers, worksite enforcement has nearly always targeted immigrant workers, not their employers. A summer 2006 White House fact sheet touted the arrests of 1187 workers—but only seven managers—in one raid.¹⁰⁴ While its

99. See, e.g., *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 326 (2003), and cases cited in Sarah Cleveland, Beth Lyon & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. OF SOC. JUST. 795 (2003).

100. See *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 819 (Md. 2005). See also *Fernandez-Lopez v. Jose Cervino, Inc.*, 671 A.2d 1051, 1052 (N.J. Super. Ct. App. Div. 1996) (undocumented immigrant from Guatemala was "plastering the ceiling over a stairwell area, using a ladder and some planks supplied by the contractor as make-shift scaffolding, when he fell and was hurt." His employer challenged his eligibility for workers' compensation based on his immigration status); and cases cited in Cleveland, Lyon & Smith, *supra* note 99.

101. *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002).

102. See THE WHITE HOUSE, FACT SHEET: BASIC PILOT: A CLEAR AND RELIABLE WAY TO VERIFY EMPLOYMENT ELIGIBILITY (2006), available at <http://www.whitehouse.gov/news/releases/2006/07/20060705-6.html>.

103. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: EXECUTIVE SUMMARY ICE ACCOMPLISHMENTS IN FISCAL YEAR 2006 (2006), <http://www.ice.gov/pi/news/factsheets/2006accomplishments.htm>.

104. THE WHITE HOUSE, FACT SHEET: BASIC PILOT, *supra* note 102.

worksite arrests total a seven-fold increase since 2002, ICE issued fine notices to only three employers nationwide in 2004, down from 417 in 1999.¹⁰⁵

Recently, on December 12, 2006, one thousand ICE agents carried out simultaneous dawn raids at six meat processing plants in six states and arrested a total of 1282 immigrant workers, most of them Latin American.¹⁰⁶ The raid was trumpeted by ICE as a victory in the “war on illegal immigration,”¹⁰⁷ in part because some of those arrested were using social security numbers belonging to United States citizens.¹⁰⁸

Rather than focus on either the employers who hire undocumented workers or the smugglers who profit by trading in their labor or supplying them with social security numbers, DHS and the media reports following the raids spotlighted “identity theft” by undocumented immigrants.¹⁰⁹ Those who work with the undocumented know that workers do what they need in order to secure employment—they invent or purchase social security numbers and use these simply to have a piece of identification in order to work.¹¹⁰ Ostensibly, workers may not know whether the nine digits they are using have been assigned to another person. Workers employed at meatpacking and other plants are not stealing identities in order to make lavish purchases on someone else’s credit card.¹¹¹ The new label of “identity theft” serves only to further demonize workers.

The current employer sanctions regime and the government studies of electronic verification systems should make Congress wary of rushing to enact a new system. Given the history of employer sanctions, the “new improved” employer sanctions will likely result in more discrimination against authorized, foreign-looking workers. More severe employer sanctions mean more incentives for employers to continue to employ undocumented workers in an underground

105. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 6–7 (2005).

106. News Release, U.S. Immigration and Customs Enforcement, U.S. Uncovers Large-Scale Identity Theft Scheme Used By Illegal Aliens to Gain Employment at Nationwide Meat Processor (Dec. 13, 2006), http://www.ice.gov/pi/news/news_releases/articles/061213dc.htm.

107. *Id.*

108. *Id.*

109. *Id.* See also Julia Preston, *Illegal Worker, Troubled Citizen and Stolen Name*, N.Y. TIMES, Mar. 22, 2007, at A1.

110. See Preston, *supra* note 109. See also Silvia Moreno, *Immigration Raid Leaves Texas Town a Skeleton*, WASH. POST, Feb. 9, 2007, at A2.

111. Preston, *supra* note 109.

economy. Once workers are employed “off the books,” more employers will be tempted to ignore workplace protections of all kinds and to use immigration status as a club against those workers who complain.

B. Failed Policy: Current Guestworker Programs Create an Unfair Deal for U.S. Workers and Foreign Workers Alike

I propose a new temporary worker program that will match willing foreign workers with willing American employers, when no Americans can be found to fill the jobs.

—President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004).¹¹²

It is laudable that the Bush Administration understands the need for immigration reform. Lengthy history shows, however, that it is not so simple to match willing foreign workers with willing employers. Nor is it simple to determine when no Americans can be found to fill jobs. Guestworker programs present a huge challenge for labor law enforcement, but they have taken up an inordinate amount of air space in the public debate on immigration reform, at the expense of discussion of labor standards.

The United States has long depended on immigrants to compensate for perceived and actual shortfalls in the native-born labor force. Many programs have been created over the years in an effort to regulate the flow of immigrant labor, most notably the *Bracero* program that brought millions of Mexican farm workers to the United States starting in 1942 to respond to alleged war-time shortages of workers.¹¹³ The program started small but grew to 400,000 visas per year at its peak.¹¹⁴ Mexican citizens filled a total of approximately 4.5 million jobs by the time the *Bracero* program ended in 1964.¹¹⁵

More recently, industries in the service and manufacturing sectors rely upon immigrant workers who enter the country through both temporary and permanent visas.¹¹⁶ There are currently two

112. Press Release, Office of the White House Press Sec’y, President Bush Proposes New Temporary Worker Program (Jan. 7, 2004), <http://www.whitehouse.gov/news/releases/2004/01/20040107-3.html>.

113. DEBORAH WALLER MEYERS, TEMPORARY WORKER PROGRAMS: A PATCHWORK POLICY RESPONSE 1 (Migration Policy Institute, Task Force Insight No. 12, 2006), available at http://www.migrationpolicy.org/ITFIAF/TFI_12_Meyers.pdf.

114. S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 4 (2007).

115. *Id.*

116. See, e.g., U.S. Dep’t of Labor, Employment & Training Admin., Foreign Labor Certification, <http://www.flcdcenter.com/CaseH2B.aspx> (linking to downloadable FY 2006 data on occupations of employers using the H-2B system) (last visited June 9, 2007).

guestworker programs for temporary work lasting less than a year: the H-2A program, for temporary agricultural work, and the H-2B program, for temporary nonagricultural work. These programs allow employers to obtain permission to hire foreign workers on temporary visas after engaging in recruitment in the United States and promising to meet certain requirements regarding wages and working conditions.¹¹⁷ Each program imposes on foreign workers a temporary, non-immigrant status that ties workers to particular employers and makes their ability to obtain a visa dependent on the willingness of the employer to make a request to the United States government.¹¹⁸

1. *The H-2A Program*

The H-2A agricultural guestworker program is arguably the most exacting of the current guestworker programs, allowing foreign agricultural workers to enter the country temporarily to fill jobs for which there is a worker shortage.¹¹⁹ Under the current H-2A program, employers must engage in recruitment locally, regionally, and nationally through the Employment Service, with advertisements in local papers, and other means of recruitment dictated by the Employment Service (such as contact with labor unions and church organizations).¹²⁰ The recruitment period for United States workers can last up to sixty days.¹²¹ Additionally, employers must promise to hire any United States worker¹²² who presents himself or herself for the job until the work period is half over.¹²³ They must first recruit within the United States, and, if no workers can be found, they may then be “certified” to recruit abroad.¹²⁴ Thus, “willing workers” are in theory matched with “willing employers” when no local workers may be found.

117. See generally U.S. Dep’t of Labor, Employment & Training Admin., H-2A Certification, <http://www.foreignlaborcert.doleta.gov/h-2a.cfm> (last visited Apr. 12, 2007) [hereinafter U.S. Dep’t of Labor, H-2A Certification]; U.S. Dep’t of Labor, Employment & Training Admin., H-2B Certification for Temporary Nonagricultural Work, <http://www.foreignlaborcert.doleta.gov/h-2b.cfm> (last visited Apr. 12, 2007) [hereinafter U.S. Dep’t of Labor, H-2B Certification].

118. See U.S. Dep’t of Labor, H-2A Certification, *supra* note 117; U.S. Dep’t of Labor, H-2B Certification, *supra* note 117.

119. U.S. Dep’t of Labor, H-2A Certification, *supra* note 117.

120. *Id.*; 20 C.F.R. § 655.103(d) (2006).

121. 20 C.F.R. § 655.205(c) (2006).

122. Under the program, a United States worker includes any United States citizen or national or any worker present in the United States with authorization to be employed. 20 C.F.R. § 655.302 (2006).

123. 20 C.F.R. § 655.203(e) (2006).

124. 20 C.F.R. § 655.206 (2006).

A recent example from Washington State illustrates how the system works, at its worst, for both U.S. and foreign workers: In 2004, workers from Thailand were brought to the Yakima Valley in Washington State in 2004 as H-2A agricultural workers.¹²⁵ As required under the program, the jobs were first announced through the local Yakima County Worksource agency, which, according to court documents, referred over one thousand U.S. farm workers for the some 250 jobs. Workers say that they were interviewed and told they had a job, but not told when and where to show up for work, so the company was able to claim that it did not have enough U.S. workers.¹²⁶

An international subcontractor recruited workers from Thailand as H-2A workers. In order to get work, these workers say they incurred costs of \$10,000–17,000 for transportation, passports, visa fees, and other fees. If they did not have the money, the labor contractor was only too happy to lend it, often secured by mortgages on the workers' homes.¹²⁷

Once in the United States, the workers were housed in overcrowded, substandard housing, according to their complaint. Deductions from wages were made for state and federal income tax—in a state that does not have an income tax.¹²⁸ In September, a settlement with the state required restitution of \$230,000 to workers and the state.¹²⁹

The workers covered by this settlement agreement are among the lucky ones—lucky because both state and federal Departments of Labor got involved in their dispute and further lucky because they are now among the only H-2A workers in the country covered by a union contract.¹³⁰ The notoriety of the case and intense efforts by workers

125. First Amended Complaint, *Perez-Farias v. Global Horizons, Inc.*, No. 05-DV 3061 (E.D. Wash. Apr. 13, 2006).

126. Notice of discontinuation of employment services from Karen T. Lee, Commissioner, State of Washington Employment Security Department, to Mordechai Orian, Global Horizons Incorporated (May 10, 2005) (on file with New York University Journal of Legislation and Public Policy); First Amended Complaint at 26–27, *Perez-Farias v. Global Horizons, Inc.*, No. 05-DV 3061 (E.D. Wash. Apr. 13, 2006). In addition, workers allege they were subjected to production standards not part of the job offer and not provided with promised transportation. *Id.* at 29.

127. Class Action Complaint at 7, 9–10, *Yapunya v. Global Horizons, Inc.*, No. CV-06-3048-RHW (E.D. Wash. June 10, 2006).

128. Settlement Agreement at 2, In Re *Global Horizons, Inc.*, 2005-LI-0056 & 2005-ES-001 (Wash. Office of Admin. Hearings, Sept. 22, 2005).

129. Press Release, Washington State Department of Labor and Industries, State Agencies Reach Settlement with Farm-Labor Firm (Sept. 22, 2005), available at <http://www.lni.wa.gov/news/2005/pr050922a.asp>.

130. Statement of Arturo S. Rodriguez, President, United Farm Workers of America, Announcing UFW Contract with Global Horizons, Apr. 11, 2006, <http://www.ufw>.

and their advocates produced a first-ever contract with the United Farm Workers (UFW) union.¹³¹ UFW, and its Vietnamese- and Thai-speaking organizers, now administers a contract that covers hundreds of workers in several states and is far more protective of workers' rights than the H-2A program provisions themselves.¹³² For example, the contract provides for seniority provision, wage payments 2% above the required pay under the H-2A program, a grievance procedure for violations of the contract or H-2A requirements, and bereavement and transportation pay for workers who must return home to deal with family emergencies.¹³³

2. *The H-2B Program*

The H-2B program is the non-agricultural temporary worker program, typically used in the reforestation, landscaping and hospitality industries, among others. This program provides less legal protection for both U.S. and foreign workers than does the H-2A program. For example, there is no requirement for free housing, no requirement that transportation be reimbursed, and no requirement that a certain amount of the work promised be actually provided to the worker. There is no eligibility for free federal legal services.¹³⁴ The H-2B program's recruitment provisions are governed by a General Administrative Letter produced in 1995 by the DOL.¹³⁵ Essentially, it requires that employers wishing to take part in the program offer "prevailing" wages and working conditions, advertise the job opportunity for three days, and list the job with the Employment Service for ten days.¹³⁶ In that program, a number of lawsuits have similarly alleged that recruiters require that employees pay large recruitment fees or pledge

[org/_page.php?menu=organizing&inc=keycampaign/globalhorizons/GH_ASRstatement_1.htm](http://www.ufw.org/_page.php?menu=organizing&inc=keycampaign/globalhorizons/GH_ASRstatement_1.htm).

131. Press Release, United Farm Workers of America, Breakthrough Nationwide UFW Pact Protecting Foreign Farm Workers Remedies Abuses Plaguing Guest Worker Program (Apr. 11, 2006), http://www.ufw.org/_page.php?menu=organizing&inc=keycampaign/globalhorizons/GHAdvisory.htm.

132. Global Horizons – UFW Contract Summary, http://www.ufw.org/_page.php?menu=organizing&inc=keycampaign/globalhorizons/GHcontract.htm (last visited June 9, 2007).

133. *Id.*

134. See S. POVERTY LAW CTR., *supra* note 114, at 7–8.

135. U.S. DEP'T OF LABOR, EMPLOYMENT & TRAINING ADMIN. GENERAL ADMINISTRATIVE LETTER 1-95, ATTACHMENT TO GAL 1-95, PROCEDURES FOR TEMPORARY LABOR CERTIFICATION IN NON-AGRICULTURAL OCCUPATIONS 2 (1994), available at http://wdr.doleta.gov/directives/attach/GAL1-95_attach.pdf.

136. *Id.* at 4–5.

collateral with the employer's representatives in order to be hired.¹³⁷ A recent compilation of the stories of individual guestworkers chronicles workplace complaints that have not been redressed, unaddressed workplace injuries, and retaliation in the forestry industry.¹³⁸

3. *By-Passing an Available Workforce*

Guestworker programs have the potential to undermine labor standards for U.S. and foreign workers alike. Specifically, for U.S. workers, they have the potential to decrease job availability, since labor shortages can be more perceived than real.¹³⁹ History shows that in certain labor markets and certain geographic locations, unrestricted access to guestworkers has the potential to dilute labor standards for all workers. During the *Bracero* program, the Secretary of Labor found that normal competition for improvement in the farm labor market was eliminated and wages had been "inexorably" depressed.¹⁴⁰ One study of twenty-nine crops in California for the period 1952 to 1959 found that in eight crops, wage increases were modest, in eleven crops wages remained stagnant, and in ten crops, wages had actually declined over this time period.¹⁴¹

In 2005 and 2006, agricultural employers reported widespread labor shortages, in California, Arizona, and Washington State. A review of these claims by Professor Philip Martin indicates that these shortages may have been exaggerated: "For the past several years,

137. See, e.g., *Perez-Perez v. Progressive Forestry Servs., Inc.*, No. CIV. 98-1474-KI, 2000 WL 40927, at *3 (D. Or. Jan. 19, 2000); *Escolastico De Leon Granados v. Eller & Sons Trees Inc.*, No. 1:05-CV-1473, 2006 U.S. Dist. LEXIS 73781, at *4 (N.D. Ga. 2006); *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 U.S. Dist. LEXIS 2510, at *5 (E.D. La. 2006). One such case was recently settled for cash payments and an agreement to avoid retaliation in the future. See Press Release, Southern Poverty Law Center, *Forestry Workers Get Justice with Settlement of SPLC Lawsuit* (Sept. 8, 2006), available at <http://www.splcenter.org/news/item.jsp?aid=214>.

138. THE IMMIGRANT JUSTICE PROJECT OF THE S. POVERTY LAW CTR., *BENEATH THE PINES: STORIES OF MIGRANT TREE PLANTERS* 1-2, 14 (2006), http://www.splcenter.org/images/dynamic/main/ijp_beneaththepines_web.pdf.

139. *Guest Worker Programs: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Richard M. Estrada, Comm'r of the U.S. Comm'n on Immigration Reform) ("Anyone who reviews the historical record will find that allegations of actual or impending labor shortages have been common in this debate but that actual labor shortages have been rare. . . . Indeed, one often gets the feeling that when growers say they can't find workers, they fail to complete the sentence. What they really mean is that they can't find workers at the extremely low wages and working conditions they offer.").

140. ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 208 (1964) (quoting Sec'y of Labor Arthur J. Goldberg).

141. *Id.* at 209-11.

farmers have been complaining of labor shortages, even in areas with high unemployment rates. Acreage planted and farm sales have been stable or rising, which is not what would be expected with labor shortages that resulted in unharvested crops and revenue losses.”¹⁴²

While it is difficult to measure whether a labor shortage exists, Martin’s research found that indicators such as numbers of employed workers, crop values, and acres in production did not indicate labor shortages in these areas, and that any hard times that growers were experiencing were due more to dropping prices, weather, and pests.¹⁴³ Martin did note slight increases in wages in both California and Washington State, which indicated a tightening of the labor market.¹⁴⁴

In 1998, a DOL Office of Inspector General report outlined the shortcomings of the H-2A recruitment system in its ability to reach U.S. workers.¹⁴⁵ These included inefficient administration of the program and less than good faith recruitment efforts by employers.¹⁴⁶

Determining whether no “American workers can be found” involves a combination of measuring unemployment rates and requiring good-faith recruitment of local workers before foreign workers can be hired. Without adequate labor market testing, guestworker programs will repeat the problems of the past, to the detriment of all America’s workers.

4. *Taking Advantage of Our “Guests”*

For the foreign workers, guestworker status often results in a bondage-like system where, by law, the workers cannot change employers,¹⁴⁷ remedies for labor law violations are limited,¹⁴⁸ and termination of employment subjects them not only to loss of jobs but to

142. Philip Martin, *Farm Labor Shortages*, 13 RURAL MIGRATION NEWS 4 (2006), available at http://migration.ucdavis.edu/rmn/more.php?id=1155_0_4_0.

143. *Id.*

144. *Id.*

145. U.S. DEP’T OF LABOR INSPECTOR GEN., Report No. 04-98-004-03-321, CONSOLIDATION OF LABOR’S ENFORCEMENT RESPONSIBILITIES FOR THE H-2A PROGRAM COULD BETTER PROTECT U.S. AGRICULTURAL WORKERS (1998), available at <http://www.oig.dol.gov/public/reports/oa/1998/04-98-004-03-321s.htm>.

146. *Id.*

147. The H-2A regulations contemplate an application by an employer or employer association, who recruits for a particular job. See 20 C.F.R. § 655.100 (2006). Theoretically, a worker can be transferred from one employer to another within an association.

148. For example, H-2A workers are excluded from the protections of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), which is the principal federal employment law for agricultural workers. 29 U.S.C. §§ 1802(8)(B)(ii), (10)(B)(iii) (2000). A federal appeals court in North Carolina has held that it is not unlawful for an employer to practice age discrimination in hiring prospective

deportation.¹⁴⁹ Abuses against guestworkers have been chronicled in the litigation outlined above, as well as a number of news reports.¹⁵⁰

The most recent detailed account of these abuses is a report by the Southern Poverty Law Center, entitled *Close to Slavery*.¹⁵¹ In it, the Law Center chronicles accounts of workers arriving in the United States with fee-related debts to labor contractors in amounts ranging from \$500 to \$10,000, at exorbitant interest rates.¹⁵² Workers recruited from Peru, Bolivia, and the United Kingdom to work at a major hotel company in New Orleans paid between \$3500 and \$5000 to come to the United States to work in maintenance, housekeeping, and guest services.¹⁵³ The H-2A and H-2B programs have produced a veritable army of recruiters who profit from selling the right to work in the United States to desperate workers.¹⁵⁴

guestworkers. *Reyes-Gaona v. N.C. Growers' Ass'n*, 250 F.3d 861, 866–67 (4th Cir. 2001).

149. S. POVERTY LAW CTR., *supra* note 114, at 16.

150. On February 11, 2003, two farmworkers' advocate groups submitted a public communication to the Mexican National Administrative Office under the North American Agreement on Labor Cooperation, alleging unfair treatment of H-2A migrant workers in North Carolina and detailing abuses by North Carolinian employers, including nonpayment of overtime, blacklisting, and denying access to workers' compensation benefits. See Public Communications Submitted to the Mexican National Administrative Office, Mexican NAO 2003-1, available at http://www.naalc.org/english/summary_mexico.shtml; see also Barry Yeoman, *Silence in the Fields*, MOTHER JONES, Jan.–Feb. 2001, at 42; LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 15, 201–02 (2000), available at <http://hrw.org/reports/pdfs/u/us/uslbr008.pdf> (detailing abuses of H-2A workers in North Carolina).

151. See generally S. POVERTY LAW CTR., *supra* note 114.

152. *Id.* at 9.

153. *Id.* at 12.

154. In litigation and news articles, immigrant workers frequently allege that they have paid extraordinary fees to recruiters for travel, visa fees, and "recruitment fees." Recently, H-2B workers alleged they paid between \$3,000 and \$5,000 to recruiters who brought them to the U.S. from Peru, Bolivia, and the Dominican Republic to work in luxury hotels in New Orleans. See Press Release, S. Poverty Law Ctr., SPLC Exposes Exploitation of Immigrant Workers (Aug. 16, 2006), available at http://www.splcenter.org/legal/news/article.jsp?site_area=1&aid=205/; *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, No. 02-1589, slip op. at 3, 5 (N.D.N.Y. June 1, 2004) (rejecting defendant H-2A and H-2B employers' arguments that their recruiters' activities abroad are not covered by U.S. law); *Recinos-Recinos v. Express Forestry, Inc.*, No. 05-1355, 2006 WL 197030, at *2 (E.D. La. Jan. 24, 2006) (H-2B forestry worker class allege that recruiters required pledging of collateral in sending country to prevent workers from leaving before contract completed); *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1232 (11th Cir. 2002) (holding U.S. firms responsible for H-2B workers' transportation, visa, and immigration expenses); see also Charles D. Thompson, Jr. & Benjamin Grob-Fitzgibbon, *Dream or Déjà Vu? The Debate Surrounding George W. Bush's Proposed Immigration Reform*, 14 HEMISPHERE 32, 38 (2004) (stating that some H-2A workers pay as much as \$1500 for transportation and

In some cases, employers confiscate workers' visas and identity documents in order to ensure that they cannot leave their jobs.¹⁵⁵ Although H-2B program policies require that workers be paid the "prevailing" wage, workers report that they earn piece rate wages far lower than this amount.¹⁵⁶ H-2B workers in forestry report working between eight and twelve hours a day, without overtime pay.¹⁵⁷ An expanded guestworker program will simply exacerbate these trends.

IV.

REAL SOLUTIONS: POLICIES THAT PROTECT ALL WORKERS

If employer sanctions do not work, and guestworker programs do not work, what is an appropriate solution to the problem of exploitation of low-wage workers? At least part of the lesson of low-wage work in the United States, including work by U.S. citizens, guestworkers under various programs, and undocumented workers, shows that comprehensive immigration reform must mean comprehensive enforcement of the hard-won labor protections that all workers in the United States rely upon, as a matter of law, economics, and human rights.¹⁵⁸ If immigration reform is not accompanied by enforcement of minimum labor standards, an expanding pool of low-wage workers will be subject to the abuses outlined here. If an expanded guestworker program is not accompanied by sufficient labor standards and enforcement of these, more guestworkers will be hired in place of

costs); Ronald Goldfarb, *MIGRANT FARM WORKERS: A CASTE OF DESPAIR* 19–28 (1981); Dana Harman, *Many 'Guest Workers' Vulnerable, Migrant Advocates Say; Abuse by Employers, Lax Oversight Cited*, USA TODAY, Apr. 26, 2006, at A10 (reporting typical Mexican guestworker estimate that he paid about \$500 in fees in order to arrive in U.S. worksite); Leah Beth Ward, *Desperate Harvest*, CHARLOTTE OBSERVER, Oct. 31, 1999 (guestworkers in 1999 paid up to \$500 for an H-2A visa to work for a grower in North Carolina); Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 522 (2002); Tom Knudson, *It Was Like Slavery*, SACRAMENTO BEE, Nov. 13, 2005, at A11 (reporting complaint by forestry worker that he "signed over his home" to secure a position).

155. S. POVERTY LAW CTR., *supra* note 114, at 15.

156. *Id.* at 18.

157. *Id.* at 19.

158. In 2003, the Inter-American Court of Human Rights issued an advisory opinion (Advisory Opinion OC-18/03) on the treatment of unauthorized migrant workers and their labor rights in the countries that make up the Organization of American States. Advisory Opinion OC-18/03 provides that as a matter of compliance with the anti-discrimination provisions of various inter-American human rights treaties, countries must protect the rights of all migrant workers. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct.H.R. ¶¶ 118, 119 (Sept. 27, 2003), *available at* http://www.corteidh.or.cr/serie_a_ing/serie_a_18_ing.doc.

workers already in the country, and employers will continue to take advantage of them. We must enforce existing laws, and take a hard look at exclusions built into those laws to develop a more effective system of labor law compliance. This section proposes policy options that are designed to advance the labor rights of all workers, with special attention to protection of vulnerable immigrant workers.

What can Congress and the Administration do to guarantee American workers a fair day's pay? It can make the DOL, including the OSHA, more effective. It can close the current loopholes that allow employers to mischaracterize workers as "independent contractors." And it can stop rewarding employers who use immigration status to retaliate against workers.

A. *Making the DOL More Effective*

Workplace enforcement of labor standards should be at a level designed to send a message that America will not tolerate non-payment and underpayment of wages. This means more emphasis on enforcement: more personnel and more focus on industries that are known violators of wage and hour laws, so that at a minimum, low-wage workers get the wages that they are entitled to under current law.¹⁵⁹

1. *Indexing the Minimum Wage*

The new Democratic majority in Congress in 2007 indicated that one of its first orders of business was to increase the minimum wage. The House introduced the bill on January 5, 2007, and passed it on January 10 as one of its first bills, but the effort stalled in the Senate. A minimum wage increase was finally passed in May 2007, to take effect in July 2007. Congress should both raise the minimum wage and peg the new minimum to inflation, so that the lowest-paid workers get automatic increases each year to keep their purchasing power in line with consumer price hikes.¹⁶⁰

As is noted in the introduction to this piece, increasing the minimum wage is only half the battle. Just as it should learn from the

159. For a list of the statistics on various low-wage industries, see IMMIGRANT & NONSTANDARD WORKER PROJECT, NAT'L EMPLOYMENT LAW PROJECT, HOLDING THE WAGE FLOOR: ENFORCEMENT OF WAGE AND HOUR STANDARDS FOR LOW-WAGE WORKERS IN AN ERA OF GOVERNMENT INACTION AND EMPLOYER UNACCOUNTABILITY (2006), available at <http://www.nelp.org/docUploads/Holding%20the%20Wage%20Floor2%2Epdf>.

160. See discussion *supra* note 11.

laboratories of the states in indexing the minimum wage, Congress must follow the states' lead to adequately enforce it.

2. *Beefing Up Enforcement*

Congress should follow the lead of states that have been most successful in enforcing new minimum wage standards.

First, it should increase the number of Wage and Hour investigators from 788 to at least double that amount and use its resources strategically to focus audits on problem industries with persistent violations.¹⁶¹ Immigrant and other low-wage communities can help identify abusive industries and employers.¹⁶² Congress should create an Office of Community Outreach charged with working with community and organizing groups to identify problems and witnesses for enforcement targets and to educate workers about their rights.¹⁶³ Worthy of consideration, too, are laws permitting community organizations and unions to file complaints on behalf of workers, as some states and localities have done.¹⁶⁴

Many states have also increased penalties for violations of wage and hour rights, and Congress should do the same. It should enhance liquidated damages to workers for unpaid wages up to three times the wages owed, in order to deter future violations and encourage workers to come forward. One recent example is the Arizona Minimum Wage Law, which allows for treble damages for violations of the state minimum wage.¹⁶⁵

161. The new H-2C temporary worker program provided for in S. 2611, the Comprehensive Immigration Reform Act of 2006, would have included the annual hiring of 2000 additional investigators at the DOL, but their work was to be confined to the enforcement of the provisions of that bill. S. 2611, 109th Cong. § 412 (2006).

162. For some examples of immigrant and community groups partnering with labor standards enforcement efforts, see NAT'L EMPLOYMENT LAW PROJECT & BRENNAN CTR. FOR JUSTICE, EXAMPLES OF WAGE ENFORCEMENT ACTIONS AROUND THE COUNTRY (2005), available at <http://www.nelp.org/docUploads/campaign%20descriptions%2Epdf>.

163. This has been done at the state level in several states, including Illinois. See *id.* at 2.

164. For example, under the Illinois Day and Temporary Labor Service Agency Act, "any interested person" may file a claim. 820 ILL. COMP. STAT. ANN. 175/55 (2006). Under the San Francisco minimum wage ordinance, "any person aggrieved by a violation of this Chapter, any entity a member of which is aggrieved by a violation of this Chapter, or any other person or entity acting on behalf of the public . . . may bring a civil action in a court of competent jurisdiction against the Employer . . ." S.F. ADMIN. CODE CH. 12R.7(c).

165. See Proposition No. 202, An Initiative Measure Repealing Section 23-362, Amending by Adding New Section 23-362 Relating to the Arizona Minimum Wage Act (2006), available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop202.pdf>.

One model for consideration in making the DOL more effective is Senator Edward Kennedy's amendment to the Senate Comprehensive Immigration Bill, proposed during the heated debate on that bill.¹⁶⁶ The amendment, which failed by a vote of 57–40, would have created enhanced enforcement of labor protections for U.S. workers and guestworkers alike, by increasing the dollar amounts of civil and criminal fines for violation of labor rights, strengthening enforcement of the NLRA, equalizing remedies for immigrant and non-immigrant workers, using some of the fees generated by the guestworker program for a labor law enforcement fund, and increasing bilingual staff at the DOL.¹⁶⁷ The bill itself is discussed in more detail in later sections of this article.¹⁶⁸

Finally, FLSA should be amended to include a “hot goods” capability for services performed under substandard conditions. The federal government already has the power, under FLSA's “hot goods” provision, to stop shipment of goods prepared under sweatshop conditions.¹⁶⁹ Under the provision, the DOL is the only entity with the power to seize goods, and it may only seize goods produced in substandard labor conditions, so it is a seldom-used remedy. In the new service economy, an agenda for low-wage workers should expand the hot goods power to include the capacity to stop services provided under substandard conditions and a proposal to permit private parties to use the hot goods remedy.

3. *Closing Loopholes for Independent Contractor Abuses*

Companies should not be allowed to evade responsibility by contracting it away to labor brokers. This means holding accountable worksite employers who use contractors.

Congress should create in FLSA a presumption that workers providing labor or services for a fee are “employees” covered by the Act. This is already law in over ten states' workers' compensation acts¹⁷⁰

166. See 109 CONG. REC. 64, S4913–14 (May 22, 2006) (statement of Senator Kennedy).

167. See *id.*

168. See discussion *infra* Part IV.D.

169. 29 U.S.C. § 215 (a)(1) (2000).

170. See, e.g., WASH. REV. CODE § 51.08.180 (2002) (defining “worker” in Washington state workers' compensation act as “every person in the state who is engaged in the employment of an employer under the title, whether by way of manual labor or otherwise in the course of his or her employment . . .”). At least ten states (Arizona, California, Colorado, Connecticut, Delaware, Hawaii, New Hampshire, North Dakota, Washington, Wisconsin) have a general presumption of employee status in their workers' compensation acts (regardless of what job the injured worker has). ARIZ. REV. STAT. ANN. § 23-901(5)(b) (1995); CAL. LAB. CODE § 2750.5 (2003); COLO. REV.

and in Massachusetts' wage act.¹⁷¹ Congress should do away with employer incentives to misclassify workers as independent contractors. Currently, employers decide whether their workers are employees or independent contractors with little scrutiny from the Internal Revenue Service (IRS) and no consequences.¹⁷² Section 530 of the Revenue Act of 1978, 26 U.S.C. § 7436, ties the IRS's hands in attempting to deter misclassification. Under the statute, an employer who is found by the IRS to have misclassified its workers can have all employment tax obligations waived. Section 530 has, since 1978, prohibited the IRS from issuing clarifying regulations on independent contractor misclassification enforcement and has prevented the IRS from collecting millions of dollars of unpaid taxes and penalties.¹⁷³ It applies when an employer can show a "reasonable basis" for having treated its workers as independent contractors.¹⁷⁴ Among other factors, a business can rely on its belief that a significant segment of the industry treats workers as independent contractors, thereby perpetuating industry-wide noncompliance with the law.¹⁷⁵

In addition to these steps Congress can take in the short term, in the long term, Congress should look more closely at the groups of workers who are left out of minimum wage and overtime regulation in the United States and make sure that all workers have the protection of this minimum standard of pay. As noted, at present, domestic workers who primarily provide companionship services to the aged and infirm ("home health workers") are exempt from minimum wage and overtime requirements, and all domestic workers are excluded from over-

STAT. § 8-40-202 (2006); CONN. GEN. STAT. § 31-275(9)(a) (2003); DEL. CODE ANN. § 2301 (10) (2006); HAW. REV. STAT. § 386-73.5 (2004); N.H. REV. STAT. ANN. § 281-A:2(VI)(b)(1) (1999); N.D. CENT. CODE § 65-01-03 (2004); WASH. REV. CODE § 51.08.180(1) (2002); WIS. STAT. § 102.07(4) (2001).

171. MASS. GEN. LAWS ch. 149 § 148B (2007).

172. See FRANCOIS CARRE & J.W. McCORMACK, CONSTRUCTION POLICY RESEARCH CENTER, HARV. LAW SCH. AND HARV. SCH. OF PUB. HEALTH, THE SOCIAL AND ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION (2004); MICHAEL KELSAY ET AL., DEP'T OF ECON., UNIV. OF MISSOURI-KANSAS CITY, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF ILLINOIS (2006); STATE OF NEW JERSEY, COMM'N OF INVESTIGATION, CONTRACT LABOR: THE MAKING OF AN UNDERGROUND ECONOMY 2, 9-12 (1997).

173. U.S. GEN. ACCOUNTING OFFICE, GAO/T-GGD-96-130, TAX ADMINISTRATION: ISSUES IN CLASSIFYING WORKERS AS EMPLOYEES OR INDEPENDENT CONTRACTORS: TESTIMONY BEFORE THE SUBCOMMITTEE ON WAYS AND MEANS 5-6 (1996) (statement of Natwar M. Gandhi, Assoc. Dir. of Tax Policy and Admin. Issues).

174. See 26 U.S.C. § 3401 (2000) and accompanying notes. See also Internal Revenue Manual, Technical Guidelines for Employment Tax Issues, § 4.23.5.2, 4.23.5.2.2.3 (2003), available at <http://www.irs.gov/irm/part4/ch23s05.html#d0e328505>.

175. See Internal Revenue Manual, *supra* note 173, at § 4.23.5.2.2.3 (2003).

time pay.¹⁷⁶ “Tipped employees’” wages are subject to deduction for tips they supposedly receive.¹⁷⁷ Agricultural employees are exempt from overtime rules.¹⁷⁸

For a longer term agenda on contingent labor and misclassification, Congress need look no further than the work of the Dunlop Commission.¹⁷⁹ In 1995, the Dunlop Commission released its report after a twenty-month review of labor and employment laws and relations in the United States.¹⁸⁰ Among its recommendations was adopting a single definition of employee for all workplace laws based on the economic realities of the employment relationship.¹⁸¹ The Commission stated:

The law should confer independent contractor status only on those for whom it is appropriate—entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected social security, unemployment, personal income, and other taxes.¹⁸²

In the longer term, Congress should also consider industry-specific legislation. There is precedent for such an approach in the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), passed in 1982, to address the special problems of agricultural workers. The AWPA provides for registration and licensing of labor intermediaries, regulation of housing conditions and the conditions of transportation of agricultural workers, and provides for remedies for unsafe conditions or misrepresentation of terms and conditions of employment.¹⁸³ Some states have passed protective legislation that focuses on certain groups of workers thought to be vulnerable to abuse. At least five states have farm labor contracting laws (California, Flor-

176. 29 U.S.C. § 213(a)(15) (2000); 29 U.S.C. § 213(b)(21) (2000); 29 C.F.R. § 552.109(a) (2006).

177. 29 U.S.C. § 203(m) (2004).

178. 29 U.S.C. § 213(b)(12).

179. The DOL’s Commission on the Future of Worker-Management Relations (the “Dunlop Commission”) was created to study the contingent workforce. For its final report, see U.S. DEP’T OF LABOR, COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, REPORT AND RECOMMENDATIONS (1995), available at http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm#Table.

180. *Id.* at Preface.

181. *Id.* at Section 5.

182. *Id.* at Executive Summary.

183. See 29 U.S.C. §§ 1801–1872 (2004).

ida, Idaho, Oregon, and Washington).¹⁸⁴ Three states have laws regulating employment in the garment industry (California, New Jersey, and New York).¹⁸⁵ One state has specialized laws regulating the meat packing industry (Nebraska).¹⁸⁶ Six states have laws that regulate day labor (Arizona, Florida, Georgia, Illinois, New Mexico, and Texas).¹⁸⁷ Domestic worker legislation was proposed in New York and California in 2006.¹⁸⁸ The Day Labor Fairness and Protection Act, first proposed by Congressman Luis Gutierrez in the 108th Congress, would have addressed the special problems of day laborers.¹⁸⁹ These are industries known for abuse of vulnerable workers, yet excluded either by law or in practice from basic labor standards, often due to the use of labor intermediaries.

B. Making OSHA More Effective

The steps that can protect the pocketbooks of low-wage workers can also protect their lives. This means more emphasis on targeted, sector-specific enforcement, dismantling barriers to enforcement faced by immigrant and low-wage workers, higher penalties for endangering worker health and safety, and stronger protections for those who refuse unsafe work.

1. Beefing Up Enforcement

OSHA's current educational efforts are laudable, but they have not solved problems of workplace injuries, especially the alarming rate of injuries and deaths among Latino and immigrant workers. For example, though at least one in ten meatpacking workers is injured every year, OSHA inspects only "about 75 of the more than 5,000

184. CAL. LAB. CODE §§ 1682–1699 (West 2007); FLA. STAT. ANN. §§ 450.27–450.39 (West 2007); IDAHO CODE ANN. § 44–1601; OR. REV. STAT. §§ 658.405–658.503 (2005); WASH. REV. CODE ANN. §§ 19.30.010–19.30.902 (West 2005).

185. CAL. LAB. CODE §§ 2675–2684 (West 2007); N.J. STAT. ANN. §§ 34:6-144–34:6-146 (West 2000); N.Y. LAB. LAW §§ 340–349-a (McKinney 2007).

186. NEB. REV. STAT. § 48-2213 (2004).

187. ARIZ. REV. STAT. ANN. §§ 23-551–23-553 (2006); FLA. STAT. ANN. §§ 448.20–448.26 (West 2006); GA. CODE ANN. §§ 34-10-1–34-10-6 (2004); 820 ILL. COMP. STAT. 175/1–175/99 (2006); N.M. STAT. ANN. §§ 50-15-1–50-15-7 (2005); TEX. LAB. CODE ANN. §§ 92.001–92.031 (Vernon 2001).

188. Assemb.B. 628, 229th Leg., Reg. Sess. (N.Y. 2007); Assemb.B. 551, 2005-06 Leg., Reg. Sess. (Cal. 2005). In California, AB 551 passed both houses of the state legislature in 2005, but was vetoed by Governor Schwarzenegger as an interference with the marketplace. Governor's Veto Message, Sept. 2, 2005, available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0551-0600/ab_551_vt_20050902.html.

189. H.R. 2870, 108th Cong. (2003).

meatpacking plants each year.”¹⁹⁰ OSHA does not keep individual plant records, so it is not clear how many accidents occur at each plant.¹⁹¹ In Arizona, construction industry leaders complain that the state does not have enough inspectors to adequately police the highly-dangerous construction industry.¹⁹² Given these continually poor outcomes, OSHA must embark on a targeted enforcement program for the industries, employers, and operations where workers, both immigrant and native, are at high risk of injury. Both civil and criminal penalties for OSHA violations should be increased. OSHA should issue its long-delayed final standard requiring employers to pay for personal protective equipment (PPE).¹⁹³

2. *Beefing Up Outreach and Training*

OSHA should enhance its efforts to protect workers, focusing on immigrant and Latino workers through increased safety and health training in languages understood by immigrant communities, enhancing its own language capabilities and increasing its outreach, training, and education efforts. OSHA could learn as well from some of the innovative programs that community groups have undertaken and could provide funding to these programs.

For example, two community-based training programs run, respectively, by Paper, Allied Industrial, Chemical and Energy Workers International Union (PACE) and the Service Employees International Union (SEIU), use “curricula based on a worker-centered learning, training led by worker trainers, and a chief program goal of increasing workers’ ability to advocate for health and safety changes in the workplace.”¹⁹⁴ A review of the programs found that “[b]etween half (55.4%) and three quarters (74.8%) of respondents from each type of facility reported that they or their coworkers were more willing to

190. Sudeep Reddy, *Processing Plants’ Dangers Don’t Scare off Migrants: One in 10 Workers Injured Each Year at Meatpacking Factories*, DALLAS MORNING NEWS, Nov. 21, 2006, at 1A.

191. *Id.*

192. Chad Graham and Matt Dempsey, *Hispanic Workers Suffer During Boom*, THE ARIZ. REPUBLIC (Phoenix), Feb. 13, 2007, at D1.

193. See Employer Payment for Personal Protective Equipment, 64 Fed. Reg. 15402 (proposed Mar. 31, 1999) (to be codified at 29 CFR pts. 1910, 1915, 1917, 1918, 1926). In proposing the payment for PPE rule, OSHA found that issuance of a rule requiring employer payment for protective equipment would significantly reduce the risk of injuries, preventing over 47,000 injuries and seven fatalities each year. *Id.* However, no final rule has yet been issued.

194. Tobi M. Lippin et al., *Empowerment-Based Health and Safety Training: Evidence of Workplace Change from Four Industrial Sectors*, 38 AM. J. INDUS. MED. 697, 698 (2000).

raise health and safety concerns after the training.”¹⁹⁵ In Dallas-Ft. Worth, a Capital Development Program (CDP), a forty-hour training course which attempts to break down barriers of language, literacy, and culture, has resulted in “an injury rate far below the national average for a heavy construction site.”¹⁹⁶ More training and outreach in conjunction with groups on the ground, combined with a targeted enforcement system that sets punishment at a level high enough to deter future violations, could make the difference for many workers.

C. *More Effective Employer Sanctions*

In order to insure that all workers are equally protected by labor laws and to reduce the incentives to hire undocumented workers, Congress should ensure that immigration status should be entirely irrelevant to whether or not a worker is protected by core labor standards. These include protection against discrimination on the job, protection from retaliation for making complaints, access to workers’ compensation, the protection of the Unfair Immigration-Related Employment Practices Act, and ability to exercise freedom of association and collective bargaining. Senate Bill 2611, the comprehensive immigration bill that passed the U.S. Senate in May 2006, contained many of the elements outlined here for both immigration and labor law reform, but not all.¹⁹⁷ Prior pieces of comprehensive immigration reform legislation also contained some of these proposals. Each was incomplete in its protections in ways that will be outlined here.

1. *Provide Legal Remedies for Labor Law Violations to All Workers*

A comprehensive legalization program will allow many currently undocumented workers to enforce their labor rights. But under any system, some undocumented workers will continue to be present. Em-

195. *Id.* at 702.

196. JAMES L. NASH, BEST PRACTICES IN TRAINING HISPANIC WORKERS (2004), available at <http://www.cdc.gov/elcosh/docs/d0600/d000652/d000652.html>.

197. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (Engrossed as Passed by Senate). There was a plethora of immigration legislation in the 108th and 109th Congresses. See ANDORRA BRUNO, CRS REPORT FOR CONGRESS ORDER CODE RL32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS (2006), available at <http://fpc.state.gov/documents/organization/62664.pdf>. This analysis focuses on S. 2611 because that bill passed one house of Congress, was the subject of intense bi-partisan negotiation, and contained many elements that would have protected labor rights of immigrant and U.S. workers. Senate Bill 2611 and its more protective predecessor, the Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act, are highlighted here in the hope that these provisions can be strengthened in 2007.

ployer sanctions provisions will cause some employers to hire undocumented workers off the books. These workers, as well as those who fall out of status, due to job loss, minor criminal convictions, missed deadlines, and other reasons, will be subject to the same limitations on enforcement of their rights as are all currently undocumented workers. In order to avoid abuse of these workers, immigration reform legislation should guarantee that all workers, regardless of immigration status, have equal access to remedies for labor law violations and equal coverage under workers' compensation laws.

Two proposals in the 108th Congress included this concept. The Safe, Orderly, Legal Visas and Enforcement (SOLVE) Act, introduced by Senator Kennedy in the Senate and by Representative Gutierrez in the House, provided that "backpay or other monetary relief for unlawful employment practices shall not be denied to a present or former employee" as a result of failure to comply with employment verification laws.¹⁹⁸ The Fairness and Individual Rights Necessary to Ensure a Stronger Society (FAIRNESS) Act contained identical language.¹⁹⁹ Senator Kennedy's amendment to S. 2611 also contained a similar provision saying that an alien subjected to an illegal employment practice "may not be denied backpay or other monetary relief" on the basis of the employee's immigration status.²⁰⁰

2. *Equalize the anti-discrimination provisions of IRCA with other anti-discrimination laws*

As noted above, the anti-discrimination protections in IRCA were enacted to address discrimination that was expected to result from the implementation of employer sanctions. While IRCA's anti-discrimination protections have been critical in protecting some workers from discrimination, many others are excluded from these provisions, including lawful permanent residents not intending to become citizens and all unauthorized workers.²⁰¹ Allowing all workers to present claims for violations of the anti-discrimination provisions, and removing the "intent" requirement would bring IRCA into line with other civil rights laws that prohibit discrimination based upon race, color, national origin, religion, and gender. For example, Title VII of the Civil Rights Act declares certain practices to be discriminatory conduct without an additional requirement of discriminatory "intent," as

198. S. 2381/H.R.4262, 108th Cong. § 321 (2004).

199. H.R. 3809, 108th Cong. § 702 (2004).

200. See 109 CONG. REC. 64, S4913-14 (May 22, 2006) (statement of Senator Kennedy, S.AMDT. 4106 § 807).

201. See 8 U.S.C. § 1324b(a)(3) and discussion *supra* Part III.A.1. .

do both the Age Discrimination in Employment and Americans with Disabilities Acts.²⁰² Taking a step in the right direction, S. 2611 contained a provision that would have expanded the definition of “protected individual” to include all legal permanent residents, immigrants granted temporary protected status, immigrants granted parole, and non-immigrants admitted under temporary guestworker programs.²⁰³

3. *Firewall Between Immigration and Labor Law Enforcement*

All workers should have meaningful access to systems of labor law enforcement. This means preserving historic boundaries between labor law enforcement and enforcement of immigration law.

The Supreme Court has specifically 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.²⁰⁴ As has been noted, if employers can hire, abuse, and then fire undocumented workers who complain about labor law violations, they will be encouraged to hire more undocumented workers. Since workplaces with immigrants also contain non-immigrant workers, employers who can deport their problems away can disrupt, for example, an organizing drive including both documented and undocumented workers. For these reasons, since the late 1990’s, U.S. immigration authorities have had a policy that gives some protection to workers when an employer threatens to turn them in to immigration personnel in retaliation for workplace complaints.²⁰⁵ The policy should be strengthened and codified.

In 1998, the DOL entered into a Memorandum of Understanding with the INS establishing that the labor agency will not report the undocumented status of workers if discovered during an investigation of a labor dispute triggered by an employee complaint, nor will it inquire into a worker’s immigration status while conducting a com-

202. 42 U.S.C. § 2000e-2 (1994); 29 U.S.C. § 623 (1999); 42 U.S.C. § 12112 (1995).

203. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 305(b) (2006).

204. “[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.” *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976).

205. OFFICE OF PROGRAMS & OFFICE OF FIELD OPERATIONS, POLICY AND PLANNING, REV. OPERATIONS INSTRUCTION 287.3 (Dec. 4, 1996) (on file with New York University Journal of Legislation and Public Policy).

plaint-driven investigation.²⁰⁶ However, studies of the policy show that it has not been uniformly enforced.²⁰⁷ A recent raid in Tar Heel, North Carolina, conducted with the employer's cooperation following a union-organized walkout of hundreds of workers, illustrates how employers facing labor disputes can use immigration law to rid themselves of workers who complain.²⁰⁸ This policy, too, should be strengthened and codified.²⁰⁹

4. "Whistleblower" protections

As noted above, it is all too common for employers to misuse immigration status to cause the deportation of workers who complain. Measures must be taken to ensure that workers with valid claims have the right to remain in the United States and present them. In other areas of the law, Congress has made special status provisions for immigrants who are involved in legal cases. With passage of the Trafficking Act and the Violence Against Women Act (VAWA), immigrant victims of domestic violence or those involved in criminal cases may be eligible for the T and U visas, which grant the worker "lawful temporary status," without a fixed duration, and work authorization. After three years of continuous presence in the United States on either visa, an immigrant satisfying additional criteria set forth in the law will be eligible to adjust her status to legal permanent resident.²¹⁰ While SOLVE contained temporary protection of witnesses

206. See Memorandum of Understanding Between the Immigration and Naturalization Serv. Dep't of Justice and the Employment Standards Div. Dep't of Labor, Nov. 23, 1998, available at <http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm>.

207. Out of 184 worksite raids conducted over a thirty-month period in New York, 122 of the businesses had a labor investigation pending, according to one analysis. See Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues In Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390-91 (2004).

208. Julia Preston, *Immigration Raid Draws Protest From Labor Officials*, N.Y. TIMES, Jan. 26, 2007, at A17.

209. Each of these provisions was contained, to some degree, in the SOLVE immigration bill in 2004. S. 2381/H.R.4262, 108th Cong. (2004). It included confidentiality in investigations by the Office of Special Counsel, which enforces the immigration-related discrimination laws. *Id.* § 322(2)(A)(2). It also included non-intervention by the Department of Homeland Security in labor disputes. *Id.* § 318.

210. The Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) provides a T visa as a way for people who have been trafficked into the United States for illegal purposes to obtain temporary lawful status, provided they cooperate with any reasonable requests for assistance made by law enforcement officials. Pub. L. No. 106-386 § 107(f), 114 Stat. 1465 (2000). U visas, available for victims of certain crimes, enumerated in the Act, have similar provisions. *Id.* The Violence against Women Act, passed as a title of VTVPA, also provides for a path to legalization for certain immigrant women who are victims of domestic violence. *Id.* § 1513(f).

involved in labor disputes,²¹¹ the Trafficking Act and VAWA are more generous—they allow a path to legalization for victims of crime. A similar path should be made available to victims of abuse at the hands of their employers.

5. *Eligibility for Legal Help*

In 1974, Congress passed the Legal Services Corporation Act, which was designed to provide equal access to the civil justice system for people who cannot afford lawyers.²¹² Legal Services Corporation programs are prohibited from providing legal assistance “for or on behalf of” most immigrant workers who are not lawful permanent residents.²¹³ One of the key reasons that working people need access to the civil justice system is to enforce their labor rights. Undocumented workers and H-2B guestworkers tend to be impoverished and unable to afford private lawyers. The complexities of the H-2B program make it unlikely that many lawyers in the country are familiar enough with it to pursue labor cases. Even where legal questions involve a simple wage claim, the complexities of working with undocumented workers make it difficult for private lawyers to take their cases. As a practical matter, without the means to bring suit in court, workers’ rights cannot be adequately enforced.²¹⁴

D. *Repair Existing Guestworker Programs*

These same principles of stepped-up enforcement of core labor standards, regulation of subcontracting activities and guaranteed equality under the law apply equally to workplaces with guestworkers.

211. SOLVE Act, S. 2381/H.R. 4262, 108th Cong. § 319 (2004). Senator Kennedy’s amendment contained a provision that would have allowed the Secretary of Labor to extend work authorization for immigrants who had filed labor complaints, but only in 60-day increments. 109 CONG. REC. 64, S4914 (May 22, 2006) (statement of Senator Kennedy, S.AMDT. 4106, § 806).

212. Legal Services Corporation Act, 42 U.S.C. § 2996 (2000).

213. 45 C.F.R. § 1626.1 (2006). This policy is currently being challenged as a violation of the North American Agreement on Labor Cooperation. Petition submitted to the National Administrative Office of Mexico (Apr. 13, 2005), *available at* <http://www.dol.gov/ilab/media/reports/nao/submissions/2005-01petition.htm>. Under an amendment to S. 2611, H-2B forestry workers would have been eligible for representation by federally-funded legal services programs. S. 2611.ES, 109th Cong. § 774 (2006).

214. For example, in adopting the AWPA, Congress identified the lack of a private right to sue as a primary reason for the failure of its predecessor statute. *See* S. REP. NO. 93-1206, at 3 (1974). Accordingly, one of the “major purpose[s]” of the 1974 Amendments was to “creat[e] a civil remedy for persons aggrieved by violations of the act.” S. REP. NO. 93-1206, at 6 (1974). For further discussion of governmental and private pathways for enforcement, see discussion *infra* Part IV.D.4.

Rather than beginning anew with a bigger guestworker program, Congress should repair the problems with the existing programs for low-wage workers.

Because of the abusive history and enormous potential for guestworker programs to be misused to bypass an available workforce and to take advantage of the lack of freedom of guestworkers themselves, the new Congress must recognize and correct past mistakes in guestworker programs, before turning to a new, additional guestworker program. The following is a list of additional principles that would be needed to reform guestworker programs in an effort to protect the labor rights of both American- and foreign-born workers.

Senate Bill 2611 contained a number of the concepts outlined here for guestworker reform, but not all. Most notably, it did allow guestworkers to have a path to legalization, so that eventually, workers who had spent time as guestworkers in the country would be able to make their home in the United States.²¹⁵ Of particular concern, however, the newly-designed guestworker program outlined for non-agricultural temporary workers contained in the bill had more in common with the less-protective H-2B program than the more-protective H-2A program, both of which have been the subject of extreme abuse. The following section gives particulars on each of these issues, as well as ideas to reform these programs.

1. Developing (and Enforcing) a Labor Market Test

The notion of a labor market test under current guestworker programs generally means that the employer is required to advertise jobs in order to test the availability of U.S. workers. As illustrated in the Global Horizons example outlined above, these efforts can be less than good-faith.²¹⁶ As noted above, the Office of Inspector General for the DOL has found shortcomings in the H-2A recruitment system—currently the most demanding of the guestworker programs.²¹⁷ The proposed H-2C program in S. 2611 potentially required less in the way of a labor market test by recruitment of local workers than is currently required in the H-2B program. According to the bill, if the DOL certified a shortage in an industry, a prospective H-2C employer need only notify current workers that it is filing a petition.²¹⁸ If no

215. Under the proposal, workers would have been able to self petition for a permanent visa after four years as a guestworker, or employers would have been allowed to petition for them. S. 2611, 109th Cong. § 408(h) (2006).

216. See *supra* Part III.B.1.

217. See *supra* note 145 and accompanying text.

218. S. 2611, 109th Cong. § 404 (2006).

shortage has been certified, the employer must undertake recruitment efforts through the state employment service ending fourteen days before the filing of the petition for foreign workers.²¹⁹ The bill provides for an objective test of the labor market by allowing the DOL to certify, by unspecified methods, that there is a shortage in an industry.²²⁰ Also, the program may not be used in an area where “the unemployment rate for workers who have not completed any education beyond a high school diploma during the most recently completed 6-month period averaged more than 9.0 percent.”²²¹

The “Agricultural Job Opportunity, Benefits, and Security Act” (“AgJobs”) was first introduced in 2003 by Senator Larry Craig and Representative Chris Cannon.²²² It would have granted legal status to millions of farm workers in the United States and would have overhauled the H-2A agricultural worker program.²²³ It was eventually incorporated into S. 2611. The AgJobs labor market test provisions incorporated into S. 2611 were more extensive, owing at least in part to its origins in the current H-2A program. Employers would be required to individually contact former employees, place a job order in the local job market and through the Employment Service, and employ any U.S. worker who comes to it for 50% of the contract period.²²⁴

Clear recruitment requirements more like those in the H-2A program, combined with efforts to develop a set of objective labor market indicators, and active oversight of recruitment efforts, would help identify the industries and geographical areas in which there is a true undersupply of workers. These more objective labor market indicators could include unemployment and employment rates among workers with the same skill levels as the guestworkers who would be filling the jobs, or focused on the industries in which guestworkers are being requested, within a particular labor market area.

2. *Wage Levels That Avoid Depression of Wages*

While most economists agree that the presence of immigrant workers does not cause a general depreciation in wages for United States workers,²²⁵ the data on the *Bracero* program show some wage

219. *Id.*

220. *Id.*

221. *Id.*

222. BRUNO, *supra* note 197, at 10.

223. *See id.* at 10–11.

224. S. 2611, 109th Cong. § 615 (2006).

225. There are a number of recent studies on potential wage depression caused by the presence of undocumented workers in the economy. Most studies find that immigration is, and will continue to be, vital to meet our growing economy over the next

depression caused by the presence of foreign workers from poorer countries who accept lower pay to obtain jobs in this country, and who are prohibited from changing jobs.²²⁶ In order to guard against future wage depreciation that may be caused by the influx of many hundreds of thousands of guestworkers, it is necessary to include enhanced wage standards in a viable guestworker program.²²⁷

H-2A program regulations require an employer to pay, at a minimum, the highest of the state or federal minimum wage, the local “prevailing wage” for the particular job, or an “adverse effect wage rate (AEWR).”²²⁸ AEWRs are the minimum wage rates which the DOL has determined must be offered and paid to U.S. and foreign workers by employers of H-2A workers.²²⁹ The AEWR was created under the *Bracero* program as a protection against the depression of wages.²³⁰ The DOL issues an AEWR for each state based on U.S. Department of Agriculture data.²³¹ In 2007, the lowest AEWR is \$8.01 per hour in Arkansas, Louisiana, and Mississippi, and the highest is \$10.32 in Hawaii.²³²

The AEWR has often been criticized by farmworker advocates as being too low to guard against wage depression.²³³ This is the case

fifteen years, when “baby-boomers” are retiring, but many find some negative effects on the wages of similarly-skilled, similarly-educated workers. *See, e.g.*, B. LINDSAY LOWELL ET AL., IMMIGRANTS AND LABOR FORCE TRENDS: THE FUTURE, PAST, AND PRESENT (2006), available at http://www.migrationpolicy.org/ITFIAF/TF17_Lowell.pdf. It is difficult to isolate the effects of immigration versus other effects on wages and job availability: During the 1990–2004 period of high immigration levels, among the 90% of native-born workers with at least a high-school diploma, wage increases ranged from 6.5% to 21.5%, depending on education. While wages of some unskilled workers declined, it is not clear how much of that decline was due to other forces beyond immigration (such as trade). Giovanni Peri, *Rethinking the Effects of Immigration on Wages: New Data and Analysis from 1990-2004*, IMMIGRATION POLICY IN FOCUS, Oct. 2006, at 5.

226. *See, e.g.*, *Evaluating a Temporary Guest Worker Proposal: Hearing Before the Subcomm. on Immigration and Border Sec. of the S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Vernon Briggs, Professor of Industrial Relations, Cornell Univ.); WILLIAM G. WHITTAKER, CRS REPORT FOR CONGRESS ORDER CODE RS21015, THE ADVERSE EFFECT WAGE RATE 2 (2005).

227. 20 C.F.R. § 655.102(b)(9) (2006).

228. S. POVERTY LAW CTR., *supra* note 114, at 21. *See also* 20 CFR § 655.107 (2003).

229. U.S. DEP’T OF LABOR, ADVERSE EFFECT WAGE RATES 2007, <http://www.foreignlaborcert.doleta.gov/adverse.cfm>.

230. S. POVERTY LAW CTR., *supra* note 114, at 21.

231. *See* 20 C.F.R. § 655.107(a) (2003).

232. U.S. DEP’T OF LABOR, *supra* note 229.

233. *See, e.g.*, BRUCE GOLDSTEIN, GUESTWORKER POLICY: H-2A PROGRAM ADVERSE EFFECT WAGE RATES ARE TOO LOW (2006), http://www.fwjustice.org/Immigration_Labor/H2abDocs/AEWRTooLow.doc.

for several reasons. First, while AEWs are typically a higher wage than either minimum or prevailing wages, they have in effect become a “maximum” wage for workers.²³⁴ Under the H-2A system, if domestic workers are not willing to accept the rate that the employer offers, then the employer may employ foreign workers who, given the disparity in wage rates between the United States and their home countries, will almost always be available at the AEW.²³⁵ Since under the regulations, the employer must only offer the AEW to U.S. workers, any U.S. worker who would like to work for an employer but be paid more than the AEW may be deemed “unavailable” for work, and thus rejected in favor of guestworkers. In addition, the present AEW system allows for manipulation by employers who pay by piece rate. It allows employers to pay a piece rate of a particular amount per bin of apples, for example, but require superhuman quantity and quality standards in order for workers to be considered qualified for jobs.²³⁶ These shortcomings, as well as the shortcomings of the agency administering it,²³⁷ should be considered as Congress devises a properly calculated adverse effect wage rate to guard against wage depression.

The AgJobs compromise that was part of S. 2611 as passed by the Senate in the 109th Congress included a provision that the employer agree to pay the adverse effect wage rate.²³⁸ The AEW was subjected to additional research on its effectiveness in preventing wage depression.²³⁹ The AEW should be a continued feature of the H-2A program and an additional feature of the H-2B program.

3. *Wages and Working Conditions That Avoid Depression*

In the current H-2A program, putative employers of guestworkers must offer the same benefits and job requirements to both United States and foreign workers.²⁴⁰ These include free housing, tools and supplies, transportation to work and reimbursement for transportation expenses home after the contract is completed, a guarantee of work for three-quarters of the total period that is included in the job offer, and

234. See WHITTAKER, *supra* note 224, at 4.

235. *Id.*

236. See GOLDSTEIN, *supra* note 233.

237. In 2002, the DOL was successfully sued for its failure to issue the H-2A program wage rates in a timely manner. See *United Farm Workers of Am., AFL-CIO v. Chao*, 227 F. Supp. 2d 102, 103–04 (D.D.C. 2002).

238. S. 2611, 109th Cong. § 615 (2006).

239. S. 2611 § 615, containing § 218E(b)(3)(G).

240. 20 C.F.R. § 655.102 (2003).

the making of certain assurances including that the workers are not being hired as strikebreakers in a labor dispute.²⁴¹

In the proposed H-2C program in S. 2611, an employer would have been obligated only to agree that working conditions in the H-2C job are “standard” in the industry, that workers’ compensation would be provided, that no displacement of U.S. workers occurred in the hiring of this particular worker, and that it would pay either actual wages of other workers or prevailing wage.²⁴² A Temporary Worker Task Force was to study the impact on wages and working conditions of the new guestworker program.²⁴³

In the AgJobs proposal included in S. 2611, again owing to its genesis in the H-2A program, a number of additional guarantees were included, nearly identical to the current program.²⁴⁴ These should be retained in the H-2A program and added to the current H-2B program.

4. *Not Only Standards, but Enforcement*

Experience on enforcement of labor standards has shown that workers are best able to enforce their rights when they have two complementary means of enforcement: access to an active enforcement agency and to their own private right of action. When budgetary shortfalls or lack of will prevent agencies from protecting workers, a private right of action means that individuals may raise challenges using private litigation. But if private litigation is the only route, lack of access to lawyers prevents many low-wage workers from enforcing their own rights.²⁴⁵

Senate Bill 2611 contained some important steps towards this dual enforcement, but it did not go far enough. The new H-2C program would have included the annual hiring of 2,000 additional investigators at the DOL, but their work was to be confined to the enforcement of the title of the bill dealing with the H-2C program.²⁴⁶ No private right of action was granted to H-2C workers to enforce

241. 20 C.F.R. §§ 655.202(a), (b)(1), (b)(5), (b)(6), 655.203(a) (2006).

242. S. 2611 § 404, containing § 218B(c).

243. S. 2611 § 408.

244. These included housing, transportation, wage protections, a guarantee of employment, and safety standards. S. 2611 § 615, containing §§ 218E(b)(1), (2), (3)(G)–(H), (4), (5).

245. In the current H-2B program, the DOL takes the position that it has no authority to enforce the H-2B contract on behalf of H-2B workers, since violations are not necessarily violations of FLSA or other federal laws that it enforces. Thus H-2B workers must rely solely on their own private right of action to enforce their rights. S. POVERTY LAW CTR., *supra* note 114, at 8.

246. S. 2611, 109th Cong. § 412 (2006).

their own contracts, and, except for guestworkers employed in forestry, no additional access to free legal services was part of the bill.²⁴⁷

The AgJobs program allowed for a private right to sue for certain violations of the agricultural worker's contract.²⁴⁸ These are: housing violations, discrimination, payment when due, transportation, motor vehicle safety, and failure to provide promised terms, conditions, and benefits of employment.²⁴⁹ When Congress takes a look at immigration reform in the new session, it should include full public and private enforcement, as well as additional personnel power.

5. *Regulate Mega-Contractors and the Entities That Use Them*

As noted above, subcontracting of workplace responsibilities and classifying workers as "independent contractors" are large and growing problems within the United States.²⁵⁰ The H-2A and H-2B programs have engendered an industry of international labor recruiters who profit from selling the right to work in the United States.²⁵¹ These recruiters must be regulated, but experience has shown that they cannot be adequately regulated without placing responsibility on the employers who use them. Recruiters should be licensed, bonded, and required to make written disclosures of terms and conditions of employment, and transportation and "recruitment" fees should be abolished.²⁵²

247. As noted, under S. 2611, H-2B forestry workers would have been eligible for representation by federally-funded legal services programs. S. 2611 § 774.

248. S. 2611 § 615, containing § 218G(b).

249. *Id.*

250. *See* discussion *supra* Part II.A.

251. *See* discussion *supra* Part III.B.1–2.

252. Some of these provisions are in the pending Senate bill, S. 2611, 109th Cong. § 404 (2006), containing § 218B(h) (explaining that recruiter must be licensed, that the DOL may require a bond, that recruiter must disclose terms and conditions of employment in workers' language, that retaliation is prohibited, and that false and misleading information is prohibited; but there is no private right of action, and fees charged for transportation must be "reasonable"). House Bill 2298, sponsored by Congressman George Miller, also attempted to address this question. That bill similarly required disclosures in the workers' language, prohibited false and misleading information and on recruitment fees, required payment of transportation costs by the employer, and contained prohibitions on retaliation. While that bill more clearly addressed the employer's responsibilities, it did not include a registration or bonding mechanism. *See* H.R. 2298, 109th Cong. § 2 (2006). Some recruitment fee practices are already outlawed in at least two of the source countries for guestworkers in the U.S. *See* Ley Federal de Trabajo [L.F.T.] [Labor Law], Art. 28 (Mex.) and Decree No. 14-41, Art. 34 (Guat.). The 11th Circuit has ruled that visa fees and travel costs must be repaid by employers at the beginning of employment to the extent that they reduce wages below the minimum wage. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1232 (11th Cir. 2002). The *Arriaga* decision did not find U.S. employers liable for recruitment or "referral" fees. *Id.*

The proposed guestworker program in S. 2611 contained some regulation of international labor contractors and those who employ them. First, the bill provided that a guestworker could not be treated as an independent contractor.²⁵³ Since it also referred to the definition of “employ” used in the FLSA, it allowed for a person to claim that a worker is jointly employed by the contractor and an on-site employer.²⁵⁴ However, since the section contained no private right of action, H-2C workers could only bring suit directly for a violation of minimum wage and overtime laws, rather than any higher wage promised them or required under the law. Such a provision would likely not significantly increase these workers’ access to the legal system to enforce their rights.

The same section prohibited the provision of false and misleading information, the violation of terms and conditions of employment, and provided that written disclosure of terms and conditions of employment be provided to workers.²⁵⁵ It also required labor recruiters to be licensed.²⁵⁶ The provision could be greatly enhanced by a complete private right of action, wage bonding, and outlawing of transportation fees.

6. *Portability*

One of the primary problems with guestworker systems is that a guestworker’s job AND his or her ability to remain in the country depend on remaining in the good graces of the employer. This is a situation made for employers who would take advantage of workers. Along with beefed up enforcement of wage and hour laws, workers must have the ability to change jobs in order to equalize bargaining power. New immigration legislation should allow for easy portability of visas.²⁵⁷

7. *Family Unity*

Some principles make sense as a matter of law. Others make sense as a matter of economics. Two additional principles make sense

253. S. 2611 § 404, containing § 218B(f)(1).

254. S. 2611 § 403, containing § 218A(n)(4); 29 U.S.C. § 203(g) (2000).

255. S. 2611 § 404, containing § 218B(h)(2)–(5).

256. S. 2611 § 404, containing § 218B(h)(7)(B)(i).

257. In the H-2C program, workers would have been allowed to move to a different employer, as long as that employer followed recruitment procedures and the worker did not work without employment authorization. In the AgJobs program, victims of discrimination could ask the DOL to locate other employment within the term of their authorized stay, but the visas are otherwise not portable. *See* S. 2611 § 403, containing § 218A(j) (incorporating a provision for “portability” of H-2C visas).

as a matter of human rights and human dignity. An observer of the German guestworker programs once said, “[w]e wanted guestworkers, but they brought us human beings.”²⁵⁸ In recognition that guestworkers are people with families, they should be allowed to bring their families with them as they come to the United States, and to travel in and out of the country. In addition, while some guestworkers would prefer to return home after their term of work in the United States is over, many others certainly put down roots and wish to stay. Guestworkers should be provided a path to citizenship in exchange for their help in building our economy.

The negotiators of the Senate bill in 2006 understood this question, and the guestworker programs allowed the worker’s spouse and minor children to enter the country as well.²⁵⁹ The pathway to legalization for guestworkers in the Senate bill was not particularly strong. Under it, an employer could apply for permanent status for a worker after one year in the program, but a worker could apply only after four years working within the United States and with the help of an employer, who was required to attest that it would employ the worker, and the DOL, which was required to certify that there were not sufficient U.S. workers to perform the job in question.²⁶⁰ Further consideration should be given to a self-petitioning process for those who are helping to build our country and our economy.

V.

CONCLUSION

Low-wage jobs in the United States are bad and getting worse. Years of unregulated employer schemes and government neglect have made basic wage and hour laws outdated, shrunk the pool of workers entitled to coverage, and made the very term “enforcement” nearly meaningless.

At the same time, immigrant workers who share the same workplaces and wages and working conditions with U.S. workers have been held up as scapegoats, and among the most-discussed ideas for fixing our nation’s broken immigration system have been sealing the borders and relying on a failed system of employer sanctions and an inhumane guestworker program to take care of future labor needs.

258. FARMWORKER JUSTICE FUND, THE BASICS ABOUT GUESTWORKER PROGRAMS, http://www.fwjjustice.org/Immigration_Labor/GuestworkerBASICS.htm (last visited Apr. 6, 2007).

259. S. 2611 § 403, containing § 218A(m).

260. S. 2611 § 408(h).

Our nation has never had the political will to enforce employer sanctions laws, and they have turned in to a reliable way for unscrupulous employers to retaliate against workers who dare to complain. Guestworker programs have proved unworkable for upholding the labor standards of both U.S. and foreign workers.

We can do better with a new system of “employer sanctions”—by penalizing employers who violate basic wage and hour laws, expose their workers to life-threatening workplace dangers, and brush off their workplace responsibilities to labor intermediaries. We can shore up the labor standards in current guestworker programs in order to give U.S. workers a fair chance at a decent job, and decent wages and working conditions to immigrants. We can put these immigrants on a path to citizenship.

In a nation that prides itself on principles of fairness and equality, we must decide to enforce labor and employment laws on an equal basis for all workers. If we intend to have a meaningful immigration policy, we must have a meaningful labor policy. It is hoped that the policies outlined here can guide Congress in its deliberations.