

Labor Working Group
U.S. Human Rights Network – CERD Shadow Report

Labor and Employment Rights in the United States:
**A Critical Look at U.S. Compliance with the Convention on the
Elimination of All Forms of Racial Discrimination***

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I. INTRODUCTION

We welcome the United States of America's Periodic Report to the United Nations Committee on the Elimination of Racial Discrimination, and its acknowledgment of the challenges presented by the legacy of discrimination in the United States. The Report discusses labor issues mainly revolving around collective bargaining and employment discrimination, this latter primarily in terms of hiring issues¹ and acknowledges the racial disparities in the different labor sectors, noting that Asian-Americans and whites had higher percentages of workers in management and professional occupations while Blacks and Latino/as represent a greater percentage of those employed in service professions.²

What the report does not acknowledge, however, is how labor and employment violations pervasive in certain industries have a disparate impact on racial and ethnic minorities, and the role U.S. immigration and labor policies as well as the legal system play in sanctioning and perpetuating those violations. Nor does the U.S. examine the causes of such occupational segregation, or appear to acknowledge that such segregation presents violations of the Convention and a concomitant duty to address these issues. This Chapter is intended to supplement the U.S. report, demonstrating how immigrants and people of color, often relegated to low-wage work, suffer disproportionately from workplace injustices in violation of their rights under CERD.³ U.S. must take affirmative action to ensure all workers, regardless of race, national origin, ethnicity or descent, are guaranteed equal rights in the workplace and equal access to remedies when those rights are violated. Article 2(1)(c) of the Convention requires parties to "take effective measures to review governmental, national and local policies ... which have the effect of creating or perpetuating racial discrimination." And the Programme of Action coming out of World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance urges:

States to take concrete measures that would eliminate racism, racial discrimination, xenophobia and related intolerance in the workplace against all workers, including migrants, and ensure the full equality before the law, including labour law, and further encourages States to eliminate barriers, where appropriate, to: participating in vocational training, collective bargaining, employment, contracts and trade union activity; accessing judicial and administrative tribunals dealing with grievances; seeking employment in different parts of their country of residence; and working in safe and healthy conditions.⁴

¹ Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of all Forms of Racial Discrimination (April 2007) [hereinafter *U.S. periodic report*] (Employment Enforcement Actions are described in ¶¶ 60-63; nine out of the twelve enforcement actions described relate to discriminatory hiring).

² *Id.* at ¶¶ 222-223.

³ Not included in this report is a discussion on the ways in which the labor and employment rights of Arab-Americans are violated, particularly with regard to workplace discrimination. This omission is in no way intended to minimize that discrimination, but is rather attributed to the authors' relative lack of experience with the Arab-American population in the U.S. and the lack of available data directly attributed to such discrimination. Also excluded from this report due to lack of readily available data is workplace discrimination experienced by Native Americans.

⁴ Declaration, included in Conference Report, A/CONF.189/12, at ¶ 29.

In its 2001 Concluding Observations, the CERD called upon the U.S. too “take all appropriate measures according to article 2, paragraph 2, of the Convention, to ensure the right of everyone, without discrimination as to race, colour, or national or ethnic origin, to the enjoyment of rights contained in article 5 of the Convention,” which rights specifically include labor and employment rights.⁵ Unfortunately, the U.S. has not made significant progress in the addressing the persistence of workplace discrimination and disparities in employment opportunities. As illustrated herein, the government must do more to ensure that all laws enacted to protect workers in the U.S.—including those guaranteeing fair wages, freedom from forced labor, equal opportunities and treatment at work, the right to freedom of association, freedom from unreasonable search and seizure at work, and health and safety protections—are being applied to *all* U.S. workers.

A. Historical Background of Racial and Ethnic Minorities and Labor and Immigration Policy

As the United States acknowledges, our country is still recovering from its history of slavery – “Subtle, and in some cases overt, forms of discrimination against minority individuals and groups continue to plague American society, reflecting attitudes that persist from a legacy of segregation, ignorant stereotyping, and disparities in opportunity and achievement.”⁶ Indeed, African-Americans were first brought to the United States for purposes of labor exploitation.

At present, African-Americans in the United States suffer from poor educational attainment due to persistent patterns of racial segregation, poor access to full-time, good paying jobs, and a consequent inability to join the middle class. After a short period of growth in the 1990s, the ensuing years have seen job growth stagnate, unemployment rates climb, real wages for low-skilled workers decline, and poverty rates edge up again for African-Americans.⁷

Along with other people of color, immigrants in the U.S. today are the heirs of this history, as well as a long history of racialized immigration policy.⁸ In many periods of our nation’s history, immigrant workers have been welcomed for their labor, often in the most dangerous and lowest paying jobs, but excluded from full participation in society and full coverage under labor laws. Chinese immigrants in America, for example, are best known for their contribution to the construction of the Transcontinental Railroad, but they were prevented from immigrating to

⁵ See CERD Concluding Observations for the United Kingdom of Great Britain and Northern Ireland, (10/12/2003) CERD/C/63/CO/11 at ¶ 24 specifically encouraging “the State party to submit ... more detailed information on achievements under the State party’s programmes aimed at narrowing the employment gap.”

⁶ . U.S. Periodic Report at ¶ 53.

⁷ Margery Austin Turner, Marla McDaniel, with Daniel Kuehn, *Racial Disparities and the New Federalism*, (Washington, DC: The Urban Institute, October 2007), available at <http://www.urban.org/publications/411563.html>.

⁸ As migration experts Stephen Castles and Mark J. Miller have pointed out, “Assimilation of newcomers is part of the ‘American creed,’ but in reality this process has always been racially selective.” Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World*, 3rd Edition, (New York and London: The Guilford Press, 2003), p. 222.

America by the Chinese Exclusion Acts of 1882, which remained in effect, in various forms, until 1943, and were subjects of extreme racism.⁹

The history of Mexican workers in the United States is similarly one of welcoming workers for their labor, but excluding them from legal protections and the right to remain permanently in the country. In the 1900s and 1910s, the U.S. saw Mexican immigration as regulated by labor demand, but when nativism increased during the Depression of the 1930s, hundreds of thousands of Mexicans, 60% of them citizens or children of citizens, were deported back to Mexico.¹⁰ In the 1940's, Western agricultural interests successfully argued for the Bracero program, which allowed 168,000 Mexican workers into the United States to contribute their labor during wartime, but provided no right to remain in the United States. In 1954, "Operation Wetback" satisfied the needs of both nativists and Western growers by militarizing the border, deporting one million migrants from Mexico, and, at the same time, more than doubling the number of temporary Bracero visas.¹¹

The history of U.S. labor law is similarly racialized. For example, the landmark New Deal legislation mandating minimum labor standards, the Fair Labor Standards Act, garnered necessary votes from conservative Southern Democrats by excluding agricultural and domestic workers – who were predominantly African American workers at the time, now joined by immigrant workers.¹² These explicit exclusions continue today in some form and the impact of exclusions on racial and ethnic minorities is compounded in those sectors where the United States fails to enforce its labor laws, which has serious implications for U.S. compliance with the CERD.

B. Present Day: Intersection of Labor Policies, Immigration Policies and Racialized Workplace Discrimination

In the United States, low wage workers are predominantly racial and ethnic minorities, both U.S. citizens and immigrants. While non-whites make up 19% of the U.S. population,¹³ they make up 43% of the working poor.. According to the U.S. Department of Labor, "Black and Hispanic or Latino workers [are] more than twice as likely as their white counterparts to be among the working poor."¹⁴ Of people who work 27 weeks or more in the year and are below the poverty line, the percentages of Black and Latino workers are far higher than the same statistics for whites and Asians. Five percent of white men and 6.2% of white women workers are below the poverty line, whereas the numbers are 8.2% and 12.5% for black men and women, respectively,

⁹ John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925* (New York: Atheneum, 1963), p. 25 (noting: "No variety of anti-European sentiment has ever approached the violent extremes to which anti-Chinese agitation went in the 1870s and 1880s. Lynching, boycotts, and mass expulsions . . . harassed the Chinese.").

¹⁰ Ngai, p. 72.

¹¹ Douglas Massey, Jorge Durand and Nolan J. Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration*, (New York: Russell Sage Foundation, 2002), 36-38.

¹² Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Texas L. Rev. 1335, 1371-1380 (1987).

¹³ U.S. Periodic Report, Table 1a.

¹⁴ *A Profile of the Working Poor, 2004*, U.S. DEPT. OF LABOR, Report 994, at 1.

and 10.3% and 10.9% for Latino/a men and women.¹⁵ In particular, Black women with less than a high school diploma are among the working poor at about one and a half times as their Black male counterparts.¹⁶

Immigrants comprise 14 percent of the U.S. labor force and 20 percent of the nation's low-wage labor force.¹⁷ There were 17.9 million foreign-born workers in the United States in 2002 and 8.6 million were low-wage workers.¹⁸ Forty-eight percent of foreign-born workers earned less than 200 percent of the minimum wage, as compared with 32 percent of native workers.¹⁹ These statistics on their face give rise to an obligation on the part of the U.S. to take affirmative measures to identify reasons for the disparate earnings of racial and ethnic minorities, including the foreign-born, and, in accordance with its obligations under article 2 and 5 of the Convention to undertake a policy of eliminating discrimination and guaranteeing all workers "the full and equal enjoyment of human rights and fundamental freedoms."²⁰

A general examination of the industries in which immigrants and people of color are concentrated provides a starting point for understanding their unequal earnings. According to a 2006 government survey of employed persons by occupation, sex, and race, only 13.6% of the total workforce is Latino/a, but they are disproportionately represented in low-wage and often dangerous industries. For example, Latino/as represent 36.7% of dishwashers, 40.9% of grounds maintenance workers, 39.2% of hand packers and packagers, 39.7% of workers in farming, fishing, and forestry, 29.3% of construction workers, 32.1% of laundry workers, and 49.5% of workers in press, textile, garment, and related material.²¹ Another study found immigrant workers represent 44% of the low wage earners in private household services and farming, forestry, and fishing,²² and are "the least well paid and the most likely to be foreign-born of all major occupational groups tracked by the Census."²³

Likewise, 10.9% of the workforce is Black, but African Americans make up 15.9% of service industry workers, 15.6% of building and grounds maintenance workers, 23% of food service workers, 18% of janitors, 19.9% of maids, 21.7% of workers in press, textile, garment, and related material, and 28.0% of refuse and recyclable material collectors, and 49% of sales and related occupations.²⁴

Although Asian Americans are overrepresented in some professional occupations such as physicians and medical scientists, this population, which makes up 4.5% of the workforce, represents 15.3% of sewing machine operators, 14% of electronics assemblers, 12.6% of taxi

¹⁵ *A Profile of the Working Poor, 2004*, U.S. DEPT. OF LABOR, Report 994, at 7 tbl.2.

¹⁶ *Id.* at 2.

¹⁷ Randy Capps et. al., *A Profile of the Low-Wage Immigrant Workforce*, (Washington DC: The Urban Institute, 2003) available at http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ CERD article 2, ¶ 2.

²¹ *Characteristics of the Employed*, U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS, Current Population Survey tbl.11, available at <http://www.bls.gov/cps/cpsaat11.pdf>.

²² *A Profile of the Low-Wage Immigrant Workforce supra*, note 14.

²³ *Id.*

²⁴ *Id.*

drivers and chauffeurs, and 45% of personal service workers. A look at two specific industries shows how work is further racially segmented within industries. Seventeen percent of the restaurant industry workforce is of Hispanic origin,²⁵ and immigrants of color are further discriminated against within the industry. As noted in a report looking specifically at the New York City restaurant industry:

It is largely workers of color, and particularly immigrants of color, who are concentrated in the industry's 'bad jobs,' while white workers tend to disproportionately hold the few 'good jobs.' Workers also reported discriminatory hiring, promotion and disciplinary practices, as well as verbal abuse motivated by race, national origin or English language facility – 33% of workers that we surveyed reported experiencing verbal abuse on the basis of race, immigration status or language. Similar numbers also reported that they or a co-worker had been passed over for a promotion based on race, immigration status or language.²⁶

Blacks and Hispanics are also disproportionately represented in the meat and poultry industries, where approximately 42 percent of the workers are Hispanic or Latino/a and 20 percent are Black, while only 32 percent were white.²⁷ Similarly, foreign-born workers comprise a disproportionate percentage of the workforce in the meat and poultry industries, and as with the restaurant workers in New York, they are often relegated to the lower-paying, dirtier and more dangerous of jobs within the industry. Approximately 26 percent of all workers in this industry are foreign-born noncitizens, as compared with approximately 10 percent of all manufacturing workers in the United States. Within the meat and poultry industry, an even larger percentage of the production and sanitation workers— 38 percent—are foreign-born noncitizens.²⁸

In the U.S. labor market, people of color therefore occupy the least desirable, most dangerous jobs. This is due to several factors, including labor market segmentation that has traditionally defined certain jobs as “white” jobs and certain others as “Black” jobs, the loss of blue-color manufacturing jobs in urban locations where African-Americans live (without meaningful job training development programs to replace them), structural discrimination that results from facially race-neutral policies (such as seniority rules, plant location decisions, funding of public education) and the disparate effects of economic recession.²⁹

25Beth Boston *New Study Offers Workforce Insight*, FOODSERVICE WORKFORCE SOLUTIONS (2003) available at, http://foodserviceworkforcesolutions.org/content/0024_Stateoftherestaurantindustry.asp

²⁶ Restaurant Opportunities Center of New York and New York City Restaurant Industry Coalition, *Behind the Kitchen Door: Pervasive Inequality in New York City's Thriving Restaurant Industry*, at 2, Jan. 25, 2005, available at <http://www.rocny.org/documents/ROC-NYExecSummary.pdf> at 2.

²⁷ United States Government Accountability Office, *Workplace Safety and Health: Safety in the Meat and Poultry Industry, while Improving, Could Be Further Strengthened* at 20 (January 2005) available at <http://www.gao.gov/new.items/d0596.pdf>

²⁸ *Id.* at 21.

²⁹ Cedric Herring, *African-Americans and Disadvantage in the U.S. Labor Market*, (1995), available at www.regd.isr.umich.edu/prba/perspectives/spring1995/cherring.pdf

Likewise, many of the industries employing migrants, including unauthorized migrants – such as agriculture, building construction, landscaping, the garment industry, hotels and restaurants, domestic services, janitorial and cleaning services, home health care and meatpacking – are the same industries that receive special industry-based exclusions from labor protective laws, or where violations of existing laws frequently go unredressed. The United States’ failure to protect the labor rights of migrants with particular immigration statuses has left them prey to extreme levels of exploitation. Furthermore, as the United States Department of Labor acknowledged in 1989, the proliferation of immigrant workers with diverse legal statuses has the potential to become a new source of social and economic stratification.³⁰ As illustrated in the statistics above, that stratification has happened for immigrants and people of color, and the U.S. is treaty-bound to take measures to address this stratification.

I. Workers in the United States experience both *de jure* and *de facto* discrimination through the denial of their full rights under Article 5(e)(i) of the CERD.

A. Employment Discrimination in the U.S.

We focus here on three specific issues of concern not fully addressed by the U.S. Report in its discussion on employment discrimination in the U.S.: the lack of enforcement of race-based discrimination claims by the Employment Litigation Section (ELS) of the Civil Rights Division of the Department of Justice; the increased use of criminal background checks in hiring and firing determinations and their discriminatory impact on people of color; and the lack of protections for sexual orientation and sexual identity discrimination for LGBT workers of color.³¹

Enforcement of Title VII

Title VII of the federal Civil Rights Act protects workers’ rights to be free from discrimination based on several factors: sex, color, race, religion and national origin,³² and, as noted by the U.S. in its Report, the U.S. Equal Employment Opportunity Commission (EEOC) is the government agency that enforces most federal employment discrimination laws, including Title VII. Cases are litigated by the ELS.

While the Employment Litigation Section has a proud history that includes opening up governmental service jobs, including police and fire officers and other officials to African-Americans, Asian, Latino/a and female workers, its recent history has not been as praiseworthy.³³ In the first two years of the current presidential administration, only seven Title VII cases were filed by the department, compared to 34 cases during the first two years of the Clinton administration.³⁴ The Section’s statistics demonstrate that it has turned away from race discrimination cases in favor of age discrimination and religious discrimination cases, despite the

³⁰ Castles and Miller, p. 183.

³¹ A discussion of employment discrimination and immigrant workers of color is discussed *infra* in Sec. V.

³² 42 U.S.C.A. § 2000e *et. seq.*

³³ Testimony of Richard S. Ugelow, Hearing on the Employment Section of the Civil Rights Division of the U.S. Department of Justice, Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives (September 25, 2007) *available at* <http://judiciary.house.gov/media/pdfs/Ugelow070925.pdf>.

³⁴ *Id.*, 4-5.

core mission of Title VII to combat race discrimination. While enforcement of both religious and age discrimination cases is highly important, the case data suggests that the ELS is not giving enough attention to the problem of race discrimination in America.

From 2000 through July 2006, the EEOC referred more than 3,200 individual charges of discrimination to the ELS. Of these, the ELS filed only seven cases alleging a pattern of race discrimination. Of these seven, two were “reverse discrimination” cases, (involving race discrimination against whites); one was a case involving race discrimination against Native Americans and three involved African-Americans.³⁵

Criminal Background Checks and People of Color

The vast expansion of criminal background checks of today’s workers, driven by concerns for national security and public safety, is a new reality that has a discriminatory impact on communities of color.

In 2006, the Federal Bureau of Investigation (FBI) performed more fingerprint-based background checks for civil purposes than for criminal investigations. In the past ten years, the number of civil requests for criminal records has more than doubled, exceeding 12.5 million in 2006. In 2004, nearly 5 million of the FBI’s criminal record requests were conducted specifically for employment and licensing purposes.³⁶

State criminal background checks for employment and licensing purposes have also expanded as a result of the many new laws mandating screening of workers employed in a broad range of occupations and industries. In addition, background checks conducted by private screening firms have increased at a record rate, with 80% of large employers in the U.S. now screening their workers for criminal records (an increase of 29% since 1996).³⁷

At the same time, an estimated one in five adults in the United States have a criminal record on file with the states.³⁸ Thus, there are literally millions of U.S. workers with a criminal record that will show up on a routine criminal background check, including large numbers of people with arrests that never led to convictions. Three out of four individuals being released from prison have served time for non-violent offenses, including property crimes (40%) and drug offenses (37%). Nearly half of all non-violent offenders (48%) are African-American and another 25% are Latino.³⁹

³⁵ Id., 5-6.

³⁶ Steve Fisher, FBI, Criminal Justice Information Services Division, Office of Multimedia, Response to Information Request from Maurice Emsellem, National Employment Law Project (dated July 22, 2005).

³⁷ Press Release, “SHRM Finds Employers are Increasingly Conducting Background Checks to Ensure Workplace Safety” (Society for Human Resources Management, January 20, 2004).

³⁸ According to the latest official state survey, there are 64.3 million people with criminal records on file with the states, including serious misdemeanors and felony arrests. Bureau of Justice Statistics, *Survey of State Criminal History Systems*, 2001 (August 2003), at Table 2. Because of over counting due to individuals who may have records in multiple states and other factors, to arrive at a conservative national estimate we reduce this figure by 30% (45 million). Thus, as a percentage of the U.S. population over the age of 18 (209 million according to the 2000 Census), an estimated 21.5% of the U.S. population has a criminal record on file with the states.

³⁹ Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2005), at page 1.

Employers frequently use criminal background checks deny work to people of color. Several major studies have documented employers' blanket treatment of people with criminal records. A survey of over 3,000 employers in four major urban areas (Atlanta, Boston, Detroit, Los Angeles) found that 60% of employers would not even consider hiring anyone who has a criminal record.⁴⁰ Racism and the assumptions correlating race and prior criminal history produce stark disparities in the workplace. Indeed, white applicants are three times more likely to get a call back than similarly credentialed African-Americans.⁴¹

While there are no national laws that specifically address criminal-record based discrimination, the EEOC has recognized that, due to the higher arrest and conviction rates of African Americans and Latinos as compared to whites, employer policies that restrict employment based on criminal records have a disparate racial impact and may violate Title VII of the Civil Rights Act of 1964. The EEOC has issued a guidance instructing that an employer must justify such hiring practices by showing a "business necessity" based on several specific factors, including the age and seriousness of the offense, the time that has passed since the conviction, and the nature of the job.⁴² Despite this guidance, many employers routinely refuse to hire workers with criminal records, because no special effort has been made to widely disseminate the policy to employers, and there is little enforcement of disparate impact race discrimination cases based on criminal record hiring policies.

Discrimination against LGBT Workers of Color

The U.S. report is silent on the ways in which the failure of U.S. federal law to protect against employer discrimination on the basis of sexual orientation has a discriminatory impact on the LGBT communities of color. Title VII of the Civil Rights Act does not prohibit sexual orientation or sexual identity discrimination, and the lack of federal protection for employment discrimination fails to protect the basic right to work of most members of the LGBT community. The rights of LGBT federal employees and federal job applicants are also extremely limited. At least one member of the U.S. Congress has accused the Bush administration of waging a "covert war" on homosexuals in federal employment.⁴³

Although there is some protection offered at the state and local level, Human Rights Campaign reported that it is still legal to fire someone because of their sexual orientation or gender identity in 34 States.⁴⁴ Only thirteen states have explicit anti-discrimination protection for transgender

⁴⁰ Holzer, Harry J., Steven Raphael, and Michael Stoll, "Employment Barriers Facing Ex-Prisoners" (Urban Institute, 2003).

⁴¹ Pager, Devah, "The Mark of a Criminal Record," *American Journal of Sociology*, Vol. 108, No. 5, pages 937-75 (2003).

⁴² EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964 (1987).

⁴³ See Federal EEO Advisor, Vol. 9, No. 3, Apr. 1, 2006 (quoting Rep. Waxman) (Rep. Waxman also introduced a bill in the U.S. Congress, H.R. 3128, to protect gay federal employees).

⁴⁴ HUMAN RIGHTS CAMPAIGN, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 3 (2004).

people.⁴⁵ A study by the National Gay and Lesbian Task Force (NGLTF) estimates that 52% of LGBT workers are afforded no legislative protection against sexual orientation discrimination while seeking private employment opportunities.⁴⁶ According to an interview conducted by the National Center for Lesbian Rights and the Transgender Law Center, 49% of respondents have experienced discrimination in employment because they were perceived to be transgender and transgender workers also face discrimination in terms of income, with 64% of respondents making less than \$25,000 per year.⁴⁷ The U.S. has failed to identify the discriminatory impact the lack of protection has on LGBT persons of color, and the multiplicities of discrimination that implicate obligations under the Convention.

B. *De Jure* Exclusions from Legal Protection that have a Discriminatory Impact on Workers Rights under Article 5(e)(i)

Article 5(e)(i) calls upon States-Party to guarantee just and favourable conditions of work, equal pay for equal work, and just and favourable remuneration without distinction. Article 5(e)(ii) further guarantees the right to freedom of association. Yet, as outlined below, entire categories of workers employed in industries with high concentrations of minorities and immigrants are excluded from statutory protections relied upon by the U.S. government to demonstrate compliance with the Convention, resulting in unfavourable conditions of work, unequal pay, and unjust and unfavourable remuneration, contributing to the stark income disparities for people of color and immigrants, discussed above.

Exclusions based on industry: Domestic workers and agricultural workers (historically jobs held by African-Americans and now largely held by persons of Latino ancestry and immigrants) are explicitly excluded from significant protections provided under federal law. Two recent New York City studies found that almost all domestic workers are women, 95% of them women of color, immigrants from Latin America and the Caribbean, Asia, and Africa.⁴⁸ Seventy-eight percent of U.S. agricultural workers are from Mexico and Latin America.⁴⁹ They are excluded from the definition of “employee” under the National Labor Relations Act (NLRA), which provides for the right to freedom of association and collective bargaining. They are additionally excluded from certain protections set out in the federal Fair Labor Standards Act (FLSA), which guarantees a minimum wage and overtime pay, and the Occupational Health and Safety Act (OSHA), designed to protect health and safety on the job. Domestic workers, many home-health

⁴⁵ The Transgender Law and Policy Institute, *Transgender Issues: A Fact Sheet*, <http://www.transgenderlaw.org/resources/transfactsheet.pdf>.

⁴⁶ National Gay and Lesbian Task Force, Press Release, Jan. 27, 2006 (finding that only 48 percent of the nation's population lives in a jurisdiction that protects gay people from discrimination).

⁴⁷ NATIONAL CENTER FOR LESBIAN RIGHTS & TRANSGENDER LAW CENTER, *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* 13 (2003) <http://www.nclrights.org/site/DocServer/transrealities0803.pdf?docID=1301>.

⁴⁸ Annette Bernhardt, Siobhán McGrath and James DeFilippis, *Unregulated Work in the Global City*, (New York: Brennan Center for Justice, 2007), 63; DOMESTIC WORKERS UNITED & DATACENTER, *HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY* (July 14, 2006), *available at* <http://www.domesticworkersunited.org/homeiswheretheworkis.pdf>.

⁴⁹ Findings from the National Agricultural Workers Survey (NAWS) 2001 - 2002. A Demographic and Employment Profile of United States Farm Workers. U.S. DEPARTMENT OF LABOR, OFFICE OF THE ASSISTANT SECRETARY FOR POLICY, OFFICE OF PROGRAMMATIC POLICY, Research Report No. 9. March 2005, *available at* <http://www.doleta.gov/agworker/report9/toc.cfm>.

care workers and large numbers of seasonal workers are further excluded from protection against racial and gender based discrimination, as U.S. federal anti-discrimination law only applies to those employers with more than 14 employees for 20 weeks or more in a year.

Agricultural Worker Protection Act: The federal Migrant and Seasonal Agricultural Worker Protection Act, a specialized law that covers terms and conditions of employment for agricultural workers, and which partially fills the gaps in protection resulting from the statutory exclusions mentioned above, excludes certain seasonal migrants admitted under a federal program known as the H-2A visa program, from coverage. This exclusion applies to approximately 40,000 primarily Caribbean and Latin American workers yearly.⁵⁰

Citizenship discrimination: The United States describes the work of the Department of Justice's Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) in ¶¶ 238-239 of its Report. While we acknowledge the important work OSC has done, its mandate is limited such that it fails to ensure compliance with the Convention. While federal law protects against intentional discrimination on the basis of race, ethnicity, national origin, religion and gender (with the limitations mentioned above on size of employer), it does not protect against racial disparities resulting from ostensibly race-neutral policies. Furthermore, with limited exceptions, there is no protection against discrimination based on immigration status, which often serves as a proxy for or in conjunction with other forms of prohibited discrimination. The Immigration Reform and Control Act of 1986 protects citizens and certain categories of legally authorized migrants from discrimination on the basis of their citizenship status. But not only do those provisions not apply to undocumented migrants, they also exclude from protection legal migrants who fail to demonstrate their intent to become citizens in their failure to apply for citizenship within six months of becoming eligible to do so.⁵¹

Although CERD allows for differentiation between citizens and non-citizens, General Recommendation 30 makes clear that article 1 ¶ 2 of the Convention “must be construed so as to avoid undermining the basic prohibition of discrimination.”⁵² It further provides that States should “take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.”⁵³ Any differentiation in the treatment of citizens and non-citizens must be judged “in light of the objectives and purposes of the Convention,” and “applied pursuant to a legitimate aim” and be “proportional to that aim.”⁵⁴ Yet, as the United States itself had previously recognized, equal enforcement of labor and employment laws, including federal anti-discrimination laws, protects all workers and removes incentives for employers to hire undocumented workers.⁵⁵ That historical recognition combined with increased number of

⁵⁰ 8 U.S.C.A. § 1324(b)(3); 29 U.S.C.A. § 1802(8)(B)(2), (10)(B)(iii).

⁵¹ There are many reasons why legal migrants may not apply for citizenship, including the examination and high fees for doing so (USCIS raised its filing fees effective July 30, 2007, constructively increasing the cost of filing for adjustment of status to that of legal permanent residence from \$395 to \$1010, and the cost of filing for naturalization from \$330 to \$675, <http://www.uscis.gov/files/nativedocuments/G-1055.pdf>).

⁵² Gen. Rec. 30, ¶. 2.

⁵³ Gen. Rec. 30, ¶. 33.

⁵⁴ Gen. Rec. 30, ¶. 4.

⁵⁵ See DOL Memorandum of Understanding, www.nilc.org/immsemplmnt/emprights/MOU.pdf (allowing, however, that DOL may report the undocumented status of workers in an investigation not prompted by a specific

unauthorized migrant workers and calls for increased temporary worker programs run counter to the purported aim of immigration law enforcement.

C. *De Facto* Discrimination under Article 5(e)(i) and Related Violations of the CERD

a. Health and Safety

Both U.S.-born workers of color and immigrant workers in the U.S. workforce are overrepresented in high risk sectors. From the period of 1992 to 2002, overall workplace fatalities among foreign-born workers increased by 46 percent.⁵⁶ During this same period the overall number of workplace fatalities in the U.S. workforce dropped from 6,217 in 1992 to 5,524 in 2003.⁵⁷ From 1996 to 2000 the share of foreign-born employment in the U.S. workforce increased by 22 percent, while the share of fatal occupational injuries for this population increased disproportionately by 43 percent.⁵⁸ Among immigrants workers fatally injured on the job in 2005, 62% were Latino/a, 13% were Asian, Native Hawaiian and Pacific Islanders and 6% were Black.⁵⁹ Workers of color represented 30% of the fatalities suffered by workers on the job in the U.S. that year.⁶⁰ Article 5 (e)(i) of CERD guarantees “just and favourable conditions of work,” and General Recommendation 30 makes clear that obligation extends to non-citizens.⁶¹ Unfortunately, available statistics related to workplace injuries and fatalities make clear the U.S. is not doing enough.

The Department of Labor Bureau of Labor Statistics (BLS) found in 2005 that the highest work-related fatality rates were in the construction, transport and warehousing, and agricultural sectors.⁶² African American and immigrant workers are disproportionately represented in these high risk sectors and accordingly their rates of injury and death are disproportionately high.⁶³ Between 1996 and 2001, private construction, retail trade and transportation and public utilities were the three industries in which fatally injured foreign-born workers most frequently were employed.⁶⁴ Industries with the highest fatality rates for foreign-born workers include mining (30.4 per 100,000), construction (17.3 per 100,000), transportation and public utilities (15.2 per 100,000) and agriculture, forestry and fishing (15.2 per 100,000).⁶⁵

complaint, i.e. a random investigation into an industry (such as poultry factories) known from wage and hour violations); U.S. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Jun. 27, 2002) available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (referencing former policy of and rationale for divorcing immigration status from rights and remedies available under federal anti-discrimination laws).

⁵⁶ AFL-CIO, *Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies Programs*, available at, http://www.aflcio.org/aboutus/laborday/upload/immigrant_risk.pdf at 1, Aug. 2005.

⁵⁷ AFL-CIO, *Immigrant Workers at Risk*, *supra*, at 3.

⁵⁸ *Id.*

⁵⁹ AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT, at 24 (2007), available at www.aflcio.org/issues/safety/memorial/doj_2007.cfm.

⁶⁰ *Id.*, at Table

⁶¹ Gen. Rec. 30, ¶. 3.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ AFL-CIO, *Immigrant Workers at Risk*, *supra*, at 4.

⁶⁵ *Id.*

Between 1992 and 2002 the number of all Hispanic worker fatalities increased by 58 percent- and between 1995 and 2000, some 60 percent of Hispanic workers' deaths involved those born in another country.⁶⁶ Based on studies done by the Census of Fatal Occupational Injuries published in 2003, Hispanic men have the greatest overall relative risk of fatal occupational injury of any gender, race, or ethnic group.⁶⁷ Hispanic men have a relative risk that is 22 percent higher than the relative risk for all men.⁶⁸

The Occupational Safety and Health Administration (OSHA) has inadequate resources committed to protecting worker safety and health. At current staffing levels, it would take 117 years for OSHA to inspect the workplaces under its jurisdiction.⁶⁹ Further hindering the work is the fact that knowledge about and enforcement of health and safety rights are not equally available to all levels of English speakers. OSHA has recognized the existence of a language barrier for Spanish-speaking workers and has taken a number of positive steps--setting up a Spanish 800 number, making a Spanish website and compiling a list of Spanish speaking OSHA employees.⁷⁰ However OSHA does not employ an adequate number of multilingual inspectors or compliance assistance specialists in all of their regions, or in many of the languages commonly spoken by immigrants in the U.S.⁷¹ As of March 2005 there were 121 Spanish-speaking compliance safety and health officers nationwide.⁷² In some instances when there was not a Spanish-speaking OSHA officer, Hispanic workers would be forced to communicate about workplace conditions through company supervisors, thereby significantly impeding their ability to express safety concerns.⁷³ Workers cannot effectively express their safety concerns if their only voice is through their supervisor. Further problematic is the fact that these efforts do not extend to the non-English speaking, non-Spanish speaking communities of color. Measures must be enacted to ensure that non English-speakers can adequately voice their concerns and that they are getting the vital safety training in a language they understand.

OSHA's effectiveness among immigrant workers has been dramatically hindered by federal immigration enforcement. Recently, the Federal Bureau of Immigration and Customs Enforcement (ICE) conducted raid operations while impersonating OSHA officials. In Goldsboro, North Carolina, fliers directed immigrant workers to a supposed mandatory safety meeting. At the meeting federal immigration officials arrested 48 workers. ICE officials conducted similar raids on May 20, 2005 in six states, resulting in the arrest of 60 undocumented

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Rebecca Smith & Catherine Ruckelshaus, *Solutions not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. Legis. & Pub. Pol'y 555 (2007).

⁷⁰ Statement of John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health before the Subcommittee on Employment, Safety and Training, Committee on Health Education, Labor and Pensions, United States Senate, (February 27, 2002) available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=TESTIMONIES&p_id=286

⁷¹ AFL-CIO, *Immigrant Workers at Risk*, *supra*, at 15.

⁷² *Id.*

⁷³ *Id.*

immigrants.⁷⁴ This tactic provoked suspicion within the foreign-born community, making individuals less likely to file OSHA complaints, weakening the effectiveness of the health and safety laws touted by the U.S. as protecting all workers without discrimination.

b. Wage Theft and Subcontracting

Wage theft is a serious problem in the United States. Recent government and private studies show many of our fastest-growing service jobs have appalling minimum wage and overtime compliance rates⁷⁵:

- Workers from a majority of restaurants in New York City “reported overtime and minimum wage violations”;⁷⁶
- 50% of day laborers suffer wage theft⁷⁷;
- 60% of nursing homes are out of compliance with Fair Labor Standards Act minimum wage and overtime provisions⁷⁸;
- 43% of residential care facilities were out of compliance with the FLSA minimum wage and overtime provisions,⁷⁹
- A study found virtually no compliance with worker protection laws in the poultry processing industry⁸⁰;
- 70% of forestry work is out of compliance with worker protection laws.⁸¹
- Almost 50% of garment manufacturing contractors are out of compliance with FLSA⁸²;

These industries are primarily made up of the foreign-born and people of color. New York’s domestic industry, for example, is made up of 99% foreign-born workers, 95% women of color.⁸³ Eighty-eight per cent of the day labor work force in the United States comes from Mexico and Central America.⁸⁴ Seventy-eight percent of the agricultural worker population in

⁷⁴ Steven Greenhouse, *Immigration Sting Puts 2 U.S. Agencies at Odds*, N.Y. TIMES, July 16, 2005.

⁷⁵ For more statistics and information on the numbers of workers in the growing job sectors, see NELP, *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%20Floor%20Epdf>

⁷⁶ *Behind the Kitchen Door*, supra, n. ___, at 2, Jan. 25, 2005.

⁷⁷ Abel Valenzuela Nik Theodore, Edwin Meléndez, and Ana Luz Gonzalez, *On the Corner: Day Labor in the United States* (January 2006), available at <http://www.sscnet.ucla.edu/issr/csup/pubs/papers/item.php?id=31>

⁷⁸ “Nursing Home 2000 Compliance Fact Sheet,” U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, available at <http://www.dol.gov/esa/healthcare/surveys/nursing2000.htm>.

⁷⁹ “Residential Living Facilities 1998 Compliance Baseline Fact Sheet,” U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, available at <http://www.dol.gov/esa/healthcare/surveys/residential.htm>.

⁸⁰ “FY 2000 Annual Performance Report” U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION (March 31, 2001) at B-1 available at <https://www.youth2work.gov/esa/aboutesa/str-plan/esa00rpt.pdf>.

⁸¹ *Id.*

⁸² Bureau of National Affairs, Daily Labor Report 87 (May 6, 1996) U.S. Department of Labor, *Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act*.

⁸³ *Home is Where the Work Is*, supra, at 5.

⁸⁴ Valenzuela and Theodore, *On the Corner*, supra, at 4.

the United States was born in Mexico and Central America.⁸⁵ In New York, immigrant workers represent 67% of the workforce of the restaurant industry.⁸⁶ Latino/a, South Asian, and Asian workers make up a large proportion of “back of the house” workers, as well as many bussers and barbacks. Some African-Americans are among the cooks and waiters in this industry.⁸⁷

In the face of these dismal levels of compliance with the United States’ most basic workplace law, government enforcement of the wage and hour rights of low-wage workers has been severely lacking and 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%.⁸⁸ In FY 2004, there was approximately one federal Wage and Hour investigator for every 110,000 workers covered by FLSA.⁸⁹ By 2007, the U.S. Department of Labor’s (U.S. DOL) budget dedicated to enforcing wage and hour laws will be 6.1 percent less in real dollars than before President Bush took office.⁹⁰ The DOL’s own plans to secure compliance reflect an attitude of resignation, rather than an intention to secure full compliance: to use one industry as an example, the Department’s strategic plan for the years 2003-2008 states that its intention is to increase compliance in the health care industry from only 51% to only 75% over the course of five years.⁹¹

For many immigrant workers, U.S. DOL’s Wage and Hour Division’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 because, for a variety of reasons, those workers rarely file complaints.⁹² For example, the United States General Accounting Office (now called the “Government Accountability Office,” GAO) observed in a September 2002 report that day laborers, primarily composed of immigrant workers of color, do not complain, due to language, education and skill levels, fear of retribution, or, for some, fear of deportation. As a result, government agencies are unable to do their job with respect to day laborers, under the current complaint-driven approach to enforcement, because they do not find out about violations.⁹³

⁸⁵ Findings from the National Agricultural Workers Survey (NAWS)

⁸⁶ Forthcoming report, the Restaurant Opportunities Center (see attached summary). A related problem is discrimination in the restaurant industry, where the living wage jobs at the “front of the house” are offered to white workers, and “back of the house” workers, such as dishwashers, who labor at the lowest-paid jobs, are immigrant workers of color.

⁸⁷ Unregulated Work in the Global City, at 55.

⁸⁸ Annette Bernhardt & Siobhán McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, (New York: Brennan Ctr. for Justice at NYU Sch. of Law, Economic Policy Brief No. 3, 2003).

⁸⁹ There are nearly 88 million people covered by FLSA. *Id.* at 2.

⁹⁰ Judd Legum et al., *Labor—Bush Priorities Hurt Workers, Help Employers*, THE PROGRESS REPORT (Ctr. for American Progress Action Fund, Wash., D.C.), June 14, 2006.

⁹¹ U.S. Department of Labor, Strategic Plan, 2003-2008, p. 28 (June 2003).

⁹² 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).

⁹³ 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).

For other immigrant workers and people of color, the federal minimum wage and overtime laws simply do not apply. Workers left out of minimum wage protection include home health care workers (largely immigrant and U.S.-born women of color) subject to FLSA's "companionship exemption," who are not covered by minimum wage at all.⁹⁴ Agricultural workers and live-in domestic workers are not covered by overtime rules.⁹⁵ Tipped restaurant employees' wages also can be reduced by as much as half, based on tips they are expected to, but often do not receive.⁹⁶

For still other workers, employers have opted to self-exempt from wage and hour laws by passing off their workplace responsibilities to subcontractors⁹⁷ or misclassifying workers as independent contractors.⁹⁸ The United States GAO concluded in its July 2006 report, "employers have economic incentives to misclassify employees as independent contractors because employers are not obligated to make certain financial expenditures for independent contractors that they make for employees, such as paying certain taxes (Social Security, Medicare, and unemployment taxes), providing workers' compensation insurance, paying minimum wage and overtime wages, or including independent contractors in employee benefit plans."⁹⁹

In general, independent contractors constitute a small proportion of the American workforce, hiring out their special skills to various companies.¹⁰⁰ Because independent contractors are thought of as being in business for themselves, employers are not required to pay a variety of payroll taxes (including social security and unemployment insurance).¹⁰¹ These workers are not protected under *any* United States employment law.¹⁰² In an era of non-enforcement, these tax and liability advantages often lead employers to misclassify employees (whose work is controlled by their employer) as independent contractors in order to cut their labor costs.¹⁰³

The problem of misclassification is widespread and pervasive in certain industries in which immigrant workers of color predominate. While government commissioned studies rarely capture the "underground" or "casual" economy, where workers are paid off the books, a 2000 study commissioned by the US Department of Labor found that up to 30% of firms misclassify

⁹⁴ See 29 U.S.C. § 213(a)(15) (2000).

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

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

⁹⁷ 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>.

⁹⁸ 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>.

⁹⁹ *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification*, GAO-06-656 (July 2006), at p. 25.

¹⁰⁰ 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.

¹⁰¹ INTERNAL REVENUE SERV., PUBL'N NO. 15-A, EMPLOYER'S SUPPLEMENTAL TAX GUIDE 6 (2007); INTERNAL REVENUE SERV., PUBL'N NO. 15, (CIRCULAR E), EMPLOYER'S TAX GUIDE 7 (JAN. 2007).

¹⁰² U.S. GOV'T ACCOUNTABILITY OFFICE, *supra*, at 7-8.

¹⁰³ See NAT'L EMPLOYMENT LAW PROJECT, 1099'D, *supra*, at 1-2.

their employees as independent contractors.¹⁰⁴ Many states have studied the problem and found high rates of misclassification, especially in construction, where as many as 4 in 10 construction workers were found to be misclassified.¹⁰⁵

Independent contractor misclassification occurs with an alarming frequency in those industries discussed above with high numbers of racial minorities and immigrants:¹⁰⁶ construction,¹⁰⁷ day labor,¹⁰⁸ janitorial and building services,¹⁰⁹ home health care,¹¹⁰ child care,¹¹¹ agriculture¹¹², poultry and meat processing,¹¹³ high-tech,¹¹⁴ delivery,¹¹⁵ trucking,¹¹⁶ home-based work¹¹⁷, and the public¹¹⁸ sectors, all of which have disproportionate representation of workers of color and immigrant workers.

Related to the problem of misclassification is the growing use of labor intermediaries in many occupations. Large employers in many of these same industries use subcontracting arrangements, through labor contractors, temporary service agencies, and professional employer organizations, who, on paper, are made the “employers” of the workers. In this way, a worksite employer attempts to avoid all of their responsibilities as an employer by passing them off to an often undercapitalized third party. When labor trouble arises, the worksite employer claims that the subcontractor is the sole employer of the workers. If that person cannot be found, or has no assets, the workers are without any remedy.

¹⁰⁴ Lalith de Silva *et al.*, “Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs” i-iv, prepared for U.S. Department of Labor, Employment and Training Division by Planmatics, Inc. (Feb. 2000), available at <http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>.

¹⁰⁵ See Fiscal Policy Institute, “New York State Workers Compensation: How Big is the Shortfall?” (January 2007); Michael Kelsay, James Sturgeon, Kelly Pinkham, “The Economic Costs of Employee Misclassification in the State of Illinois” (Dept of Economics: University of Missouri-Kansas City: December 2006); Peter Fisher *et al.*, “Nonstandard Jobs, Substandard Benefits”, Iowa Policy Project (July 2005); Francois Carre, J.W. McCormack, “The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004); State of New Jersey, Commission of Investigation, “Contract Labor: The Making of an Underground Economy” (September 1997).

¹⁰⁶ Francois Carre, J.W. McCormack, “The Social and Economic Cost of Employee Misclassification in Construction (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health: December 2004), at p. 8.

¹⁰⁷ *Id.*

¹⁰⁸ Valenzuela and Theodore, *On the Corner*.

¹⁰⁹ See *Coverall North America, Inc. vs. Commissioner of the Division of Unemployment Assistance*, SJC-09682, 447 Mass. 852 (2006); *Vega v. Contract Cleaning Maintenance*, 10 Wage & Hour Cases 2d (BNA) 274 (N.D. IL 2004).

¹¹⁰ See *Bonnette v. Cal. Health & Welfare Agcy.*, 704 F.2d 1465 (9th Cir. 1983).

¹¹¹ See, e.g., IL Executive Order conferring bargaining status on child day care workers otherwise called independent contractors: <http://www.gov.il.gov.gov/execorder.cfm?eorder=34>.

¹¹² *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1988).

¹¹³ *Employment Arrangements: Improved Outreach* at p. 30.

¹¹⁴ *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996).

¹¹⁵ *Ansoumana et al v. Gristedes et al*, 255 F.Supp.2d 184 (S.D.N.Y. 2003).

¹¹⁶ New York Times, “Teamsters Hope to Lure FedEx Drivers,” May 30, 2006 (cataloguing cases).

¹¹⁷ *Employment Arrangements: Improved Outreach* at p. 31.

¹¹⁸ Phillip Mattera, “Your Tax Dollars at Work... Offshore,” Good Jobs First (July 2004) available at http://www.goodjobsfirst.org/publications/Offshoring_release.cfm

II. Workers in the United States experience both *De Jure* and *De Facto* discrimination through the denial of their right to freedom of association under Article 5(e)(ii)

In the United States, the National Labor Relations Act (NLRA) protects an employee's right to "self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection..."¹¹⁹

Throughout the late 19th and for much of the 20th century, union representation and the labor movement played a huge role in achieving workplace justice, raising living standards, and ushering many groups of workers into the American middle class. These days, however, U.S. employers have waged what Business Week [in a 1994 article] called "one of the most successful anti-union wars ever" with spectacular results. Union membership is now at its lowest level since the 1920s. Fifteen percent of U.S. citizens were members in 1996 compared to thirteen percent in 2003.¹²⁰ Twelve percent of immigrants were union members in 1996, compared to ten percent in 2003.¹²¹ Of the 17.7 million foreign-born wage and salary workers in the United States in 2003, 1.8 million are members of unions, with an additional 202,000 covered by a union or employee association contract.¹²²

This war has been facilitated in part because U.S. labor policies fall short of international standards. For example, the United States' failure to protect the freedom of association rights of striking workers, federal employees, and its principles regarding so-called "employer free speech" have repeatedly come under criticism by the International Labor Organization.¹²³ Workers' voices have continually been silenced by threats, harassment, required participation in anti-union meetings, and by the laborious, toothless process of the National Labor Relations Board itself.¹²⁴

All workers suffer from the denial of the right to join and form labor unions and to collectively bargain, but because women and people of color benefit disproportionately from union representation, they are also the most harmed by denial of this right. In 2006, median weekly earnings for African Americans were 36% greater for unionized than for non-union workers, 8% greater for Asian Americans, and 46% greater for Hispanic union members.¹²⁵ The union wage premium is likewise high in certain industries, such as service occupations, office and administrative support, transportation and material moving – in all of these industries, people of color are over-represented.¹²⁶

¹¹⁹ National Labor Relations Act, 29 U.S.C. § 157 (2006).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Immigrant Union Members*, Migration Policy Institute (2004), available at http://www.migrationpolicy.org/pubs/7_Immigrant_Union_Membership.pdf.

¹²³ Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-wage Worker Communities*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 285 (Fall 2007)

¹²⁴ Let All Voices Be Heard, at 5; Gordan Lafer, NLRB Elections: Neither Free nor Fair, (Washington, DC: American Rights at Work) 2007, available at <http://www.americanrightsatwork.org/publications/general/neither-free-nor-fair.html>.

¹²⁵ Let all Voices be Heard, at 8.

¹²⁶ Let All Voices be Heard, 8-9.

With specific regard to its obligations under Article 5 of the Convention to guarantee the “right to freedom of peaceful assembly and association” and “the right to form and join trade unions,” the United States claims in ¶ 242 of its Report that “U.S. law guarantees all persons equal rights to form and join trade unions.” This statement ignores both the *de jure* and *de facto* exclusions from this protection for racial and ethnic minorities, both U.S. and foreign born, both industry-based statutory exclusions from coverage and judicially-created limitations on remedies.

With respect to *de jure* exclusions, agricultural and domestic workers are excluded from protections under the NLRA, as mentioned above, as are State and Federal Employees. These industry based exclusions violate the right to freedom of association and disproportionately affects racial minorities and immigrants, prohibiting them from effectively advocating for better working conditions.

State employees, for example, often find their labor rights further limited by state legislation which fails to fill in the gaps left by the federal labor law protections. In North Carolina, for example, General Statute (NCGS) §95-98 explicitly denies state employees the right to freedom of association, declaring any agreement or contract between the government of any city, town, county, other municipality or the state of North Carolina and any “labour union, trade union, or labour organization as bargaining agent for any public employees” to be illegal unlawful, void and of no effect.¹²⁷ This legislation frustrates the ultimate purpose of the freedom to associate by prohibiting collective bargaining and functions as a state-mandated impediment to eliminating race and sex discrimination in the workplace.

Public sector workers of North Carolina deal with miserable working conditions, health and safety violations in the workplace, unconscionable wages, unreasonable hours, extreme understaffing, unreasonable forced overtime, favoritism and disrespectful treatment from superiors.¹²⁸ By the State’s own admission there are problems with unequal treatment for racial minorities and women in hiring, promotions, discharges, and wage rates. In a study conducted by the state in 2002, African-American males in state employment had the highest percentage of representation in the lowest salary grades, were subjected to the highest percentage of disciplinary actions, and occupied the lowest percentage of workforce representation.¹²⁹

The International Commission for Labor Rights (ICLR) conducted an independent study of North Carolina’s public worker employment in 2005. The ICLR found race and gender-based discrimination present in hiring, promotions, pay, the exercise of discipline and termination; all areas in which collective bargaining would normally play a prominent role and protect workers from the prejudices and preferences of individual supervisors.¹³⁰ The commission also reported, “from the perspective of experts, workers, North Carolina legislators, and state agencies, certainly the prevalence of race-based discrimination is the overarching barrier to workplace

¹²⁷ ILO Case No. 2460, p. 215, available at <http://www.ilo.org/public/english/standards/realm/gb/docs/gb298/pdf/gb-7-1.pdf>.

¹²⁸ ILO Case No. 2460, p. 215, available at <http://www.ilo.org/public/english/standards/realm/gb/docs/gb298/pdf/gb-7-1.pdf>.

¹²⁹ ICLR Report, page 20.

¹³⁰ ICLR Report, page 2.

justice in public sector workplaces in North Carolina.”¹³¹ Public hearings revealed that many workers are treated in ways that reflect anti-union and racist sentiments.¹³² In one instance when workers tried to organize a union, they found a dummy hanging by its neck from a tree across the street from the parking lot where 90% of the black workers park; a white man stood next to the dummy saying, “you going to end up like this”.¹³³

The United Electrical, Radio and Machine Workers of America Union (UE) and the UE Local 150 of North Carolina, which is comprised mainly of women and people of color, working in some of the most difficult and low-wage public sector jobs in the State (janitors, refuse-disposal workers, cleaning and grounds staff for universities, hospital and special services workers and bus drivers) filed a complaint on December 7, 2005 with the International Labour Organization alleging a violation of the workers’ right to collective bargaining.¹³⁴ The ILO Committee, noting the central role the right to freedom of association and collective bargaining plays in improving the living and working conditions of union members,¹³⁵ recommended the establishment of a collective bargaining framework for the public sector in North Carolina, and the repeal of NCGS §95-98 in order to bring state legislation into conformity the rights of freedom of association and collective bargaining.¹³⁶ To date, this has not happened, in violation not only of ILO principles but of Article 5(e)(ii) of CERD.

For unauthorized immigrants, labor policies set down by the U.S. Supreme Court result in discrimination. While deemed to be employees under the National Labor Relations Act (NLRA), in *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*,¹³⁷ the United States Supreme Court constructively denied undocumented workers protection under the NLRA through the denial of back pay.¹³⁸ The elimination of the only meaningful remedy to the worker has had the practical effect of eliminating the enforceability of this right and limiting undocumented workers’ right to freedom of association,¹³⁹ and leaving workers more vulnerable to exploitative working conditions because, without an effective remedy available, undocumented workers are less likely to risk job loss by attempting to form or join a union, or speak out about poor working conditions.

Despite the United States’ repeated contention that undocumented workers receive the same protections as citizen workers in their rights under the National Labor Relations Act, the reality

¹³¹ ICLR Report, page 20.

¹³² ICLR Report, page 28.

¹³³ ICLR Report, page 28.

¹³⁴ ICLR Report, page 19.

¹³⁵ ILO Case at 230.

¹³⁶ *Id.*

¹³⁷ 535 U.S. 137 (2002).

¹³⁸ Back pay is pay for work that would have been performed but for the unlawful termination, and is the only remedy available to the individual whose rights under the NLRA have been violated by the employer. The other substantive remedy available to an individual was reinstatement to the worker’s former position, but that remedy was earlier foreclosed for undocumented workers by the Immigration Reform and Control Act of 1986 (IRCA), the law that prohibits the knowing employment of undocumented workers, and is not at issue here. See, *Sure-Tan, Inc.*, 467 U.S. at 903-904.

¹³⁹ *Report on Complaints against the Government of the United States presented by the AFL-CIO and the Confederation of Mexican Workers (CTM)*, Case No. 2227, ILO Committee on Freedom of Association, (November 2003). See also, Smith & Ruckelshaus, 8 (200?).

is very different. Employers have used the *Hoffman* decision to deter employees from pursuing their employment rights and from voting in union elections,¹⁴⁰ and unauthorized workers and others working with them are now more vulnerable to intimidation from their employers.¹⁴¹ A recent report by Human Rights Watch focusing on the meatpacking industry, found that many employers threaten to call immigration authorities if workers seek to organize or make claims for labor law protection.¹⁴² One study found that 52% of employers in workplaces that include undocumented immigrant workers threaten to call immigration authorities during organizing campaigns.¹⁴³ As evidenced in these studies and other experiences, the *Hoffman* decision has severely undermined labor protections, resulting in increased labor exploitation, and the creation of a racialized two tiered workforce in the United States.¹⁴⁴

III. Workers Particularly Vulnerable to Article 5(e) Discrimination: Guestworkers, Day Laborers, Women and Children

a. Guestworkers

You bring them in, pay them two or three dollars an hour, give them a little food, give them a place to stay. That's cheap labor. And they're the hardest-working sons of bitches you'll find – harder than any white man you can find around here.

Employer John Pickle describing his choice of Indian welders he hired as guestworkers.¹⁴⁵

There are currently two guestworker programs for temporary work lasting less than a year in the U.S.: the H-2A program, for temporary agricultural work, and the H-2B program, for temporary

¹⁴⁰ See Human Rights Advocates report for further discussion.

¹⁴¹ United Mine Workers of America was involved in efforts to organize employees of C.W. Mining Company at the Co-Op Mine, near Price, Utah, approximately 75 of whom were of Latino origin, some of whom were undocumented. The company's retaliatory actions throughout the campaign resulted in the filing of several unfair labor practice charges with the National Labor Relations Board (NLRB), culminating in a Complaint issued by the NLRB's General Counsel in December 2005 in which he alleged the Company's investigation into its employees' immigration status, its requirement for new work authorization paperwork, and its termination of, and refusal to rehire, employees were unlawful activities intended to discourage employees from exercising their rights to freedom of association. The NLRB hearing was scheduled for May 2006, but in light of *Hoffman*, and its impact on back pay, the UMWA General Counsel concluded most of the fired workers would not be entitled to back pay and settled its charges against the company. Consequently, only two of the thirty-five employees who had lost up to seventeen months of work were awarded back pay. See Petition Alleging Human Rights Violations of the Human Rights of Undocumented Workers, available at: <http://www.nelp.org/docUploads/FinalPetition%2Epdf>.

¹⁴² Lance Compa, *Blood, Sweat and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, Human Rights Watch, (Jan. 2005), available at <http://www.hrw.org/reports/2005/usa0105/>.

¹⁴³ *How to Join a Union: Employer Interference by the Numbers*, American Federation of Labor - Congress of Industrial Organizations (2006), available at <http://www.aflcio.org/joinaunion/how/employerinterference.cfm>.

¹⁴⁴ As noted above, Gen. Rec. 30 calls upon States party to "take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements,"¹⁴⁴ and notes that any differentiation in the treatment of citizens and non-citizens must be judged "in light of the objectives and purposes of the Convention," and "applied pursuant to a legitimate aim" and be "proportional to that aim."¹⁴⁴ But the U.S. has offered no such justification, but instead maintains that the denial of the remedy is separate and distinct from the denial the right.

¹⁴⁵ John Bowe, *NOBODIES: MODERN AMERICAN SLAVE LABOR AND THE DARK SIDE OF THE NEW GLOBAL ECONOMY* (New York: Random House, 2007), p. 93.

nonagricultural work. These programs allow employers to obtain permission to hire foreign workers after engaging in recruitment in the U.S. and promising to meet certain requirements regarding recruitment, wages and working conditions. Each program imposes on foreign workers a temporary, non-immigrant status that ties workers to particular employers and makes their ability to obtain and retain a visa dependent on remaining in the good graces of their employer. In 2005, the United States issued about 89,000 H-2B visas and about 32,000 H-2A visas, primarily to Mexicans.

The H-2A agricultural guestworker program is arguably the most exacting of the guestworker programs. Under it, employers must engage in recruitment locally, regionally, and nationally. They must provide free housing, transportation reimbursement, and guarantee that a certain percentage of the work promised be actually provided to the worker. Employers must promise to hire any United States worker who presents him or herself for the job until the work period is half over.¹⁴⁶

The H-2B program is the non-agricultural temporary worker program, typically used in the reforestation, landscaping and hospitality industries, and janitorial services, among others. This program provides for less legal protections than does the H-2A program. Essentially, employers must offer “prevailing” wages and working conditions, advertise the job opportunity for three days, and list the job with the Employment Service for 10 days.

In theory, both programs protect local jobs and match “willing” workers with “willing employers.” In reality, program requirements are easily manipulated. Employers who would rather not hire workers from within the country need not do so. In fact, employers can shop for workers worldwide and online: with the advent of the internet, employers can order up their guestworkers from international labor contractors who advertise on a dozen websites. The inherent exploitability of new workers, often arriving with a debt of from three months’ up to a year’s worth of work, coupled with their statutory inability to change jobs, makes them prime targets for abuse. Lack of oversight means even legally-required wages and benefits go unpaid.

A recent report documents how the workers vulnerabilities are exploited. They work in unsafe conditions, earn low wages, and suffer illegal confiscation of their documents and ill-treatment by supervisors.¹⁴⁷ They do not have health, disability, or life insurance. They often work under great debts for money they paid to get to the U.S., and many regret their decision to come after arriving to find they were lured under false promises.¹⁴⁸ While one court has ruled that recruitment 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,¹⁴⁹ U.S. DOL has refused to enforce the ruling¹⁵⁰

One employer scheme involves misclassification of workers at the time of recruitment, either through treating agricultural employees as non agricultural workers (to avoid the stricter

¹⁴⁶ 20 C.F.R. § 655.102(b)

¹⁴⁷ From conversations with the Alliance of Guestworkers for Dignity.

¹⁴⁸ Id.

¹⁴⁹ *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1231 (11th Cir. 2002).

¹⁵⁰ *Close to Slavery*, at 30.

protections and requirements provided for under the H-2A program), or through misidentifying the work to be done in order to pay lower prevailing wage rates.¹⁵¹ Employers routinely apply for more workers than needed or for longer periods of time because they do not know when their seasons will start or end, resulting in many guest-workers without work for three to four weeks at the beginning or end of their visa term.¹⁵² The promises of steady employment at relatively high wages that draw guest-workers frequently go unmet, and guestworkers' right to fair remuneration is often violated. These violations often go unremedied because U.S. DOL takes the position it cannot enforce the contractual rights of workers.

Women workers are further discriminated against through the guestworker recruitment process and once employed. In 2002, the Farmworker Legal Services Program of New York (FLSNY) established, using employment figures provided by the labor recruiter, that women were steered towards H-2B jobs and not H-2A jobs, where the pay, benefits and rights are greater. It has taken the court five years to grant class certification in the law suit filed by Legal Momentum and FLSNY following the issuance of a cause determination finding by the EEOC.¹⁵³

The Alliance of Guestworkers for Dignity is a New Orleans-based group that began in response to a huge increase in guestworkers being brought to the city after Hurricane Katrina. According to the Alliance, one company recruited workers from India—bringing them to the U.S. and promising them green cards for a fee of \$20,000. When workers organized to protest the horrible conditions they found themselves in (one employee reported earning more than three dollars an hour less than he was promised and his promised housing turned out to be a trailer without air conditioning for eight workers¹⁵⁴), the business responded early one morning by sending armed guards to take the organizers from their beds and hold them captive for eight hours.¹⁵⁵ For employees injured at work, their workers' compensation benefits, if they were not too intimidated by the threat of being blacklisted to apply, can be affirmatively cut off when they return to their home countries.¹⁵⁶ Even worse, in the case of death of an employee, many individual states limit payments to beneficiaries in other countries.¹⁵⁷ Women guest-workers are subjected to the added abuse of sexual harassment, and, in the worst cases, rape by their supervisors,¹⁵⁸ demonstrating the multiplicities of discrimination the workers endure.

In extreme cases, workers find themselves in situations of indentured servitude or forced labor because they signed over deeds to property in their home countries and paid exorbitant sums to get to the U.S.— from a few thousand up to \$20,000—which they have to pay back with interest.¹⁵⁹ While the U.S. has taken steps in a handful of the most egregious situations of abuse

¹⁵¹ Close to Slavery, at 23-24.

¹⁵² Close to Slavery, at 23.

¹⁵³ See http://legalmomentum.org/legalmomentum/inthecourts/2006/03/marcela_olveramorales_v_intern.php.

¹⁵⁴ *Id.*

¹⁵⁵ Alianza

¹⁵⁶ Close to Slavery, at 25.

¹⁵⁷ Close to Slavery, at 26.

¹⁵⁸ Close to Slavery, at 35.

¹⁵⁹ See, e.g., Close to Slavery (“Alvaro Hernandez-Lopez is typical of guestworkers recruited from Guatemala. In 2001, at age 45, he came to the United States to work for Express Forestry Inc. in the Southeast. He continued coming for two more planting seasons. ‘What I earned planting trees in the States was hardly enough to pay my

and successfully prosecuted employers for trafficking, forced labor and slavery,¹⁶⁰ the U.S. has done little to address the systemic problems that create an environment ripe for abuse.

According to the Alliance, a group of 120 Mexican Workers brought to Westlake, Louisiana on H-2B visas experienced the following:

Some . . . workers were injured and in response, received no medical treatment—not even a doctor’s visit. All the workers worry about their families and loved ones at home, and worry that they will not make enough money to pay their debts. Their passports were taken from them and not returned. As a result, many workers were afraid to walk the streets for threats the police had given, telling the workers they would be deported if they did not carry their passports.¹⁶¹

The lack of visa portability, tying workers’ status in the United States directly to the employer, combined with exploitation in recruitment and subcontracting, leave workers in extremely vulnerable situations often without adequate redress through the legal system. This is compounded by the workers’ physical and linguistic isolation.¹⁶² The result is a State-sponsored system of recruitment and employment that leaves workers’ right to “security of person and protection by the State against violence or bodily harm” in grave jeopardy, in violation of art. 5(b) of the Convention.

c. Day Laborers

The Minutemen could be heard before they were seen. First came the bullhorns barking "This is America, not Mexico" and "No work today. The Minutemen have arrived." Then the group of two dozen men and women, holding U.S. flags and cameras in their hands, turned the corner and started bearing down on Hispanic workers waiting for jobs outside the Macehualli day-labor center in northern Phoenix, Arizona. Sensing trouble, some took refuge behind the gates of the center, and others melted away down side streets. As the laborers fled, the protesters tried to take pictures of their faces. "This is our country!" shouted a Minuteman. "We are under invasion."¹⁶³

debt,' he said. 'It was really hard for us to fight to get to the States legally and then not earn any money. We were told we had to leave our deeds to get the job. On a blank paper we had to sign our names and hand over our deeds. They said that if we didn't sign this paper they wouldn't bring us to the States to work.'")

¹⁶⁰ For example, a Florida employer who was sentenced to three years in federal prison on slavery charges in 2000, held more than 30 tomato pickers “in two trailers in the isolated swampland . . . under constant watch. Three workers escaped the camp, only to have their boss track them down. . . . The employer ran one of them down with his car, stating that he owned them.” Coalition of Immokalee Workers, Online Headquarters, <http://www.ciw-online.org/slavery.html>.

¹⁶¹ Alianza

¹⁶² Close to Slavery, at 37.

¹⁶³ Terry McCarthy, *Stalking the Day Laborers*, TIME, November 28, 2005, available at <http://www.time.com/time/magazine/article/0,9171,1134748,00.html>.

Generally hired for the duration of a particular job, day laborers are employed in many sectors, including landscaping, construction, manufacturing, domestic, and service in the United States. Day laborers gather on street corners, in parking lots, and, in some cases, at public or private day labor centers, in order to search for work.

On any given day, at least 117,600 workers are either looking for day-labor jobs or working as day laborers.¹⁶⁴ The dimensions of the day-labor market are fluid, with hiring sites diminishing in size or disappearing, while new ones emerge according to the needs of the industry. The day-labor workforce in the United States is predominantly immigrant and Latino/a. Most day laborers were born in Mexico (59 percent) and Central America (28 percent).¹⁶⁵

Day laborers regularly suffer employer abuse including wage theft and work injuries in violation of CERD Article 5(e)(i). Almost half of all day laborers experienced at least one instance of wage theft in the two months prior to being surveyed. In addition, 44 percent were denied food/water or breaks while on the job. Workplace injuries are common among day laborers. One in five day laborers has suffered a work-related injury, and more than half of those who were injured in the past year did not receive medical care.¹⁶⁶

Recent events illustrate that day laborers' vulnerability as workers should not be viewed in isolation from their status as a visible and obvious target for often race-based nativist activism and violence. Day laborers become a symbol of illegal immigration in the U.S. and a target for vigilanteism in violation of article 4 of the Convention, and government policies have added to their isolation and to their status as beings outside the protection of the law.

Day labor centers and the corners where day laborers search for work have become sites for anti-immigrant protests. Vigilante groups, whose members shout insults at workers and use intimidation tactics to discourage employers from hiring them, routinely target day laborer corners and centers. The Minutemen, a group known for patrolling the U.S.-Mexico border and reporting illegal immigrants to authorities, have conducted more than 1,000 protests or "labor watches" this year at informal hiring sites and organized day labor centers nationwide.¹⁶⁷

For some day laborers, the mere act of asking for and accepting work has become fraught with violence. The San Diego County Sheriff's Department reports more than 40 robbery victims have now been identified in a two-month North County crime spree. In each incident, robbers posed as employers, drove workers to remote sites and threatened them with knives to get cash and other items of value.¹⁶⁸ In the same region, six day laborers were recently approached on a

¹⁶⁴ On the Corner,

¹⁶⁵ Id., at 22.

¹⁶⁶ Id., Table 6 at 18.

¹⁶⁷ Anabelle Garay, *Hiring sites scrutinized as part of immigration debate*, USA TODAY, (September 1, 2007), available at http://www.usatoday.com/news/nation/2007-09-01-day-laborers_N.htm.

¹⁶⁸ Colleen Mensching, *Robberies frighten, don't deter most day laborers*, NORTH COUNTY TIMES, (August 21, 2007), available at http://www.nctimes.com/articles/2007/08/22/news/top_stories/1_01_038_21_07.txt.

popular corner and offered employment, only to be tied up and driven to Tijuana, where they were abandoned.¹⁶⁹

MAY 1, 2007, Washington, D.C.

Tyler Froatz Jr., a member of the Herndon (Va.) Minutemen, is arrested after a physical confrontation with human rights activists at a rally. When apprehended by police, he has several knives, a flare gun and a stun gun, and police find a loaded rifle in his vehicle. Days later, investigators search Froatz's apartment and find an additional 15 guns, a Molotov cocktail, a grenade and large amounts of ammunition. Initially jailed on weapons and assault charges, Froatz, 24, is released to his parents in New Jersey a month later to await trial.

MAY 4, 2007, Gaithersburg, Md.

A long-established day-labor center for Latino/a immigrant workers is set on fire, causing about \$2,000 in damage. The center is run by Casa de Maryland, an immigrant assistance organization that has been the subject of many protests and threats. Without any evidence or rationale to support his allegation, Brad Botwin, director of an anti-immigration group called Help Save Maryland, tells *The Washington Post* that the laborers may themselves have started the fire.¹⁷⁰

Vigilante groups have followed day laborer and other poor immigrant workers to their makeshift homes in the hills above San Diego, California, where some 200 homeless men camp in small, isolated encampments. They have been preyed on by thieves. In recent months, several were robbed by someone who pretended to hire them for day labor.¹⁷¹ In an e-mail to a group sympathetic to the laborers, one of the anti-immigrant leaders said, "We will not tolerate any more of your third world homeless villages in America." He added, "The illegals and their filth are gone and we will NOT let them return."¹⁷²

While many police departments have investigated violence against day laborers,¹⁷³ other departments are not likely to hear from day laborers who are victims of crime, since state and local police have been encouraged to sign "cooperation" agreements with the federal Immigration and Customs Enforcement agency, which allows local police to enforce

¹⁶⁹ Jannise Johnson and Wendy Leung, *Laborers seek police aid Advocates urge investigation of day workers' kidnapping*, INLAND VALLEY DAILY BULLETIN, (May 17, 2007), available at http://www.dailybulletin.com/news/ci_5914794

¹⁷⁰ Southern Poverty Law Center, *Immigration Backlash: Violence Engulfs Latinos*, (November 2007), available at <http://www.splcenter.org/intel.news/item.jsp?sitearea=1&aid=292>.

¹⁷¹ Leslie Berestein, *The not-so-great outdoors More than 2,300 homeless agricultural workers, others said to be living in canyons of San Diego County*, THE SAN DIEGO UNION TRIBUNE, June 4, 2006 available at http://www.signonsandiego.com/uniontrib/20060604/news_mz1n4outdoor.html.

¹⁷² Press Release, *Friends of Day Laborers Presses Charges Against Minutemen*, (February 11, 2007), available at <http://deletetheborder.org/node/1963>.

¹⁷³ *Virginia State Police Investigate Day-Laborer Robberies*, ABC NEWS, (November 12, 2007), available at <http://www.wjla.com/news/stories/1107/471877.html> (reporting on the Virginia State Police's arrest of a suspect in a pair of armed robberies targeting day laborers, one of whom was struck in the head with a pistol).

immigration laws. The Bush Administration announced plans to expand the program on August 10, 2007.¹⁷⁴ So far, 597 officers and 34 state and local law enforcement agencies have signed up for the program, including three agencies in California, and four in Virginia, the states where violent attacks on immigrants have been most publicized.¹⁷⁵

Many communities within the United States have used so-called “anti-solicitation” ordinances to severely restrict day laborers’ opportunities to secure work and in many cases criminalize their efforts to do so, in violation of the day laborers’ right to work, and to free choice of employment, without discrimination, as guaranteed by article 5 of the Convention.

In the last few years more than a dozen cities and counties in Southern California have enacted ordinances that prohibit or restrict day laborers’ right to solicit work on public sidewalks and parking lots.¹⁷⁶ In 2000, the County of Los Angeles’ ordinance prohibiting day laborers and employers from soliciting employment on public property was found unconstitutional.¹⁷⁷ Federal judges have barred the cities of Glendale, and Redondo Beach, California from enforcing their no-solicitation ordinances, on the grounds that they interfered with day laborers’ First Amendment right to free of speech.¹⁷⁸ Still, different cities continue to propose such ordinances, in spite of their illegality.¹⁷⁹

The U.S. must take affirmative measures in accordance with CERD Articles 5(b) guaranteeing the right to security of person and protection by the State against violence or bodily harm, 5(d)(ix) guaranteeing the right to freedom of peaceful assembly and association, and Article 5(d)(i) providing for the right to work and to free choice of employment. The U.S. government’s failure to adequately monitor vigilante activity, its failure to protect day laborers from abuse by employers and nativist violence, its failure to speak out against anti-solicitation ordinances and its policies of encouraging police cooperation with immigration authorities contribute to an atmosphere where day laborers are continued targets of racial and ethnic discrimination, in violation of articles 4 and 5 of the Convention.

d. Women

Sexual Harassment in the Workplace

¹⁷⁴ Press Release, The White House, Fact Sheet: Improving Border Security and Immigration Within Existing Law (August 10, 2007), available at <http://www.whitehouse.gov/news/releases/2007/08/20070810.html>.

¹⁷⁵ Eleanor Stables, *State Local Police Slowly Warming to Immigration Enforcement*, *Congressional Quarterly* (November 7, 2007), available at <http://www.cqpolitics.com/wmspage.cfm?docID=hsnews-000002623700>.

¹⁷⁶ Tom Saenz, *Day Laborers and the First Amendment* (2003), at www.ndlon.org/civilr.htm. An ordinance enacted in Austin, Texas, makes it illegal to solicit work from a pedestrian from an automobile or for a pedestrian to solicit someone in a vehicle. Austin, Tex., Ordinance 990722-65. A Dade County, Florida, ordinance penalizes those who pick up laborers. Dade County FL, Ordinance 93-105, §§1-3, 10-19.

¹⁷⁷ Naush Boghossian, *Laborers Sue City over Solicitation of Jobs Prohibition*, *DAILY NEWS OF LOS ANGELES*, May 21, 2004, at N3.

¹⁷⁸ *Comite de Jornaleros de Glendale, v. City of Glendale*, No. CV 04-3521 SJO, (Central District, CA May 16, 2005); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 127 Fed.Appx. 994 (9th Cir. 2005).

¹⁷⁹ Press Release, American Civil Liberties Union, Proposed Suffolk County Law Unfairly Criminalizes Day Laborers, (March 6, 2007), available at <http://www.aclu.org/immigrants/discrim/28881prs20070306.html>.

Ms. L. is a Chinese national who was employed at a restaurant in New Jersey.¹⁸⁰ During her employment, Ms. L's co-workers hit and touched her against her will, and made humiliating and menacing sexually explicit comments. After she complained to management about these actions, the treatment became worse. The managers, who witnessed several of the egregious actions, refused to help. Eventually, Ms. L. resigned because of the intolerable working conditions and filed a lawsuit against her employers.

At a farm in Fresno, California, farmworker women referred to the farm as the "fil de calzon," or "field of panties," because so many women had been raped by supervisors there. A regional attorney for the EEOC in San Francisco said, "We were told that hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors."¹⁸¹

The women who spoke out in these instances are just a few of the millions of immigrants who have faced exploitation and sexual harassment in the factories, fields, restaurants and construction sites where they labor. The burden these immigrant women workers bear is threefold: they toil in low-wage, often dangerous jobs; they are subjected to illegal and degrading treatment by co-workers and supervisors; and they risk lengthy court battles and, in some cases, deportation, if they attempt to enforce their rights.

To its credit, the EEOC has made sexual harassment against women a priority. Unfortunately, when undocumented immigrant workers seek to assert their legal rights to be free from discrimination, employers have sometimes advanced the position that undocumented workers who experience illegal harassment, discrimination, or other workplace violations are not entitled to legal remedies on account of their immigration status. While some courts have protected victims of discrimination, others have relied on *Hoffman Plastic* to curtail some basic rights and remedies of undocumented workers.¹⁸²

Domestic Workers

We have been forced here because U.S. foreign policy has created poverty in our home countries. Once we are here in the U.S. searching for a way to survive, we are pushed into exploited jobs where our work is not recognized, respected or protected.

¹⁸⁰ See Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America, Petition to the Inter-American Commission on Human Rights, 33-34 (No. P-1190-06), filed Nov. 1, 2006 (on file with authors).

¹⁸¹ *Close to Slavery: Guestworker Programs in the United States*, Birmingham, AL: Southern Poverty Law Center (2007), available at <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>.

¹⁸² In *Crespo v. Evergo Corp.*, 366 N.J. Super. 391, 399 (App. Div. 2004), the New Jersey State Appellate Division dismissed a pregnancy discrimination claim alleging unlawful termination under the New Jersey Law Against Discrimination (LAD), a state analog to Title VII. The *Crespo* court stated that "where the governing workplace statutory scheme makes legal employment a prerequisite to its remedial benefits, a worker's illegal alien status will bar relief thereunder."

- Jocelyn Campbell, Nanny in Hoboken and Manhattan, from Barbados¹⁸³

Employed in private homes to perform household tasks that historically have been assigned a diminished value, domestic workers frequently face exploitation and abuse, a problem further exacerbated by their association with particular groups (women, minorities and migrants) who suffer multiple forms of discrimination. Domestic workers experience abuses ranging from verbal abuse and economic exploitation to physical and sexual assault and forced servitude. And in many cases, domestic workers endure these abuses without legal recourse. As discussed above, domestic workers – overwhelmingly women of color – are not defined as protected employees under the National Labor Relations Act,¹⁸⁴ are not covered by workplace regulations under the Occupational Safety and Health Act,¹⁸⁵ and are not covered by overtime provisions and are generally not protected by federal anti-discrimination laws because of the minimum number of employees required for employer coverage. The lack of legal protection, combined with their isolation in the home, makes domestic workers vulnerable to exploitation and abuse.¹⁸⁶ The situation of many domestic workers in the U.S. exemplify economically abusive relationships wherein the workers receive little or no pay and work long hours in dangerous conditions with little rest. Some employers forbid workers from leaving the house unaccompanied and may even physically restrain the workers or lock them inside the house. Others confiscate workers' passports or use threats of deportation to keep workers imprisoned.¹⁸⁷ Psychological tactics are also commonly employed. Some employers, with the intent of instilling into the workers a fear of leaving the house, fabricate stories exaggerating the danger of the U.S. streets.¹⁸⁸ Physically, mentally, and financially coercive methods are all used to keep the domestic workers enslaved.

The substandard working conditions of domestic workers illustrate how their rights are being violated under Article 5(e)(i) of the CERD. A recent study conducted by Domestic Workers United and DataCenter in New York City found that one half of the more than five hundred workers surveyed earn low wages (less than the local “living wage”), with an additional one quarter of the workers making either below the poverty line or below minimum wage. A survey of several hundred workers in Maryland confirms these findings: 51% of those surveyed reported earning less than Maryland's minimum wage.¹⁸⁹ These illegally low wages reflect the failure of

¹⁸³ Domestic Workers United and DataCenter, *Home is Where the Work Is: Inside New York's Domestic Work Industry*, May 2006, p. 13.

¹⁸⁴ Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards. VI. Legal Obstacles To U.S. Workers' Exercise Of Freedom Of Association*, available at <http://www.hrw.org/reports/2000/uslabor/USLBR008-08.htm> (2006).

¹⁸⁵ Human Rights Watch, *Appendix III: Legal Issues Relevant to Migrant Domestic Workers*, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES, available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf> (June 2001).

¹⁸⁶ The Committee itself has noted the possibility that domestic workers may be easily exploited and has recommended States party “take all appropriate measures to reduce this risk.” Concluding Observations of the Committee on the Elimination of Racial Discrimination: Italy, 08/08/2001.A/56/18, at ¶ 314.

¹⁸⁷ *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, Human Rights Watch Report, June 2001, Vol. 13, No. 2, at 13.

¹⁸⁸ *Id.*

¹⁸⁹ Montgomery County Council, *Working Conditions of Domestic Workers in Montgomery County, Maryland*, May 2006.

the U.S. government to enforce domestic laws in protection of domestic workers, compounded by the denial of fundamental labor and employment rights discussed above.

The U.S. government's denial of equal access to remedies for domestic workers further violates Article 6 of the CERD. For domestic workers employed by diplomats, the situation is particularly severe, as diplomatic immunity serves as an effective barrier to the enforcement of any rights or remedies to which the worker might otherwise be entitled.¹⁹⁰ Immigration status serves as another effective barrier to enforcement. The visa status of domestic workers employed by diplomats is tied to her employment for those working for diplomats. For others, immigration status is exploited by employers, exploitation which is tacitly sanctioned by the State. According to one report, many domestic workers cited "fear that employers would report them to USCIS and that they would subsequently be removed from the United States" as a major reason for not reporting human rights violations. This report is not groundless as U.S. law fails to protect either documented or undocumented domestic workers. Additionally, the *Hoffman* decision creates a disincentive for undocumented workers to report violations.¹⁹¹

Trafficking of Women and Girls

Human trafficking is the result of global economic policies—many of which are promulgated by the United States—that are detrimental to developing countries and impede the ability of women and girls to make choices about their health, employment, and education. Strict U.S. immigration policies limit the migration of foreign-born women and perpetuate the degradation of poor immigrant women. And the demand for cheap, unskilled labor draws women and even children to succumb to unsafe travel routes to enter the U.S. for work. Immigrant women of color are disproportionately trafficked into the United States for various types of forced labor. According to the U.S. Department of Justice, the largest group of individuals trafficked into the United States is from East Asia and the Pacific Islands, followed by Latin America, Europe, and other parts of Asia.¹⁹² Although numerous federal, state, and local government entities are dedicated to addressing human trafficking in the United States, these entities do not tackle the root causes of human trafficking to prevent exploitation from happening.

In 2000, Congress passed the Trafficking Victims Protection Act (TVPA) to address various aspects of trafficking in persons both in the U.S. and abroad. The Act created the T visa, which is available to survivors of trafficking, many of whom are immigrant women of color, who meet certain qualifications. One requirement is the survivor's willingness to assist in the investigation and prosecution of her trafficker. However, if federal law enforcement officials do not provide an

¹⁹⁰ See <http://www.aclu.org/womensrights/employ/domesticworkers.html> for testimonials from domestic workers employed by persons using diplomatic immunity as a shield to liability, as well as a Petition filed with the Inter-American Commission for Human Rights on behalf of those domestic workers.

¹⁹¹ Kathryn A. Dittrick, *Migrant Workers' Right to Organize*, 10, available at <http://humanrightsadvocates.org/images/Kate'sMigrantWorkerReport.doc>.

¹⁹² United States Department of Justice, *Assessment of US Government Activities to Combat Trafficking in Persons* at 10, June 2004, available at http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf.

endorsement for the survivor, she may face deportation regardless of the victimization and exploitation she experienced while being forced to work in the U.S.¹⁹³

e. Children

As discussed in greater detail in the report submitted by WILD, child labor remains a problem in the United States, and exploitation of child workers continues. This is particularly true in the agricultural industry. Agricultural work is recognized as the most dangerous industry for children and yet, it is also the least protected.¹⁹⁴ The exact number of children laboring in the agricultural industry is not known, as there is no comprehensive accounting of children working in America's fields to date. At best, there are very rough guesstimates produced by different institutions. In 1998, the U.S. General Accounting Office estimates that there may be as many as 300,000 children working in the agricultural industry.¹⁹⁵ In its 2007 report, the Association of Farmworker Opportunity Programs (AFOP), one of the leading NGOs working on this issue, estimates that there are between 400,000 to 500,000 child farmworkers in the U.S.¹⁹⁶ The United Farm Workers' estimates that there are as many as 800,000 children working on U.S. farms.¹⁹⁷ Of these estimates, we do not have national statistics based on gender and cannot accurately identify the percentage of boys and girls in the fields.

Those most at risk are disproportionately children of Hispanic/Latino backgrounds. While accurate statistics are not available, we know that 83 percent of the adult workers identified themselves as members of a Hispanic group, with 72 percent being Mexican, 7 percent as Mexican-American, one percent as Chicano, and three percent as other Hispanics.¹⁹⁸ It follows that a significant percentage of the youth labor force in agriculture is also largely made up of Hispanics and Latinos as they follow their parents to find work in the fields. Consequently, the limited labor protections afforded to children working in agriculture is a race-based discrimination due to the composition of the labor force in this industry.

The dangerous working conditions and severe health impact agricultural work has on children, and the lack of adequate protections under U.S. law and policy, violates CERD Article 5(e)(i) and (iv). Furthermore, children laboring in the fields face such enormous hurdles in getting an education that their right to an education, as articulated in Article 5(e)(v) is frequently violated.

¹⁹³ See Instructions for I-914, Application for T Nonimmigrant Status, USCIS *available at* <http://www.uscis.gov/files/form/i-914instr.pdf> (explaining that an officer's declaration is the primary evidence, without which it would be difficult for the victim to prove her claim).

¹⁹⁴ Mining is considered to be the most dangerous industry and agriculture ranks second. However, children below 18 are not permitted to work in mining. Please see the Child Labor Coalition "Children in the Fields Campaign Fact Sheet" available at <http://www.stopchildlabor.org/Consumercampaigns/fields.htm>. The National Consumers League ranks agricultural work as the worst teen jobs in 2007. The other four are construction, outside helpers such as in landscaping, drivers and operators of tractors, forklifts, and ATVs [all-terrain vehicles], and traveling youth crew. Please see <http://www.nclnet.org/labor/childlabor/jobreport.htm#ag>.

¹⁹⁵ U.S. General Accounting Office, "Child Labor in Agriculture: Characteristics and Legality of Work," GAO/HEHS-98-112R (Washington: U.S. General Accounting Office, 1998), p. 2

¹⁹⁶ Association of Farmworker Opportunity Program, "Children in the Fields," May 2007, p. 6.

¹⁹⁷ Cited in Human Rights Watch report, "Fingers to the Bone," available at www.hrw.org/reports/2000/frmwkr

¹⁹⁸ U.S. Department of Labor's report, "Findings from the National Agricultural Worker Survey (NAWS) 2001-2002. Chapter 1 provides detailed information on birthplace, employment eligibility, and migrant types.

Compounding these difficulties is the unequal protection and ineffective enforcement available to child farmworkers in violation of Article 6 of the CERD.¹⁹⁹

IV. Discrimination in access to rights and remedies under labor and employment laws for certain guestworkers and workers in an irregular status in violation of Article 6, compounding violations of Articles 5(e)(i) and (ii).

Article 6 obligates State-Parties to “assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” Yet statutory and jurisprudential exclusions have closed the door to these tribunals for many guestworkers and unauthorized workers.

Access to Legal Services: Through the Legal Services Corporation, Inc., the federal government provides funding for the provision of free legal aid to income eligible individuals. In 1996, Congress amended the law under which this money is granted to prohibit any legal aid program receiving federal funds from representing unauthorized migrants. Furthermore, the Legal Services Corporation-funded entities are prohibited from representing certain seasonal migrants coming under the H-2B visa program available to employers seeking unskilled laborers on a seasonal or temporary basis.

Access to Enforcement of Rights for Unauthorized Workers following *Hoffman Plastics Compounds, Inc. v. NLRB*: Relying on the *Hoffman* decision discussed above, various states in the United States have further limited the rights and remedies available to undocumented workers under state law, extending far beyond the denial of the right to freedom of association. New York, New Jersey, Kansas, Pennsylvania and Michigan, for example, have limited or eliminated such basic workplace protections as access to compensation for workplace injuries, freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury. Specifically, the highest courts in these states have either eliminated or severely limited state-law based workplace protections for undocumented workers.²⁰⁰ These

¹⁹⁹ For further discussion and documentation, see WILD report on Child Labor in U.S. Agriculture.

²⁰⁰ *Crespo v. Evergo Corp.*, 366 N.J. Super. 391 (App. Div. 2004), *cert. denied*, *Crespo v. Evergo Corp.*, 180 N.J. 151 (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); *See Sanchez v. Eagle Alloy Inc.*, 254 Mich. App. 651 (Mich. Ct. App. 2003), *cert. denied*, *Sanchez v. Eagle Alloy, Inc.*, 471 Mich. 851 (Mich. 2004) (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’ Compensation Appeal Board (Astudillo)*, 570 Pa. 464 (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.*, 152 N.H. 6 (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 (N.Y. 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). In Kansas, the Kansas Supreme Court held that a worker who

rights and remedies, often provided exclusively by state law, such as access to compensation for workplace injuries, freedom from workplace discrimination and entitlement to hold an employer responsible for a workplace injury, are among the most basic protections afforded to workers under United States law.²⁰¹ Because these rulings are interpretations of state law sanctioned or made by the states' highest court, the decisions are the law of the land in various states.

Employers and their attorneys have attempted to extend the ruling to impair workers seeking to enforce their right to non-discrimination in the workplace as well. While some courts have protected victims of discrimination, others have relied on *Hoffman Plastic* to curtail some basic rights and remedies of undocumented workers.²⁰²

After *Hoffman Plastic*, the EEOC, the agency charged with enforcing Title VII, stated clearly, "The Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work."²⁰³ However, the EEOC rescinded its "Enforcement Guidance on

submits a false name and Social Security Number on her application for workers' compensation had committed a "fraudulent or abusive act" within the meaning of the Kansas workers' compensation law, and could be sanctioned for that act, even the . This was so even though the worker had made no false claim for benefits and was entitled to them under Kansas law. *Doe v. Kansas Dept. of Human Resources*, 277 Kan. 795 (Kan. 2004). At the same time, an Assistant U.S. Attorney in Wichita, Kansas has made public a disturbing practice wherein employers, insurance companies and others take steps to verify a worker's immigration status *after* a claim is made and refer those cases to his office, which then prosecutes injured workers for document fraud, resulting in their deportation and inability to pursue workers' compensation claims. See 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).

²⁰¹ Some workplace rights in the United States are governed exclusively by state law. For example, federal anti-discrimination laws only protect employees working for employers who employ at least 15 employees. 42 U.S.C. § 2000e(b). State discrimination laws often protect employees working for employers with fewer employees. See e.g. The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq.; New York State Human Rights Law, N.Y. Exec. Law § 296; Mass. Gen. Laws ch. 151B; Elliot-Larsen Civil Rights Act, Public Act 453 of 1976, as amended (Michigan); Pennsylvania Human Relations Act, Act of 1955, P.L. 744, No. 222, as amended June 25, 1997 BY ACT 34 OF 1997, 43 P.S. §§ 951-963

²⁰² As the U.S. correctly reports in its Report, one court protected the immigration status of women victims of discrimination, saying, "[b]y revealing their immigration status, any plaintiffs found to be undocumented might face criminal prosecution and deportation." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005), U.S. Periodic Report, ¶ 151. Compare, In *Egbuna v. Time-Life Libraries, Inc.*, 1998 WL 512881 (4th Cir. 1998) an unpublished Fourth Circuit decision, an employer was successful, pre-*Hoffman Plastic*, in arguing that undocumented workers are "unqualified applicants" and therefore do not have standing to sue under Title VII for discrimination in hiring and promotion. Similarly, in *Crespo v. Evergo Corp.*, 366 N.J. Super. 391, 399 (App. Div. 2004), the New Jersey State Appellate Division dismissed a pregnancy discrimination claim alleging unlawful termination under the New Jersey Law Against Discrimination (LAD), a state analog to Title VII. The *Crespo* court stated that "where the governing workplace statutory scheme makes legal employment a prerequisite to its remedial benefits, a worker's illegal alien status will bar relief thereunder."

²⁰³ U.S. Equal Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (explaining that *Hoffman Plastic* required the EEOC to reexamine its former position that back pay is available to undocumented workers filing workplace discrimination charges).

Remedies Available to Undocumented Workers.”²⁰⁴ It noted that since its former practice of awarding back pay to undocumented workers was based on the NLRA, it was reviewing that practice in light of *Hoffman*. The EEOC has not clarified in the pending years that undocumented workers are entitled to back pay under Title VII, adding to the confusion as to whether the U.S. will fully protect immigrant workers from employment discrimination based on race, gender, color, national origin, religion or age.

As referenced supra in the discussion on citizenship discrimination in the U.S., General Recommendation 30 clearly states the obligation of States parties to “eliminate racial discrimination in the enjoyment of . . . economic . . . rights,” noting differential treatment based on citizenship status “will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” But, as one court noted, “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.”²⁰⁵

In addition to limiting or eliminating the workplace rights of undocumented workers, a further but no less problematic consequence of *Hoffman* and the cases that followed has been the intimidation of undocumented workers asserting their rights through the courts. Because *Hoffman* arguably made immigration status relevant to many workplace rights, employer-defendants often seek discovery of the immigrant-plaintiffs’ immigration status,²⁰⁶ an action that serves to chill immigrants’ willingness to pursue their workplace rights.²⁰⁷ The result is a tacit condoning of the exploitation of immigrant workers even in areas where these workers have retained enforceable workplace rights. The denial of legal protection and effective remedies violate the promise in CERD, Article 6 of “effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate . . . human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

V. Immigration Enforcement and Its Discriminatory Impact on Article 5 Rights of Workers

a. Increase of work-site immigration enforcement

²⁰⁴Id.

²⁰⁵See, *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super 14, 20; 671 A.D.2s 1054. See, also, *Dowling v. Slotnik*, 244 Conn. 781, 712 A.2d 396 (1998). <http://www.nelp.org/docUploads/immworkersafetyhealth083004%2Epdf>

²⁰⁶ See e.g. *Morejon v. Terry Hinge and Hardware*, 2003 WL 22482036 (Cal. App. 2 Dist., 2003); *de Jesus Uribe v. Aviles*, 2004 WL 2385135 (Cal. App. 2 Dist. 2004); *Veliz v. Rental Service Corporation USA, Inc.*, 313 F.Supp.2d 1317 (2003); *Hernandez-Cortez v. Hernández*, 2003 WL 22519678 (D. Kan. 2003).

²⁰⁷ See *Rivera v. NIBCO, Inc.*, 364 F3d 1057 (9th Cir. 2004), cert. denied, *NIBCO, Inc. v. Rivera*, 544 U.S. 905 (2005) (declining to order disclosure of immigration status and noting chilling effect).

On March 29, 2007, federal agents detained 69 undocumented immigrants hired by a Baltimore temporary employment agency.²⁰⁸ That same month, ICE agents arrested 327 employees working for Michael Bianco, Inc, a leather goods manufacturer in New Bedford, Massachusetts. The raid left 140 children stranded. Most of the immigrants arrested were Guatemalans that had fled civil war in their home country in the 1980s.²⁰⁹ These cases are just two recent examples of stepped up enforcement by ICE in the form of raids. Immigration authorities waged hundreds of similar sweeps last year. ICE reported that the bureau removed 221,664 undocumented immigrants in 2006, an increase of 20 percent over the previous year's tally.²¹⁰ Since 2001, the U.S. government's worksite enforcement budget has increased 42 percent,²¹¹ resulting in an increase in worksite arrests in FY 2006 of approximately 4,000 individuals, 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.²¹²

These enforcement activities violate article 5(b) of the Convention, which "guarantee[s] the right of everyone, without distinction as to race, colour, or national or ethnic origin . . . [t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution," as well as the Committee's General Recommendation 30.²¹³ Both the way in which the raids are conducted through the targeting of worksites with high-numbers of workers of identifiable ethnicities, and the discriminatory impact they have on workers of color directly implicate the availability and enforcement of equal rights and remedies in the workplace for all workers in the industries in which immigrant populations are represented in relatively high percentages.

Workplace raids serve to legitimize the intimidation of this vulnerable group by their employers, and workers refrain from asserting their rights and organizing by fear of retaliation. The raids target low-level employees, many of whom are either U.S. citizens or authorized to work in the U.S., and not the employers, many of whom have abysmal records of compliance with labor and employment laws.²¹⁴ This U.S. policy empowers and condones employers who threaten their

²⁰⁸ Brent Jones, "Illegal Workers Arrested," Baltimore: Baltimore Sun, March 30, 2007, available at http://www.baltimoresun.com/news/local/baltimore_city/bal-md.ci.raids30mar30,0,3799094.story?coll=bal-local-headlines

²⁰⁹ Erika Hayashi, "Mayor criticizes raid for disrupting families," Los Angeles: Los Angeles Times, March 9, 2007.

²¹⁰ Julia Preston, "As Deportation Pace Rises, Illegal Immigrants Dig In," New York: The New York Times, May 1, 2007, available at http://www.nytimes.com/2007/05/01/us/01deport.html?_r=1&oref=slogin

²¹¹ 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>

²¹² 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>; *See, also*, Rebecca Smith & Catherine Ruckelshaus, "Solutions, Not Scapegoats: Abating Sweatshop Conditions for all Low-Wage Workers as a Centerpiece of Immigration Reform"

²¹³ Gen. Rec. 30 provides in ¶ 21: "Combat ill-treatment of and discrimination against non-citizens by police and other law enforcement agencies and civil servants by strictly applying relevant legislation and regulations providing for sanctions and by ensuring that all officials dealing with non-citizens receive special training, including training in human rights;" and in ¶ 26: "Ensure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account." Further discussion of worksite raids and the implications under CERD is included in the Immigration Chapter.

²¹⁴ US GOV'T ACCOUNTABILITY OFFICE, GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 6-7 (2005) (noting that while its worksite

workers with deportation if they complain and intimidates workers from asserting their rights, as illustrated in the cases below.

As documented by Human Rights Watch, workers at Smithfield, the largest hog processing facility in the world, have been subjected to a series of human rights abuses by their employers.²¹⁵ In 2000 and 2006, NLRB decisions found the Smithfield Company liable of using illegal threats and violence against its workers.²¹⁶ The workers did not cave into the oppressive environment, but continued organizing unions and protesting management intimidation and abuse. In July 2006, Smithfield joined the Immigration and Customs Enforcement Mutual Agreement between Government and Employers Program (IMAGE). After years of threats and intimidation, in 2007 U.S. immigration officials raided the Smithfield plant in Tarheel, N.C. and arrested 21 workers.²¹⁷

The Smithfield case demonstrates how U.S. enforcement activity serves to interfere with workers' abilities to exercise their lawful labor rights. Since the late 1990's U.S. immigration authorities have had a policy which ostensibly gives some protection to workers when an employer uses immigration status to interfere with exercise of labor rights. A Special Agents Field Manual for the agency says that when the agency receives information concerning the employment of undocumented or unauthorized aliens, officials must consider whether the information is being provided to interfere with employees' rights to organize or enforce other workplace rights, or whether the information is being provided to retaliate against employees to vindicate those rights.²¹⁸ If immigration authorities determine that the information may have been provided in order to interfere with employees' rights, "no action should be taken on this information without the review of District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol." SAFM 33.14(h).

Unfortunately, ICE has increasingly taken enforcement action against individuals who were either in the process of organizing at their workplaces or of submitting complaints for violation of their labor rights. In one recent case from California, an immigrant from Mexico was visited in her home by ICE agents, after she had taken part in an organizing effort at the hotel where she was employed. According to the worker, two agents dressed in civilian clothes came to her home, insisting that they needed to talk with her. When they were already in the house, they showed identification, which identified them as ICE agents and told her they were federal agents that their bosses in Washington had sent them to investigate. They insisted that she go to their office the next morning to speak with them further.²¹⁹

Incidents like these illustrate that the U.S. government is not following its own policy, and is not adequately protecting the labor rights of immigrant workers. Apart from the chilling effect that they have in individual cases, they send a message to immigrant workers overall that they, in fact, have no enforceable labor rights in the United States.

arrests total a seven-fold increase since 2002, ICE issued fine notices to only three employers nationwide in 2004, down from 417 in 1999).

²¹⁵ Blood, Sweat, and Fear, *passim*.

²¹⁶ <http://www.smithfieldjustice.com/aboutthecampaign.php>

²¹⁷ *Id.*

²¹⁸ US Immigration and Naturalization Special Agent Field Manual, § 33.14 (on file with authors).

²¹⁹ Declaration of worker on file with authors.

b. Misuse of SSN data and verification system

The Department of Homeland Security finalized a measure in August 2007 that discriminates against workers based on their ethnicity by increasing employers' responsibilities when receiving Social Security "no-match" letters.²²⁰ The policy would require businesses to police their employees to prevent undocumented immigrants from working by making receipt of a "no-match" letter count as constructive knowledge for the employer that an employee is unauthorized to work.²²¹ Currently, the government informs employers that their workers are not in Social Security records through "no-match" letters. Under the newly-proposed policy, employers would have 90 days to resolve the discrepancy. Otherwise employers would be required to fire the workers or pay a \$10,000 fine.

A no-match letter can be generated for many reasons having nothing to do with work authorization. "SSA's model 2006 letter reassured employers that there are three common reasons why reported information might mismatch SSA's own records, all unrelated to immigration fraud: (1) typographical errors made in spelling an employee's name or listing the SSN; (2) failure of the employee to report a name change; and (3) submission of a blank or incomplete Form W-2."²²²

If employers verify work authorization through the worker's identification and I-9 forms, asking them to do more is an unfair burden and may deter the hiring of people based on ethnicity, a clear violation of CERD, Article 5. "The no-match rule is also likely to lead to increased discrimination against foreign-born workers. As documented by the Government Accountability Office (GAO) in its three reports in the early 1990s, employers refused to hire 'foreign-sounding' or 'foreign looking' workers because they feared penalties for hiring undocumented workers."²²³ Transgender employees of color listed as one gender in SSA records, but who live and work in another gender, would have been at even greater risk of losing their jobs as a result of the DHS enforcement procedures, because of a gender "mismatch." A lawsuit filed in California arguing that the "new rule would place in jeopardy the jobs of U.S. citizens and non-citizens legally authorized to work simply because of discrepancies in the government's error-prone Social Securities earnings database"²²⁴ convinced the District Court judge to issue an order preventing DHS from implementing the rule.²²⁵ DHS has announced that it plans to announce a new before the end of 2007, but it has not indicated how it will guard against national origin, ethnicity or sexual identity discrimination.

VI. Questions and Recommendations

Questions

²²⁰ See 72 CFR 45611-24 (Aug. 15, 2007).

²²¹ Nat'l Immigration Law Center toolkit, *available at* http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/SSA_no-match_TPs_2007-08-14.pdf.

²²² *AFL-CIO v. Chertoff*, 2007 WL 2972952, *1 fn.1 (N.D. Cal. 2007)

²²³ http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/SSA_no-match_TPs_2007-08-14.pdf.

²²⁴ *Complaint for Declaratory and Injunctive Relief, AFL-CIO v. Chertoff* (N.D. Cal. Aug. 28, 2007).

²²⁵ Case 3:07-cv-04472-CRB Document 21 Filed 08/31/2007.

What affirmative measures are you taking to eradicate workplace discrimination, and to combat the discriminatory impact that criminal background checks, statutory exclusions from laws governing rights in the workplace, and enforcement of immigration laws have on the basis of race, ethnicity, national origin and ancestry?

What steps are you taking to identify and address the disproportionate representation of workers of color, including both U.S. born and immigrants, in low-wage sectors with high rates of non-compliance with labor and employment laws?

What efforts are you making to increase enforcement of labor laws in those industries which are frequent violators of those laws, and also employ large numbers of people of color and immigrant workers?

What steps are you taking to ensure, on a country-wide basis, that immigration status and enforcement of immigration laws do not discriminatorily interfere with workers' access to enforcement of their fundamental labor rights?

Recommendations

The U.S. should ensure that all workers without discrimination are guaranteed their rights under article 5 of the Convention, including the rights to be free from employment discrimination, to freedom of association and collective bargaining, workplace safety, and just and favorable remuneration. In doing so, the U.S. should:

- Eliminate industry and size-based exemptions in the substantive law governing workplace rights;
- Keep data on worker complaints coming to DOL, including wages and hours claimed by each worker, regardless of whether DOL “takes the case,” and keep data on results obtained by DOL, in case of enforcement, so as to be able to determine the racial, ethnic, national origin and ancestry of the complainants and devise adequate programs to ensure that equal access of rights and remedies to *all* workers.
- Increase funding for DOL and OSHA investigators, and ensure the hiring of more investigators who speak languages prevalent in the industries with high rates of non-compliance to work to eradicate the discriminatory impact non-compliance with fundamental workplace rights has on workers of color, both U.S. born and immigrants.
- Work to ensure employers are not allowed to evade legal responsibility by misclassifying employees as independent contractors, or by contracting away their liability to international and local labor brokers.
- Ensure workers' ability to access free legal services for enforcement of their rights, elimination exclusions under the Legal Services Corporation Act for undocumented workers and H-2b workers.

- Ensure U.S. DOL has as its mandate the enforcement of labor protections under the guestworker programs, and also provide access such that workers themselves have the ability to seek enforcement of their rights.
- Establish a complete firewall between immigration enforcement and labor rights.
- Take a strong, nationally-coordinated enforcement approach to violence against immigrant workers, in particular day laborers.
- Publicly discourage states from enacting anti-Constitutional anti-solicitation ordinances and voice support for community establishment of day labor centers, in conjunction with community groups, as alternatives to street corner solicitation.