National Employment Law Project

55 John Street, 7th Floor
New York, NY 10038
(212) 285-3025 tel
(212) 285-3044 fax
nelp@nelp.org
www.nelp.org

Executive Director
Bruce G. Herman

Staff Attorneys
Maurice Emsellem
Richard McHugh
Catherine K. Ruckelshaus
Rebecca Smith
Amy Sugimori

Policy Analyst
Andrew I. Stettner

Librarian/Receptionist
Deborah Buchanan-Taylor

Administrative Assistant
Bukola Ashaolu

Business Manager
Amelia Dizon

Board of Directors
Marttie Thompson, Esq.
NELP Board Chair

James Haughton, Director
Fight Back

Jonathan Hiatt, General Counsel
AFL-CIO

Jinsoo H. Kim
Davis Polk & Wardwell

Lucille Logan
Community Activist

Walter Meginniss
Gladstein, Reif & Meginniss

Michael Shen
Shen & Associates, P.C.

Thomas Weeks, Director
Ohio State Legal Services Assoc.

Cathy Wilkinson
Low-Wage Worker Activist

Statement of Amy Sugimori, National Employment Law Project
Public Hearing on SB 407 before the New Hampshire House
Criminal Justice and Public Safety Committee

Tuesday, April 4, 2006

Good morning and thank you for providing me the opportunity to provide testimony today. My name is Amy Sugimori. I am an attorney with the National Employment Law Project.

About the National Employment Law Project

The National Employment Law Project (NELP) is a national not-for-profit organization that has advocated on behalf of low-wage workers, the poor, the unemployed and other groups that face significant barriers to employment and government systems of support since 1969. To learn more, visit NELP's website at http://www.nelp.org.

Introduction

Immigrants provide benefits to society, in terms of labor and cultural contributions, and also in terms of taxes. Even those who do not have Social Security numbers can and do pay taxes on their income as well as sales tax and property tax.[1] The contributions of immigrant workers are responsible for keeping the Social Security trust funds afloat. This is of critical importance as the U.S. born population ages.[2]

Moreover, like all workers in New Hampshire, immigrants have workplace rights that prohibit employers from exploiting them and gaining an unfair advantage over employers who take the high road. They also have basic human rights to be treated with dignity and respect. Unfortunately, many immigrants are often subject to mistreatment in the workplace. There is a need for more effective enforcement of labor and employment rights to eliminate sweatshop conditions for workers and unfair competition against good employers. Unfair competition happens when the costs of cutting corners on labor and employment protections are low. Employers cut costs when they are able to violate the labor and employment rights of immigrant workers without consequences. These are the real problems that needs to be addressed.

Unfortunately, the proposed SB 407-FN-A will make the situation worse, not better. Experience shows that it will lead to increased discrimination and pushing vulnerable workers further underground. Moreover, it will create additional burdens to already-stretched state Department of Labor agents who should not be additionally required to act as immigration agents. Moreover, experience shows that it will be nearly impossible for the Department of Labor to develop the community trust needed to do their job if it is known that they are also enforcing immigration law.

Increased Discrimination

The proposed legislation includes a requirement that all employers file a statement declaring whether they employ aliens. This requires employers to distinguish between workers who are citizens or nationals of the United States and all other workers.[3] Many categories of workers who are not U.S. citizens or nationals are work-authorized. This provision requires employers to inquire about workers' citizenship or nationality status

and to make a determination of that status. In effect, it requires employers to play a role as immigration agents. This will have the effect of increasing discrimination, not only against those who are not U.S. citizens but also against those who, due to race or other characteristics, are perceived to be "aliens," as have existing federal requirements described below.

The proposed requirement will come in addition to employers' current obligation under federal law to verify the identity and employment eligibility of all employees hired after November 6, 1986, and to complete a special government form-called an Employment Eligibility Verification Form or an "I-9 form" for short-for each new employee hired. This provision is often referred to as IRCA, short for the Immigration Reform and Control Act which created these requirements. The federal requirement has resulted in widespread discrimination.

Both the General Accounting Office and the U.S. Commission on Civil Rights have found that IRCA led to discrimination against citizens and legal residents who look or sound "foreign." In particular, the Commission on Civil Rights stated in its report that "we find clear and disturbing indications that IRCA has caused at least a "pattern of discrimination," if not widespread discrimination."[4] The GAO found that 10% of employers in its survey had engaged in unlawful discrimination, and that "widespread discrimination" had occurred.[5]

The proposed requirement, which does not serve a clear purpose other than to identify employers who employ workers who are not U.S. citizens or nationals, is likely to lead to similar forms of discrimination. Moreover it is likely to lead to misunderstanding about the responsibilities of employers with respect to the extremely complex area of immigration law and to push employers who are trying to be cautious to err on the side of discrimination. Here are some examples:

- An employer may require U.S. citizens or nationals who appear "foreign," because of their race, accent, name or other characteristics, to provide documentation or information relating to immigration status beyond what is asked of candidates who do not appear "foreign." This practice is illegal.

- Employers may also be encouraged to engage in illegal discrimination based or race or national origin -- an employer may place additional requirements or refuse to hire workers who are or appear to be Latino, Asian or African, for example.

- Some employers have used the need to verify or re-verify immigration status or employment authorization as a pretext for retaliating against certain workers who assert their workplace rights. The process has also been used to intimidate workers who are attempting to organize a union or who are otherwise engaged in a labor dispute. This can be a violation of workers' rights under antidiscrimination laws as well as under anti-retaliation "whistleblower" protections.

Another effect of the federal requirements that is likely to result from additional states-level requirements, has been the growth of an "underground economy" of employers willing to cut corners on legal requirements, who employ workers "off-the-books," and routinely violate their basic workplace rights.

Pushing Workers "Underground"

The proposed legislation requires state Department of Labor agents to participate in enforcement of immigration law. These state agents are likely to discover that it becomes harder to do their job once it becomes known that they are also engaging in enforcement of immigration law. Unscrupulous employers take advantage of undocumented immigrant workers because they think they can get away with it. They count on the workers' fear of immigration consequences to keep them silent: to prevent them from organizing, from speaking out about bad

conditions, from cooperating with government agencies to enforce their rights. Examples of use of immigration enforcement to retaliate against workers who speak up about on the job abuse:

- In Minnesota, a worker who was injured on the job was turned in to the Immigration and Naturalization Service by his employer who then argued that he was not entitled to wage loss benefits in worker's compensation because of his undocumented status.[6]

- In California, a worker was turned in to the INS by her employer for filing a claim for unpaid wages and overtime under the FLSA.[7]

- *Sure-Tan v. NLRB* is the best-known example of use of immigration status to gain an advantage in a workplace dispute. There, five of seven eligible voters in a successful union election were undocumented. Two hours after the workers voted in favor of union representation, and cursing the workers for having voted for the union, the employer questioned them about their immigration status. He then turned the workers over to the INS.[8]

When low-road employers take advantage of workers fear of immigration consequences, it has a negative impact on all workers and permits bad employers to obtain an unfair advantage over high-road employers. Congress recognized this when it enacted the law providing for sanctions against employers who hire undocumented workers. It specifically highlighted the importance of ensuring that the labor and employment laws protect all workers, regardless of immigration status.[9]

Immigration and Customs Enforcement (ICE) also recognizes this. ICE itself says it will not respond when there is an existing labor dispute, in recognition that unscrupulous employers may use ICE to retaliate against workers.[10]

State agencies have recognized this too. In July 2005, following an immigration raid in which ICE agents had posed as OSHA agents, Allen Mc Neely, the head of the North Carolina Labor Department's Occupational Safety and Health division was strongly critical of that choice, saying that "the ruse eroded trust between the Labor Department and the workers it is trying to keep safe," and further: "We are dealing with a population of workers who need to know about safety," McNeely said. "Now they're going to identify us as entrappers."[11]

State Department of Labor Agents can best do their job with the cooperation of workers who can provide them with necessary information and report violations of labor and employment laws. Their job will become much more difficult if they are identified as immigration agents.

Additional Burdens on Department of Labor Agents

In addition to making it harder for Department of Labor agents to gain the trust of workers, the proposal will require them to take on additional complicated responsibilities. It would be unfairly burdensome to ask state agents to navigate the complex web of immigration law. Laypeople often talk in terms of citizen/noncitizen or documented/undocumented. However, often there is not such a bright line. In addition to citizenship and legal permanent residence (green card holder), is an alphabet of visa categories from A to V as well as status as an asylee, temporary resident, or temporary protected status. A person can transition from one status to another over time. It would be unfairly burdensome to ask state and local agents to take on the additional responsibility of acting as immigration agents. Because of this complexity, one of the risks associated with requiring state agents to make determinations of immigration status is that it can lead to racial or ethnic profiling and charges of discrimination.

Additional Burdens on Local Law Enforcement

The proposed legislation also authorizes state law enforcement agencies to enter into agreements with the federal government to assist in enforcement of immigration law. Such agreements will make it more difficult for them to perform their essential duties of preserving the peace, preventing crime, and protecting the rights of all the

residents they serve. In particular, it will make it far more difficult for law enforcement officers to develop relationships in the community that are essential tools in their fight against crime.

Around the country, smart law enforcement officials understand that they need the cooperation of witnesses and victims in order to fight crime. If witnesses and victims are afraid that law enforcement agents will turn them in to immigration, they will not come forward and law enforcement cannot do its job. Because of this, states, localities and police departments around the country have adopted a number of different strategies to improve immigrant access to social services, and to encourage immigrants to cooperate with and seek the assistance of law enforcement

Both INS and the Montgomery County police department understood this when they were trying to track down the Beltway area "sniper" in 2002. This was also the approach taken in the investigations of the September 11 World Trade Center attack.

What we're doing is joining with Chief Moose in encouraging the immigrant community to come forward with information. What we will not do is seek information from the local authorities or use that information in any proceedings against an illegal immigrant.

So what we're doing is very similar to what we did in New York in the World Trade Center matter, where families of illegal immigrants who were in there were given this same assurance that if they identified the fact that they had family member in there, that that information would not be sought from the authorities or used against them. And it was a very successful approach. JAMES ZIGLAR, INS COMMISSIONER, CNN Inside Politics 16:00, October 23, 2002, Transcript # 102300CN.V15

Conclusion

As I stated above, there are real problems of workplace exploitation that need to be addressed. If the goal is to reduce illegal employer behavior, there are better ways at getting at the problem. Workers themselves are in the best position to report employer abuse – but only if they are not afraid of immigration consequences.

A key approach is increased enforcement of state labor laws. Economic incentives that an employer might gain from hiring undocumented workers should be eliminated by targeted enforcement of labor laws in favor of all workers, especially those in low-wage industries.

New Hampshire can ensure that their workers' compensation, health and safety, wage and hour and discrimination laws protect all workers no matter what their immigration status, that the Department of Labor target investigations to the industries known for violation of labor laws, and that agency procedures ensure access to state enforcement mechanisms for all workers.

New Hampshire can ensure that agencies provide access to bilingual employees, that they do not interrogate workers about their immigration status, and that they do not create other artificial barriers to enforcement of immigrant workers' rights.

Thank you.

---

[1] While I am not aware of a study focusing on New Hampshire, information gathered in other states is instructive. In Chicago, it has been reported that 70% of undocumented workers paid payroll taxes in 2001.[1] In New York, it was reported that undocumented immigrants paid more than $1 billion in total taxes in 1995.[1]

[2] The Social Security Administration (SSA) has concluded that undocumented immigrants "account for a major portion" of the billions of dollars paid into the Social Security system under names or social security numbers that don't match SSA records and which payees therefore can never draw upon. Office of the Inspector General, Social Security Administration, *Obstacles to Reducing Social Security Number Misuse in the Agriculture Industry* (Report No. A-08-99-41004), January 22, 2001. As of July 2002, these payments totaled $374 billion. Office of the Inspector General, Social Security

Administration, *Follow-Up Review of Employers with the Most Suspended Wage Items* (Report No. A-03-03-13026), October 30, 2003.
[3] Presumably the drafters of the legislation are using the definition of "alien" found in section 101 of the Immigration and Nationality Act, which says "[t]he term "alien" means any person not a citizen or national of the United States." 8 U.S.C. 1101 (a)(3).
4 *The Immigration Reform and Control Act: Assessing the Evaluation Process* (1989), http://www.law.umaryland.edu/marshall/usccr/documents/cr12r25z.pdf.
5 *Charles A. Bowscher, Comptroller General of the United States, IMMIGRATION REFORM: Employer Sanctions and the Question of Discrimination*, Testimony, Committee on the Judiciary, United States Senate, (March 1990), http://161.203.16.4/d48t13/141005.pdf.
[6] *Correa v. Waymouth Farms, Inc.,* 664 N.W.2d 324 (2003).
[7] *Contreras v. Corinthian Vigor Ins. Brokerage Inc.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998).
[8] *Sure-Tan*, 467 U.S. 884, 886-87 (1984).
[9] H.R. Rep. No. 99-682, pt. 2, at 8-9, *reprinted* in 1986 U.S.C.C.A.N. 5662 (1986).
[10] ICE Operations Instruction 287.3a, (redesignated April 28, 2000 as 33.14(h) of the SAFM) http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-45859/slb-53376/slb-53401?f=templates&fn=document-frame.htm#slb-oi2873a
[11] AP, *State labor officials complain about immigrant arrests* (July 8, 2005).