



# Workers' Rights on ICE

**How Immigration Reform Can Stop Retaliation and Advance Labor Rights | CALIFORNIA REPORT**



**Authors: Eunice Hyunhye Cho and Rebecca Smith**

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## Table of Contents

Executive Summary .....	1
Case Studies .....	5
Recommendations .....	11
Endnotes .....	13

## Authors

Eunice Hyunhye Cho and Rebecca Smith

## About the National Employment Law Project

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights.

Through its Immigrant Worker Justice Project, NELP works at the intersection of labor law and immigration law. We seek to expand and defend the labor rights of all workers, and to ensure that immigrant workers can assert their labor rights in a climate of equality and fairness, free from fear of reprisal. Our partners include worker centers and unions, immigrant rights groups, progressive lawyers, and community organizations. With them, we promote policies that expand the power of community organizing and protect immigrant workers' labor, civil, and human rights.

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## National Employment Law Project—California Office

405 14th St. Suite 1400, Oakland, CA 94612 | Tel: 510-663-5700 | Fax: 510-663-2028 | [www.nelp.org](http://www.nelp.org)

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# EXECUTIVE SUMMARY

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For the first time in many years in the United States, a broad consensus of policymakers and ordinary citizens agrees that the time has come for an overhaul of our immigration system. This overhaul will benefit immigrant workers, workers in low-wage sectors of our economy, and the economy as a whole.

The U.S. labor market remains weak, with three unemployed workers competing for every available job. This imbalance gives employers great power to set the terms and conditions of employment and to violate workers' rights without fear of consequences. This is especially the case in low-wage industries marked by rampant workplace abuse.

Employers and their agents have far too frequently shown that they will use immigration status as a tool against labor organizing campaigns and worker claims. For example,

- An employer in Garden Grove, California falsely accuses a day laborer of robbery in order to avoid paying him for work performed. Local police officers arrest the worker. Although the police find no merit to the charges, he is turned over to Immigration and Customs Enforcement (ICE).
- After the California Labor Commissioner found that a San Jose, California employer owed an immigrant worker \$50,000 for unpaid wages, the employer harasses the worker in his home and threatens to report him to immigration.
- After workers at a Latino grocery store chain in the San Francisco Bay Area attempt to organize a union, the employer announces that it needs to re-verify workers' authorization and that it will enroll in the voluntary E-Verify program, leading to widespread fear.

Silencing or intimidating a large percentage of workers in any industry means that workers are hobbled in their efforts to protect and improve their

jobs. As long as unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security. Law-abiding employers are forced to compete with illegal practices, perpetuating low-wages in a whole host of industries.

California can create a real, effective, pro-immigrant worker agenda to ensure that workers can speak up about labor abuses, now and in the future. We must learn from worker experiences and the failed policies of the past. A proactive policy to ensure protection of all workers, regardless of immigration status, must include:

- Stronger statutory protections to protect workers from employer retaliation;
- Enhanced ability of state labor law agencies, including the California Division of Labor Standards Enforcement (DLSE) and the California Department of Fair Employment and Housing (DFEH), to respond to charges of retaliation and to protect immigrant victims of workplace crime, from removal and deportation;
- Strengthened firewall between immigration enforcement, local law enforcement agencies, and state labor law enforcement; and
- Added resources for more robust enforcement of core labor laws in low-wage industries.

The National Employment Law Project (NELP) has prepared this analysis and offers the stories of immigrant workers to underscore the importance of ensuring workplace protections for all who work in California and the United States, regardless of status, and to emphasize the critical need for a broad pathway to citizenship. Such protections will benefit all workers by raising workplace standards and removing rewards for employers who abuse workers for their own gain.

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# Immigrant Workers in California Face Unfair Retaliation

## A. Labor abuses and retaliation against California's immigrant workers are all too common in expanding low-wage labor markets

Immigrants comprise a growing part of the United State labor force. In 2010, 23.1 million foreign-born persons participated in the civilian labor force.<sup>1</sup> Of these workers, some eight million undocumented workers form 5.2 percent of the U.S. labor force.<sup>2</sup> Immigrant workers, both documented and undocumented, are a significant presence in California's workplace and economy.<sup>3</sup> An estimated 2.6 million undocumented immigrants reside in California—approximately seven percent of the State's total population and one-fourth of the population of undocumented immigrants nationwide. Almost one in every ten workers in California is undocumented.<sup>4</sup>

Most undocumented immigrants work in traditionally low-wage occupations such as agriculture, construction, manufacturing, and service industries, where workers face the greatest risk for exploitation.<sup>5</sup> Undocumented workers are far more likely to experience violations of wage and hour laws. A landmark study of low-wage workers in Los Angeles found that almost 76 percent of undocumented workers had worked off-the-clock without pay and over 85 percent had not received overtime pay. Undocumented workers experienced these violations at rates higher than their native-born counterparts.<sup>6</sup> Moreover, immigrant workers are disproportionately likely to be injured or killed on the job. Approximately 29 percent of workers killed in industrial accidents in California in recent years were immigrants.<sup>7</sup> Their rate of occupational injuries not resulting in death is also higher than average. Researchers suspect

that the real numbers may be even greater, as immigrant workers often do not report work-related injury or illness for fear of retaliation.<sup>8</sup>

## B. Retaliation and threats—although illegal—are common

Our national labor and employment laws protect undocumented workers—just like any other worker.<sup>9</sup> California law moreover, specifically provides that “[f]or purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability.”<sup>10</sup>

Labor and employment laws prohibit employers from reprisals when workers engage in protected workplace activity, regardless of the worker's immigration status.<sup>11</sup> Nevertheless, retaliation is common against all workers who speak up about abuse on the job, ask questions about workplace protections, or exercise their rights to engage in collective action. In fiscal year 2012, the U.S. Equal Employment Opportunity Commission (EEOC) received more than 37,800 complaints that included retaliation claims.<sup>12</sup> A national survey of over 4,000 low-wage workers found that 43 percent of those who made complaints or attempted to organize a union experienced retaliation by their employer or supervisor.<sup>13</sup>

A study of immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers' compensation claims for fear of getting “in trouble” or being fired.<sup>14</sup> In another study of immigrant workers' perceptions of workplace health and safety, researchers from the University of California at Los Angeles (UCLA) observed that “[w]orkers worried because they know the work they did was dangerous, and also

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because they knew that if they got injured they would have limited medical care options. Some respondents said that they could not really ‘afford to worry’ because they needed the job and had little control over the working conditions.”<sup>15</sup>

While threats of job loss have an especially serious consequence in this job market, an employer’s threat to alert immigration or local law enforcement of an undocumented immigrant worker’s status carries added force. Such action is at least as frequent as other forms of retaliation. An analysis of more than 1,000 NLRB certification elections between 1999 and 2003 found that “[i]n 7% of all campaigns – but 50% of campaigns with a majority of undocumented workers and 41% with a majority of recent immigrants – employers make threats of referral to Immigration Customs and Enforcement (ICE).”<sup>16</sup>

### **C. Expansion of Immigration Enforcement Brings New Players to the Retaliation Game**

Anecdotal reports show that in recent years, employers who seek to retaliate against immigrant workers have increasingly filed reports with local law enforcement agencies, in addition to direct reports to federal immigration officials. Enforcement targeting undocumented immigrants has reached record levels. The U.S. government currently spends more on its immigration enforcement agencies—\$18 billion in FY 2012—than all other federal law enforcement agencies combined.<sup>17</sup>

The growth of costly immigration enforcement programs such as Secure Communities has expanded the reach of federal immigration enforcement agencies at the local level, radically transforming the immigration enforcement landscape. Secure Communities is a federal program that allows state and local law enforcement agencies to instantaneously share

immigration information with the U.S. Department of Homeland Security (DHS) and check the immigration status of any individual taken into custody against a flawed and inaccurate database, even without the filing of a criminal charge. Under Secure Communities, ICE may place an immigration detainer—a pre-trial hold—on any individual who appears on the federal database, and transfer the individual into immigration custody. Secure Communities has had a disastrous effect on immigrant communities, including on victims of crime and employer abuse. In FY 2010, Secure Communities led to the issuance of 111,093 immigration detainers by ICE at the local level.<sup>18</sup> Between 2008 and 2012, ICE deported over 90,092 Californians under Secure Communities, 56 percent of whom had no criminal or minor record.<sup>19</sup> Underscoring the inaccuracies of the DHS database, Secure Communities has even led to the improper immigration-related arrest of approximately 3,600 U.S. citizens by ICE.<sup>20</sup> California taxpayers spend an estimated \$65 million annually to detain immigrants for ICE; taxpayers spend \$26 million per year in Los Angeles alone.<sup>21</sup>

This flawed integration of local law enforcement with federal immigration enforcement has provided employers with additional means to retaliate against immigrant workers who seek to exercise their workplace rights. Employers may capitalize on language barriers or local law enforcement biases against immigrants to achieve their ends. Due to the growing federal-local collaboration on immigration enforcement, immigrant workers who are falsely accused of crimes often have no recourse and instead, end up in deportation proceedings after blowing the whistle on labor violations.

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#### **D. Increase in worksite immigration enforcement and I-9 audits encourages employers to “self-audit” during labor disputes**

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), a cornerstone of today’s immigration policy. Central to IRCA was the creation of employment sanctions, which impose civil and criminal penalties on employers for knowingly hiring and employing workers without authorization.<sup>22</sup> IRCA requires employers to verify a worker’s identity and eligibility to work, and complete and retain an “I-9” form for each new employee, or risk a fine.<sup>23</sup> Despite its intention to deter employers from knowingly hiring undocumented workers, workers themselves have borne the punitive brunt of the employment sanctions regime.

In the past three years, the Obama administration has reduced the frequency of worksite raids and has instead increased administrative audits of employers to detect compliance with I-9 requirements. Since January 2009, ICE has conducted more than 8,079 audits of employers, compared with 503 audits in FY 2008.<sup>24</sup> Although this strategy of “silent raids” differs from the prior administration’s primary focus on high-profile raids, the effect on workers is devastating. Where workers have conducted union organizing drives, employers may claim that they must re-verify employees’ I-9 forms to comply with an ICE audit—even where none in fact is present. Such an announcement stokes fear in an already vulnerable workforce, and can unfairly interfere in an organizing campaign.

In limited circumstances, employers may re-verify, or ask workers to produce their I-9 work authorization documentation again, after the employer’s initial verification at the time of hire, without running afoul of anti-discrimination or retaliation protections.<sup>25</sup> However, in many cases, employers have improperly conducted I-9 self-audits just after employees have filed workplace-

based complaints, or in the midst of labor disputes or collective bargaining, creating a climate of fear. In other instances, employers have attempted to re-verify workers following a reinstatement order, an illegal practice under the National Labor Relations Act.<sup>26</sup> Employers often provide little or no notice to workers about the reason for the I-9 re-verification, and fail to provide a reasonable period of time for employees to respond to the self-audit, even when they are proper.

#### **E. Use of E-Verify exacerbates retaliation by employers**

E-Verify is a federally-created internet-based program that allows employers to confirm the immigration status of newly hired workers. To use the E-Verify system, employers must enter an employee’s identification information, including name, Social Security number, date of birth, citizenship, and alien number into an online database, which is matched against databases maintained by the Social Security Administration (SSA) and DHS. The E-Verify system is voluntary for most employers, although at least some employers in 19 states and those with federal contracts must enroll in E-Verify.<sup>27</sup> Although use of E-Verify has expanded rapidly over the last decade, only around 350,000 employers are currently enrolled.<sup>28</sup>

In 2011, Governor Jerry Brown signed AB 1236, the Employment Acceleration Act, into law. The bill ensures that cities, counties, and the state government cannot mandate the use of E-Verify for private business owners, and reaffirmed that E-Verify is an optional program for private employers, with very few exceptions.<sup>29</sup> Although E-Verify is clearly optional, as examples show, unscrupulous employers have misused E-Verify as an opportunity to intimidate and retaliate against workers for union organizing or for engaging in concerted efforts to address workplace violations.

# CASE STUDIES

## Employer Retaliation: False Reports to Local Law Enforcement, Resulting in Immigration Hold

### Day Laborer Who Requests Extra Pay Lands in Jail and Faces Immigration Hold after Requesting Wages

Winnetka, California (2013)

Hector Nolasco, a day laborer in Winnetka, California, currently faces deportation because his employer falsely reported him to the police in order to avoid paying him his wages. On February 3, 2013, Hector and a friend were hired to pack and move boxes at a restaurant for five hours. Nolasco worked for six hours, and when he asked to be paid for the extra hour, his employer refused. Instead, the employer threatened to call the police.

Nolasco and his friend decided to leave, and began a three mile walk back to the corner from which they were hired. The employer followed them, hurling insults and gesturing threateningly. Suddenly, the police arrived, and placed Nolasco under arrest. Nolasco later learned that his employer had told the police that Nolasco had threatened him with a knife—the box cutter that Nolasco had used to pack boxes. Although Nolasco’s friend, who was present all day, confirmed that Nolasco never threatened anyone, Nolasco remains in police custody on a misdemeanor charge of displaying a deadly weapon. He has also been issued an ICE hold.<sup>30</sup>

photo of Hector Nolasco courtesy of NDLO



### Employer Files False Police Report to Avoid Paying Day Laborer His Wages, Leading to Deportation Proceedings

Garden Grove, CA (2012)

On the morning of March 9, 2012, Jose Ucelo-Gonzalez was hired from a Home Depot parking lot by Michael Tebb, a private contractor, to pave the parking lot of a local hospital.

At the end of the day, Ucelo-Gonzalez asked Tebb to pay him for his ten hours of work. Tebb made motions as if he wanted to fight, cursed at him, and said that he would have Ucelo-Gonzalez arrested for stealing. Tebb got in his truck and drove away, abandoning Ucelo-Gonzalez without a ride and leaving him without his pay.

Ucelo-Gonzalez called the police, who asked him for the exact address of his location. As he left the parking lot to find out the address, eight police cars pulled up. Tebb was with them. The police arrested and handcuffed Ucelo-Gonzalez. At the police station, Ucelo-Gonzalez explained that Tebb had not paid him his wages and had made false accusations, and had a co-worker come and serve as a witness on his behalf. Although the police noted that Ucelo-Gonzalez was “very sincere in his statements,” and although the false charges were ultimately dropped against him, Ucelo-Gonzalez was transferred to ICE custody.<sup>31</sup>

photo of Jose Ucelo-Gonzalez courtesy of NDLO

## Employer Retaliation: Reports or Threats to Contact ICE

### After Labor Commissioner Issues Judgment Against Employer Who Failed to Pay Worker, Employer Harasses Worker and Threatens to Report to Immigration with False Evidence

San Jose, CA (2013)

Mario Cruz,\* a gardener from Mexico, trimmed trees in San Jose, California. After his employer failed to pay him, he filed a complaint with the California Division of Labor Standards Enforcement (DLSE). The DLSE entered a judgment requiring the employer to pay him over \$50,000 for unpaid wages. Three months after the decision, Cruz still had not received any of his wages. With the help of the Wage Justice Center, a local advocacy group, Cruz sent a letter to his employer requesting his wages and indicating that he might file a lien on his employer's property if his employer did not pay.

Cruz did not receive any payment in response to his letter. Instead, on January 22, 2013, Cruz's employer paid a visit to his house. His employer threatened to have him deported. The employer visited Cruz twice more, but when Cruz refused to open the door, his employer repeated his threats to call immigration. When Cruz called the police to make a report, the police refused to help.

On January 25, 2013, immigration enforcement agents showed up at the house of one of the witnesses in Cruz's case. Cruz worried that the visit was related to his case. Cruz heard that his employer had also threatened another worker who had tried to file claims for unpaid wages in the past. His employer had told his co-worker to take less money or that drugs would be planted in his car. Cruz is now afraid of leaving the house, and is afraid that his employer is going to harm him.<sup>32</sup>



### Immigrant Worker Joins Lawsuit against Employer, Arrested by ICE due to Employer Retaliation

Anaheim, CA (2010)

Osfel Andrade, an immigrant from Mexico, worked in the shipping department of Terra Universal, a laboratory equipment manufacturer in Fullerton, California when immigration agents conducted a worksite raid on June 29, 2010. During the raid, ICE agents arrested 43 workers and placed them in deportation proceedings. Andrade was not arrested that day, but instead of remaining hidden from authorities, he agreed to serve as a named plaintiff in a class action case against his former employer. The case seeks back wages for years of unpaid wages, exploitation, and discrimination on behalf of hundreds of workers.

After Andrade joined the lawsuit, associates of his former employer attempted to pressure him to drop out of the case. Andrade refused. Shortly thereafter, ICE agents arrested Andrade at his home, and placed him in immigration detention, where he was held for three weeks until released on bond. Evidence indicates that Terra Universal informed ICE of Andrade's immigration status in retaliation for filing the lawsuit.

After Andrade's arrest by ICE, two of the other named plaintiffs in the lawsuit subsequently withdrew from the case. Andrade, however, has remained in the case, despite the fear and emotional distress caused by his employer's retaliation. His courage has earned him the respect of his co-workers and community members, and he was recently honored with the Freedom From Fear Award, in recognition of the significant risk he has taken to confront injustice on behalf of immigrants in the United States.<sup>33</sup>

photo of Osfel Andrade courtesy ACLU of Southern California



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## **Restaurant Worker Threatened with Deportation and Violence For Reporting Violations to U.S. Department of Labor** Los Angeles, CA (2012)

Somkiat Jirapojananon, an immigrant from Thailand, worked as a delivery driver for a Thai restaurant in Los Angeles. His employer required him to work eleven-hour shifts five days a week, without meal or rest breaks or overtime pay. He was paid a flat-rate of \$60 a day.

In October 2012, the U.S. Department of Labor (DOL) began investigating the restaurant for wage and hour violations. The restaurant owner ordered the employees to lie to the DOL investigators by telling them that they worked part-time and were paid \$8 an hour. The employer threatened to report Jirapojananon to immigration officials and to send people to his home to hurt him if he did not lie to the DOL. Afraid that the employer would carry out her threats once she realized he did not lie to the DOL, Somkiat began looking for another place to live and work.

In December, the DOL ordered the employer to pay Jirapojananon over \$23,000 in unpaid wages and mileage reimbursement. The employer told Jirapojananon that he had to pay that amount back to the restaurant, or that “he should think very carefully about what would happen to him or his family if he is deported or beaten up.”<sup>34</sup>

## **Workers File Suit for Unpaid Wages; Employer Tries to Have Them Fired from New Job and Threatens Deportation** Los Angeles, CA (2010)

Jose Lopez,\* Norberto Lopez,\* and Miguel Salazar\* worked in a car wash in Los Angeles, California, where they were paid as little as \$35 per day for 10-hour days. After finding better-paid work at a different car wash, they filed a lawsuit against their former employer seeking unpaid wages. The former employer came to their new workplace and tried to convince the owner to fire the men, then left messages on their cell phones threatening that he would “deport” them if they pursued their lawsuit. The men, who lived together, were afraid to leave their house alone for months. Soon after, ICE agents detained the three men, although it is unclear whether they were picked up as part of a random sweep or due to a call from the employer.<sup>35</sup>

## **Workers Who Sue Employer for Unpaid Wages Arrested and Detained by ICE in Manager’s Office** Salinas, CA (2008)

In February 2008, after talking to members of the Teamsters union, workers at a cabinet manufacturing company in Gilroy, California, filed a class action lawsuit against their employer for unpaid wages and other violations of federal and state labor protections. Isais Aguilar, a worker at the factory, served as a named plaintiff in the case. A few months later, in April 2008, management called employees to the office, where ICE officials were present. ICE arrested and detained the workers. By the time the workers’ attorney contacted ICE and members of Congress to inform them of the pending lawsuit and to stop deportation proceedings, many workers had already signed voluntary departure forms and had been removed from the United States. Aguilar’s brother was one of the workers deported during the raid.

Aguilar, however, continued to participate in the lawsuit and stand up for his rights. Soon after, in April 2009, Aguilar handed out handbills to other workers at the plant. Managers, however, threatened to call immigration after Aguilar handed out handbills to other workers at the plant and called the local police department. Although Aguilar avoided deportation, the ICE raid, threats by supervisors, repeated lay-offs, reduced hours of work, and wage cuts severely intimidated the remaining workers, and defeated the union’s organizing efforts.<sup>36</sup>

## Employer Retaliation: Re-Verification of I-9 Forms

### Manager Attempts to Require Workers to Re-File I-9 Forms, Threatens to Report to Police After Carwash Workers Organize

El Monte, California (2012)

Carwash workers at Star Carwash in El Monte, California, began to worry when their paychecks began to bounce. Their employer had filed for bankruptcy, and workers found that they had difficulty changing checks when they repeatedly came back with insufficient funds. In November 2012, eight workers of twelve at the company began to organize to work for better conditions with the support of the CLEAN Carwash Campaign, a partnership of unions, community groups, and religious groups.

Instead of ensuring that the workers received their pay, management at Star Carwash began to intimidate workers by threatening to cut their hours and fire them. The managers told the workers that they would need to refile their I-9 employment forms to re-verify their work authorization. When the workers refused, the manager brought Maria Flores,\* one of the worker leaders, into his office. The manager told Maria that she had to fill out new employment papers so that he could show it to the local police department to check her identity, or she could choose to quit. When Maria refused, her employer cut her hours down to 2-3 hours per week.<sup>37</sup>



### Pomona College Fires Dining Hall Workers through Immigration Reverification after Workers Organize for Union

Pomona College | Pomona, California (2011)

For two years, dining hall workers at Pomona College in Claremont, California organized to form a union. Discussions between workers and the College have been unsuccessful. In 2011, the administration began enforcing a rule barring dining hall employees from talking to students in the cafeteria.<sup>38</sup> The union filed unfair labor practice charges in August and September 2011 challenging the rule.<sup>39</sup> The College later changed the no-contact rule in the face of prosecution from the general counsel of the National Labor Relations Board.

In the middle of the campaign, the College received a letter from an undisclosed source accusing it of having a policy of not obtaining documentation of work authorization from its employees. The College administration investigated this complaint and found it to be false. Even though the College's review found that there was no such history of noncompliance, and although no federal agency had investigated the College for noncompliance, the College Board of Trustees decided to re-verify the immigration status of its staff. It turned the matter over to the law firm of Sidley Austin, a corporate law firm which offers services including "union avoidance" for "clients who desire to remain union-free."<sup>40</sup>

The college gave staff notice that they needed to bring in their documents within 3 weeks and by early December 2011, Pomona had fired 17 workers. Sixteen of them were dining hall workers. Some of the staff members had been employed by the College for decades.

It is impossible to know whether the college's actions were motivated by its desire to avoid unionization of its employees. What is clear is that the vagueness of the complaint that Pomona allegedly received and its harsh response—after two years of union organizing and amid pending charges of unfair labor practices<sup>41</sup>—resulted in job loss for some of Pomona's long-standing employees.

photo courtesy of UNITE HERE

## Employer Who Paid No Wages Fires Workers, Requires New I-9 Forms After Car Wash Workers Organize

Los Angeles, CA (2010)

Half of the car wash workers at Robertson Carwash in Los Angeles, California, received no wages from their employer. Although the employer charged customers for each car wash, the employer did not pay the workers at all. Instead, these workers earned only the tips provided by customers after they cleaned the cars. One of the workers, Felipe Martinez,\* earned so little that he often slept in the car wash bathroom at night to avoid living on the streets. In 2010, after workers reached out to the CLEAN Carwash Campaign, which organized a boycott of the carwash, the employer fired all of the workers who had worked only for tips. After the campaign filed unfair labor practice charges with the NLRB, the employer settled. When Felipe tried to return to work, his employer told him that he would have to reapply and fill out a new I-9 form. Felipe declined, and did not return to his job.<sup>42</sup>

## Employer Retaliation: Retaliatory Use of E-Verify



### Latino Supermarket Chain Signs Up for E-Verify and Verifies I-9 Forms in Midst of Unionizing Campaign

Mi Pueblo Supermarket Chain | San Francisco Bay Area (2012)

Workers at the Mi Pueblo supermarket chain, which caters to the Latino immigrant community in the San Francisco Bay Area, have been trying to join a union for years. In response to complaints about unfair hiring practices and violations of wage and hour laws, the United Food and Commercial Workers (UFCW) union Local 5 began a campaign to organize workers, gathering authorization cards from workers seeking collective bargaining. However, in August 2012, as the union organized both workers and local community to support the union, Mi Pueblo announced that it had decided to voluntarily join the E-Verify program to screen new hires for immigration status. Although Mi Pueblo explained that it was “forced” to use the E-Verify program by the government, ICE spokespeople confirmed that E-Verify is a voluntary program.<sup>43</sup>

Mi Pueblo’s announcement that it would use E-Verify angered the local community, and UFCW

scheduled a boycott of the supermarket chain the next month. However, days before the boycott was to begin, in October 2012, Mi Pueblo announced that federal immigration agents had launched an audit of the entire supermarket chain.<sup>44</sup> The effect of this announcement was disastrous: many workers quit working at Mi Pueblo out of fear. Despite the fear caused by Mi Pueblo and the I-9 audit, as well as union-busting tactics used by the employer, the union continues to organize.<sup>45</sup>

photos courtesy of David Bacon





## Employer Decides Unilaterally to Enter E-Verify Program without Bargaining with Union

Pacific Steel Casting Company | Berkeley, California (2012)

Berkeley's Pacific Steel Casting Company (Pacific Steel) decided unilaterally to implement the use of E-Verify in its workplace. Even though Pacific Steel workers are represented by the Glass, Molders, Pottery, Plastics & Allied Workers

International Union, Local No. 164B, AFL-CIO, CLC (Local 164B), the

union was not notified. When Local 164B learned of Pacific Steel's enrollment and requested written confirmation, Pacific Steel untruthfully claimed that because it was a federal contractor, it was required to use E-Verify and refused to bargain with the union over this issue.<sup>46</sup>

To protect its members, the union filed unfair labor practice charges with the National Labor Relations Board (NLRB). In settlement of the charges, Pacific Steel agreed to reinstate employees and pay employees for any wages and benefits lost after many were terminated as a result of Pacific Steel's unlawful entry into the E-Verify Program. The agreement, signed on March 22, 2012, also requires that Pacific Steel terminate its enrollment in E-Verify.

photos courtesy of David Bacon



\*indicates pseudonym to protect the identity of the worker

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# RECOMMENDATIONS: CALIFORNIA MUST PROTECT IMMIGRANT WORKERS FROM RETALIATION

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Based on the data and analysis presented in this report, NELP recommends the following protections for immigrant workers in California.

## Legislative Recommendations

### Strengthen California's protections against employer retaliation.

California anti-retaliation law must be strengthened to provide workers with necessary protection from employer retaliation.

- Prohibit employer threats to expose immigration status in a retaliatory fashion; increase penalties for unfair immigration-based retaliation where it is proven to have occurred; prohibit retaliation for updating employment authorization records.
- Provide for a presumption of retaliation in California anti-retaliation statutes.
- Provide for non-discretionary penalties and quadruple punitive damage provisions for employers who retaliate against workers.
- Prohibit retaliation by any person against workers engaging in protected activity including retaliation by subcontractors, day and temporary labor service agencies, clients, or agents of third parties.
- Clarify that oral complaints to supervisors constitute protected activity sufficient to trigger anti-retaliation protections.
- Clarify that no administrative exhaustion is required to litigate employer retaliation under Cal. Lab. Code § 98.6.

### Increase resources for anti-retaliation enforcement by state agencies.

The CA DLSE and DFEH enforce California's anti-retaliation statutes. Although the CA DLSE has implemented several changes to expedite retaliation cases, including streamlined conferences of parties, and informal decisions and settlements, the agencies must receive additional resources to timely adjudicate retaliation cases. Currently, more anti-retaliation cases are filed every year with the CA DLSE than can be processed: in 2011, the DLSE received 2,742 complaints of retaliation, 1,266 of which were within the DLSE's jurisdiction; the DLSE closed 1,018 cases.<sup>47</sup>

### Pass the TRUST Act.

Employers who seek to retaliate increasingly file reports with local law enforcement agencies, taking advantage of language barriers or other biases against immigrants to achieve their ends. Due to the growing federal-local collaboration on immigration enforcement, immigrant workers who are falsely accused of crimes often have no recourse and instead, end up in deportation proceedings after blowing the whistle on labor violations.

The Transparency and Responsibility Using State Tools (TRUST) Act addresses the harmful impact of California's participation in the federal government's controversial "Secure Communities" program. The TRUST Act sets reasonable limits for local responses to immigration hold requests that detain immigrant workers as a result of employer retaliation.

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**Prohibit threats to report a worker’s immigration status to law enforcement officials in order to extort money or property.**

Employers who retaliate against immigrant workers may use the threat of reporting an employee’s immigration status in order to avoid payment of wages. California should follow the lead of other states and

amend its extortion statute, Cal. Penal Code § 518, to clarify that a threat to report to law enforcement officials an individual’s immigration status in order to induce a person to give money, labor, or another item of value is prohibited under law,<sup>48</sup> or to prohibit to report an individual’s immigration status to law enforcement officials.

## **Administrative Recommendations**

**Strengthen CA DFEH and promulgate CA DFEH U visa certification protocol for immigrant victims of workplace crime.**

A “U visa” is a temporary status for immigrant victims of crime, including crimes committed in the workplace, intended to encourage immigrants to cooperate with law enforcement investigations.<sup>49</sup> The U.S. Citizenship and Immigration Service (USCIS) ultimately determines whether an immigrant crime victim can obtain a U visa. However, an immigrant victim of crime must obtain certification from a law enforcement agency or judge confirming that the petitioner is a victim of a qualifying criminal activity and has been helpful in detecting, investigating, or prosecuting that crime. The CA DFEH’s internal protocol to certify U visas for victims of crime in the workplace should be broadened to the extent authorized under federal law. CA DLSE should likewise promulgate a U visa certification protocol, and specify grounds for certification eligibility to the extent authorized under federal law.

**Reinforce the firewall between immigration and labor enforcement.**

Support extension of the firewall between immigration and state labor law enforcement agencies, including CA DLSE and CA DFEH, as embodied in DHS’s agreement with the U.S. Department of Labor (U.S. DOL).<sup>50</sup> Such an agreement would limit ICE enforcement activities from interfering with California labor law enforcement investigations and audits, including enforcement of California’s wage and hour, anti-discrimination, and health and safety laws, and should extend to private litigation by employees. A firewall between immigration and labor law enforcement is critical to ensuring that workers feel free to come forward to report serious labor abuse without fear of deportation and that state agencies can improve labor practices in low-wage industries.

**Establish a strike force to prevent retaliation.**

The CA DLSE and DFEH should establish a strike force to immediately address instances of retaliation when they take place.

# ENDNOTES

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- 10 Cal. Lab. Code § 1171.5; Cal. Civ. Code § 3339; Cal. Gov. Code § 7285; Cal. Health & Safety Code § 24000.
- 11 29 U.S.C. § 215(a)(3); *Sure-Tan*, 467 U.S. 883 (an employer's use of a worker's immigration status to retaliate for labor union activities is an unfair labor practice in violation of the National Labor Relations Act); *Contreras v. Corinthian Vigor Insurance Brokerage*, 103 F. Supp. 2d 1180 (N.D. Cal. 2000) (concluding that an employer's report to then-INS and Social Security Administration of an undocumented worker's status violated anti-retaliation provisions of the FLSA); *EEOC v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006) (finding inquiry into employee's immigration status after filing of discrimination claim to be unlawful retaliation).
- 12 Scott Flaherty, *Retaliation, Race Bias Top EEOC Complaints In 2012*, Law 360, Jan. 29, 2013, available at <http://www.law360.com/articles/410694/retaliation-race-bias-top-eeoc-complaints-in-2012>.
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