

NELP

Immigrant & Nonstandard Worker Project Policy Update *Advocating for the Working Poor and the Unemployed*

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Immigrant Worker Safety and Health: The Need for Meaningful Legal Protections

Recently there has been a great deal of attention paid to the disproportionately high levels of workplace injuries and fatalities among immigrant workers. While increased public acknowledgement of this serious and growing problem is an important first step, government agencies must work to ensure that immigrant workers have meaningful protection under the workplace safety and health laws regardless of immigration status.

This past July, OSHA held a “Hispanic Safety and Health Summit” in Orlando, Florida, highlighting the disproportionate rate of workplace-related injuries, illnesses and deaths among Hispanic workers.

A new Bureau of Labor Statistics report says that foreign born workers in the U.S. increased by 22 percent from 1996 to 2000. But during that time, the share of fatal occupational injuries for this population increased by 43 percent, while overall fatal occupational injuries to US workers declined by 5 percent. Among other findings, the report stated that:

- Immigrant workers are concentrated in low-wage, high-risk occupations. Nearly one in four fatally-injured foreign-born workers was employed in construction, with another one in three employed in retail trade or transportation/ public utilities.
- Fatal injuries in six states (California, Texas, Florida, New York, Illinois and New Jersey) accounted for 64 percent of all nationwide fatalities to foreign-born workers, with most fatal injuries occurring in California and Texas. Immigrant workers in Texas suffer an especially disproportionate risk of death on the job: During the years 1998-2002, Texas' immigrant worker population was about 17% of the total labor force, but 21% of the workplace deaths in Texas were foreign workers.

See: Foreign-born workers: trends in fatal occupational injuries.

<http://www.bls.gov/opub/mlr/2004/06/art3full.pdf>

In New York City, the disturbing trend of immigrant day laborers performing construction work and being killed on the job has raised the need for stiffer penalties and better enforcement. Bryan Virasami and Graham Rayman, *Advocates Decry Workers' Deaths*, NEWSDAY, August 13, 2004.

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http://www.newsday.com/news/local/newyork/nyc-work0615_0_5982235.story?coll=ny-nynews-headlines.

An AP investigation a few months ago concluded that that “[t]he jobs that lure Mexican workers to the United States are killing them in a worsening epidemic that is now claiming a victim a day.” Justin Pritchard, *Mexican Worker Dies Each Day, AP Finds*, NEWSDAY (March 14, 2004), at http://www.newsday.com/news/nationworld/nation/wire/sns-ap-dying-to-work_0_7940720.story

Employers Hire Undocumented Workers, Sometimes to Evade Health & Safety Costs

Employers in low-wage, high injury industries often hire undocumented workers. Some employers hire immigrant workers with a general knowledge that some in their workforce lack authorization to be employed in the U.S. Others have more specific knowledge that many in their workforce are undocumented. In the worst cases, employers seek out undocumented workers for the purpose of taking advantage of them in order to gain an economic advantage. This has been observed by courts considering the issue. See, *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super 14, 20; 671 A.D.2d 1054 (“the public policy against illegal immigration may actually be subverted by refusing to grant undocumented aliens workers’ compensation benefits. Employers might be anxious to hire illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of industrial accidents.”); *Dowling v. Slotnik*, 244 Conn. 781, 712 A.2d 396 (1998).

When the costs of industrial accidents are disproportionately left to the low-wage workers who suffer injuries, this system does not work. Unscrupulous employers attempt to avoid liability under the law and get a “free pass” by arguing that their employees’ immigration status is relevant to the issue of the employer’s liability for a workplace accident. Worker advocates have observed that employers take a sudden interest in their employees’ immigration status as soon as the employee gets injured or complains about unsafe workplace conditions.

The Hoffman Plastic Decision has Emboldened Employers

These employer practices have increased since a Supreme Court decision called *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). In that case, the Supreme Court held, by a slim 5-4 margin, that undocumented workers are not entitled to back pay under the National Labor Relations Act if they are illegally fired for engaging in organizing campaigns. Since *Hoffman*, immigrant workers around the country have been chilled in the exercise of their labor rights by news reports of employer retaliation (such as turning complaining employees over to Immigration), actual threats of retaliation, and the general confusion created by the *Hoffman* decision. Unfortunately, arguments pressed by certain employers and the flurry of litigation following the Supreme Court’s decision in *Hoffman* has created confusion among workers and sometimes

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agencies charged with enforcing the law. Many assume, wrongly, that undocumented workers are no longer able to enforce their rights under the Occupational Safety & Health Act (OSHA) or that they are no longer entitled to workers' compensation benefits if injured on the job.

In order to stop this increasing trend of injury and death that is occurring in the workplace, workplace health and safety laws must be vigorously enforced and workers injured on the job must get workers' compensation benefits. Workers face many obstacles to enforcing their rights, and these must be removed as well. This means providing meaningful access to government agencies and rights information in languages spoken by the workers. It also means preventing employers from using questions about immigration status and threats of turning workers over to immigration authorities as a means of getting a 'free pass' from liability under the laws.

Government agencies must show a clear commitment to enforce the law regardless of the injured worker's immigration status, and courts must reject attempts by employers to seek workers' immigration status information as a way of chilling injured workers' attempts to enforce their rights.

An employee's immigration status is not relevant to the question of whether an employer is in violation of OSHA, or whether an employer has fired a worker in retaliation for filing an OSHA complaint. In order for the protections under OSHA to have meaning, all workers who are retaliated against must be protected by the whistleblower protections included in OSHA. The whistleblower protections would not be meaningful if workers who experience retaliation are then subjected to questions regarding their immigration status by OSHA, or by employers seeking to avoid liability. Thus, OSHA must adopt a clear policy that discourages employer abuse of discovery to circumvent liability under the occupational safety and health law.

Most states have concluded that immigration status is not relevant to the question of whether a worker who is injured or killed on the job should be entitled to workers compensation benefits. Some states have reaffirmed this principle following *Hoffman*. For example, the Director of the Washington State Department of Labor and Industries issued a statement that undocumented immigrants continue to be entitled to both time loss and wage replacement after the *Hoffman* decision.¹ In September, 2002, a California law was enacted amending the Civil, Government, Health and Safety and Labor Codes. The new law reaffirms that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment who

¹ The 1972 law that revamped Washington's workers' compensation system is explicit: "All workers must have coverage. Both employers and workers contribute to the insurance fund. The Department of Labor and Industries is responsible for ... providing workers with medical care and wage replacement when an injury or an occupation disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status." Statement dated May 21, 2002 by Gary Moore, Director, available at <http://www.nelp.org>.

are or who have been employed, in this state.”² Other states should follow suit, and ensure that employers are not able to maintain unsafe work conditions and then evade responsibility for providing workers’ compensation because of the workers’ immigration status.

What can advocates do:

- Look up the rates of injury in your state: occupational injury, illness and fatality rates for your state can be found at the Bureau of Labor Statistics website, <http://www.bls.gov/iif/oshstate.htm#KS>
- Find out about OSHA enforcement in your state. Meet with OSHA to find out its enforcement priorities or do a Freedom of Information Act request. <http://www.osha.gov/as/opa/foia/howto-foia.html>.
- Find out about workers’ compensation access in your state. See Chapter 5 of NELP’s publication, *Low Pay High Risk*, <http://www.nelp.org/docUploads/lphrch5112603%2Epdf> for more information about immigrant access to workers compensation. Do not permit employers to succeed in arguments that they should be able to use an injured worker’s immigration status as a reason to avoid liability. Contact NELP staff for assistance with legal briefing.
- Find out about OSHA’s policy in your state about asking workers who file complaints about immigration status; encourage them not to do so and to make efforts to protect workers from employer retaliation.
- Encourage OSHA in your state to adopt a clear policy with regard to immigration status issues.

Model Policy

All workers, regardless of immigration status, are covered by occupational safety and health law, and are eligible for all remedies under the law unless explicitly prohibited by federal law.

1) The [Agency Name] will:

² See CAL. CIV. CODE § 3339 (2002); CAL. GOV’T CODE § 7285, *et seq.* (2002); CAL. HEALTH & SAFETY CODE § 24000, *et seq.* (2002); CAL. LAB. CODE § 1171.5 (2002).

- a. Investigate complaints of violations of the occupational safety and health laws and file court actions to enforce the law without regard to the worker's immigration status unless explicitly prohibited by federal law.
 - b. Investigate retaliation complaints and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about unpaid wages without regard to the worker's immigration status unless explicitly prohibited by federal law.
- 2) The [Agency Name] will not ask a complainant or witness for their social security number (SSN) or other information that might lead to disclosing an individual's immigration status, will not ask workers about their immigration status and will not maintain information regarding workers' immigration status in their files.
 - 3) During the course of court proceedings, the [Agency Name] will oppose efforts of any party to discover a complainant's or witnesses' immigration status by seeking a protective order or other similar relief.
 - 4) In the rare occasion that [Agency Name] must know the complainant's immigration status, it will keep that status confidential, and will have a policy of nondisclosure to third parties (including to other state or federal agencies), unless otherwise required by federal law.
 - 5) If a party raises the issue of an employee's immigration status in the course of [Agency Name's] proceedings, the party must show that the evidence is more probative than prejudicial, and that it obtained such evidence in compliance to 8 CFR § 274a.2(b)(1)(vii).
 - 6) [Agency Name] will train its staff (including intake officers, investigators, attorneys, and other relevant staff) on this policy and will work closely with community-based organizations to conduct this training.
 - 7) [Agency Name] will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.