NELP

National
Employment
Law
Project

Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights

Prepared by:

Rebecca Smith, Immigrant Worker Project Coordinator
National Employment Law Project
407 Adams Street SE, Suite 203
Olympia, Washington 98501
Tel. (360) 534-9160

Amy Sugimori, Staff Attorney
Luna Yasui, Staff Attorney
Sarah Massey, Communications Director
55 John Street, 7th Fl
New York, NY 10038
Tel. (212) 285-3025

ACKNOWLEDGEMENT

The authors would like to thank former NELP Staff Attorney Andrew Kashyap and former NELP Organizing Liaison Naomi Zauderer for their enormous contributions to this report. The authors thank NELP's Administrative Assistant Steven Bautista for designing the report, NELP's Litigation Director Catherine Ruckelshaus for her many insightful contributions into the evolution of the report, and NELP's Communications Intern Michelle McLeod for the cover photo. We also thank Tyler Moran, Ana Avendano and Marielena Hincapie of the National Immigration Law Center and Michele Waslin at the National Council of La Raza for their leadership and advice. And, thank you to all of the advocates and organizers who generously shared their insight and resources to assist in the creation of "*Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*."

Table of Contents

Executive Summary

Immigrant workers, especially those who are undocumented, are under attack from many fronts; from the prospect of local police enforcing immigration laws to new rules requiring documented immigrants to notify the Immigration and Naturalization Service (INS) of every address change, to new systems of information sharing among federal agencies and the proliferation of Social Security Administration "no-match" letters sent out to employers. Two recent Supreme Court rulings have also diminished the rights of working immigrants. In its recent decision in Hoffman Plastic Compounds v. NLRB,[1] the Court found that undocumented workers are not entitled to back pay when they are illegally fired after taking part in organizing campaigns. In Alexander v. Sandoval,[2] decided in 2001, the Court decided that federal civil rights protections against national origin discrimination could not be asserted by individual immigrants in a complaint directly under federal civil rights statutes. These decisions and changes in federal law, together with the delay in developing a legalization program for undocumented workers, mean that immigrant workers will often need to turn to state-based labor protective laws in order to enforce their rights.

Many of the anti-immigrant proposals, both at the federal and state level, can be summarized as measures intended to make a broad range of entities enforcers of immigration law. This is clearly the case with measures to allow local police to enforce immigration law, but is true to a lesser degree for measures to restrict access to drivers' licenses, and limits on enforcement and remedies available to the undocumented under labor laws. In this climate, there are many areas in which state and local governments can act to afford better access to work-related benefits and better protections under existing state labor and labor-related laws. In the coming years, immigrant worker advocates should focus campaigns to leverage the power of the states to protect the labor rights of immigrant workers. The following are examples of successful state and local campaigns:

- In Maryland, a new law provides increased access to public benefits including unemployment compensation, for limited English proficient individuals;
- Washington State and California have assured immigrant workers that the U.S. Supreme Court's decision in Hoffman Plastic Compounds v. NLRB will not affect states' efforts to protect undocumented immigrants' employment rights under their own laws;
- In Connecticut, a state-level "know your rights" law provides information about labor rights in Spanish and other languages;
- Several cities with large immigrant populations, including Chicago and Los Angeles, have passed resolutions in support of legalization;
- In California, a new law prohibits "English-only" workplaces.

[1] ____ U.S. _____, 122 S.Ct. 1275, 152 L.Ed. 271 (March 27, 2002).
[2] 532 U.S. 275 (2001).

In **Chapter 1**, the authors list laws that provide language access for workers, including the California and Maryland laws, and ordinances passed in San Francisco and Oakland and proposed in New York. Talking points are included that support increased access for limited English proficient (LEP) workers and highlight the Connecticut campaign to provide labor rights information in Spanish. The new California law outlawing "English-only" workplaces is also highlighted.

Around the country, communities are taking a stand against local police cooperation with the INS. Communities understand that to require or allow state agency personnel to turn suspected immigration violators over to INS increases racial tensions, results in violations of civil rights, hinders state and local agencies from doing their jobs, and undermines the very definition of community. In **Chapter 2**, ordinances aimed at confidentiality protections and non-cooperation with the INS are highlighted, as well as prohibitions on local police enforcement of immigration law.

Chapter 3 focuses on immigrants' access to drivers' licenses. It reports surprisingly good news: in 2002, most states resisted the many anti-immigrant proposals to limit access for immigrant workers to drivers' licenses. Many states will continue to consider expanding access to drivers' licenses, understanding that having licensed drivers on the roads contributes more to public safety than does discriminating against immigrant drivers under the dubious rubric of "anti-terrorism." The Utah statute, which allows use of alternative forms of identification in order to get a driver's license, is attached. The well-run campaign in Tennessee is highlighted.

Chapters 4 and 5 focus on the aftermath of the U.S. Supreme Court's ruling in Hoffman Plastic Compounds v. NLRB. Tools are provided to state advocates to ensure the continued availability of state remedies for undocumented immigrants. State agency pronouncements in Washington State and California, and a new law in California, are highlighted.

Introduction: Immigrant Workers in the U.S. Economy and the States' Role in Protecting Their Rights

It is estimated that between 28 and 30 million immigrants live in the United States, slightly more than 10.4% of the U.S. population.[3] Ninety percent of these are of working age.[4] Immigrants, both documented and undocumented, work long hours at the lowest-paid and most dangerous jobs in the U.S. economy. In states with high percentages of immigrants, three out of every four tailors, cooks, and textile workers are immigrants. A majority of taxicab drivers and service workers in homes are immigrants. Immigrants are over-represented as waiters, parking lot attendants, and sewing machine operators.[5]

Many immigrants in the U.S. workforce are undocumented. Though war and poverty in many immigrants' home countries make coming to the United States the only avenue to a better life, restrictive U.S. immigration laws mean that only a fraction of immigrants are able to legally enter and remain in the United States.

One need only open the local papers to understand the risks that these workers face in their attempts to come to the United States and make a better life for themselves:

> Eleven workers dead, abandoned in a rail car for several months in Iowa – A government official said over the weekend that Pedro Amador Lopez and Isidro Avila Bueso, both 38 [from Honduras], were among the seven men and four women whose bodies were found inside the car in Denison…. That means the men traveled more than 1,200 miles across three countries just to get to Matamoros, Mexico, where the train car crossed into the United States in June…. All died of extreme overheating and dehydration.[6]

> Eight migrants murdered in similar way over eight months in Arizona -- Joe Arpaio, the sheriff of Maricopa County, declared war against the criminals who have carried out the execution-style slayings between March and October, 2002….Arpaio believes that the victims may have been killed by human traffickers when they could not afford to pay for their entry to the U.S.[7]

The Urban Institute in Washington, D.C. estimates that there are about eight and a half million undocumented residents in the United States. About 4.7 million of these, or 55 %, come from Mexico. About 1.9 million come from other nations in Latin America, and 1.1 million come from Asia. A few hundred thousand undocumented immigrants come from Europe, Canada, and Africa.[8]

A recent study by the Pew Hispanic Center finds five million unauthorized workers in the U.S. economy. The manufacturing sector employs 1.2 million undocumented workers. The services sector employs 1.3 million

---

[3] Urban Institute, *Tabulations of 1990 Census and March 1999 Current Population Survey*.
[4] Current Population Survey (March 2000), PGP-3.
[5] Panel, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration,* National Academy Press (1997), at 215.
[6] Mark Siebert, *Another 2 in rail car identified,* DES MOINES REGISTER (Oct. 22, 2002).
[7] *Eight Migrants Murdered in Similar Way over Eight Months in Arizona,* reprinted from *EL DIARIO (CIUDAD JUAREZ) (*Oct. 19, 2002), *available at* http://frontera.nmsu.edu.
[8] Michael Fix and Passel, Jeffrey S., *Immigration and Immigrants: Setting the Record Straight,* The Urban Institute (May 1994), *available at* http://www.urban.org/pubs/immig/immig.htm.

undocumented workers. One million to 1.4 million unauthorized workers labor in the fields. Six hundred thousand more work in construction and seven hundred thousand work in restaurants.[9]

Many of these same industries are known for low wages, dangerous conditions, and frequent violations of labor laws. A Department of Labor (DOL) survey found that in 2000, 100% of all poultry processing plants were non-compliant with federal wage and hour laws.[10] A separate U.S. DOL survey found that in 1996 half of all garment-manufacturing businesses in New York City can be characterized as sweatshops, and a DOL survey in agriculture focused on cucumbers, lettuce, and onions revealed that compliance in these commodities was unacceptably low. [11]

Injuries and deaths of Hispanic workers engaged in hazardous employment are extremely high and increasing. Injuries and deaths of Hispanic workers engaged in hazardous employment are extremely high and increasing. The *Washington Post* reports that a study soon to be released by the National Academy of Sciences will report that foreign-born Latino men are now nearly 2 ½ times more likely to be killed on the job that the average U.S. worker.[12] In the year 2000, construction fatalities involving Hispanic workers increased by 24%, while Hispanic employment was up only six percent.[13] In 2001, farm workers employed in the production of crops accounted for only one percent of the workforce, but represented six percent of the occupational deaths.[14] In that year, there were 49 farm fatalities in the state of California alone.[15] Eighty-one percent of U.S. farmworkers are foreign-born, mainly from Mexico.[16] New York has the nation's highest rate of immigrants killed in the workplace, with foreign-born workers accounting for three out of every 10 deaths.[17]

Maximizing State Law Protections in an Anti-Immigrant Climate

Prior to September 11, 2001, advocates were working closely with the Bush Administration to develop a legalization program that would allow undocumented workers, at long last, to take part in the civic life of the country. In 2000, labor leaders adopted a pro-legalization resolution that had captured the enthusiasm and energy of many immigrant workers.[18] President Bush and Mexican President Fox seemed close to agreement on a legalization program that would have enabled hundreds of thousands of immigrant workers to legalize. After September 11, these hopes died, as the federal government and Congress began concentrating on harsh "anti-terrorism" measures. Congress quickly passed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (USA PATRIOT Act), and the media reported that immigration enforcement would be stepped up, and directed toward an ever-lengthening list of likely

[9] B. Lindsay Lowell and Roberto Suro, *How many undocumented: The numbers behind the U.S.—Mexico Migration Talks*, *available at* http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf.
[10] U.S. Department of Labor, FY 2000 Poultry Processing Compliance Report (2000).
[11] *Labor Department: Close to Half of Garment Contractors Violating FLSA*, DAILY LAB. REP. (BNA) 87(May 6, 1996); U.S. Department of Labor, Compliance Highlights, 1,3 (Nov. 1999).
[12] Nurith C. Aisenman, *Harsh Reward for Hard Labor,* THE WASHINGTON POST C01(Dec. 29, 2002).
[13] Bureau of Labor Statistics, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000 (Aug. 14, 2001).
[14] U.S. Department of Labor, Bureau of Labor Statistics, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES, 2001, Table 2: Fatal Occupational injuries and employment by industry (Sep. 25, 2002), *available at http://*stats.bls.gov/news.release/cfoi.t04.htm.
[15] Andy Furillo, *Farm death sparks manslaughter charge*, SACRAMENTO BEE (Dec. 18, 2001).
[16] U.S. Department of Labor, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) (2000) at 5.
[17] Thomas Maier, *Death on the Job: Immigrants at Risk*, NY NEWSDAY (Dec. 16, 2001).
[18] *See* July 31, 2001 AFL-CIO Executive Council Statement, *available at* http://www.aflcio.org/publ/estatements/jul2001/immigration.htm.

suspects: immigrant students, immigrants who had overstayed their visas, immigrants of Middle Eastern origin. More recently, the Justice Department has raised the prospect of local police enforcement of immigration laws.[19]

The U.S. Supreme Court's recent decision in *Hoffman Plastic Compounds v. NLRB,*[20] finding that undocumented workers are not entitled to backpay when they are illegally fired after taking part in union organizing campaigns, contributes to the perception that immigrant workers have no enforceable rights in the United States.

As has occurred each time anti-immigrant sentiment has dominated the federal policy scene, states are now required to step into the breach. At the state level, authorities often understand better what immigrant workers mean to a local economy. They often have closer experience with the kinds of abuses immigrants suffer, and a better understanding of the duty of agencies and police authorities to protect all local residents. This paper is intended as a guide to model legislation that states and localities can pass to protect immigrant workers. Background into each subject is provided, along with model legislation and talking points for advocates and legislatures wishing to assure immigrants in their communities that they will not be given second-class treatment under labor and employment laws.

While regulation of immigration itself is a matter of federal concern, there are many areas in which state and local governments can act to afford better access to work-related benefits and better protections under existing state labor and labor-related laws. This report focuses on five of these areas. These are language access to government benefits and services for limited English proficient individuals, confidentiality provisions that protect immigrant workers' access to public services, drivers' licensing provisions, equal employment rights and remedies for undocumented workers, and undocumented workers' access to critical workers' compensation programs.

This publication provides examples of some of the state and local laws now on the books that protect the most vulnerable of immigrant workers - the undocumented and those that do not speak English well enough to navigate state and federal bureaucracies. The report highlights model bills that have not yet made their way into law. In addition, the report profiles selected campaigns for increased labor protections, and provides talking points to assist in campaigns.

[19] Patrick J. McDonnell, *Police Want No Part in Enforcing Immigration Law,* LA TIMES (Apr. 8, 2002).
[20] ____ U.S. _____, 122 S.Ct. 1275, 152 L.Ed. 271 (March 27, 2002).

Chapter 1: Focus on Civil Rights of Limited English Speakers: Language Access to Government Benefits and Services

Every day, thousands of immigrant workers turn to state and federally funded labor agencies to access critical benefit and enforcement programs, including job training, health and safety protections, anti-discrimination protections, wage and hour protections, unemployment insurance (UI), and workers' compensation. Every day, immigrant workers find the agencies are ill-equipped to assist them in their language.

Even though federal law protects their right of access to public services and benefits, immigrants with limited English proficiency (LEP) face obstacles to enforcing their rights on the federal level. Title VI has never been fully enforced with respect to agencies that receive federal funds. In August 2000, then-President Clinton issued Executive Order 13166, "Improving Access to Services for persons with Limited English Proficiency." In response, the DOL and other agencies issued draft Guidance on what reasonable steps agencies must take to provide meaningful access to their services for LEP individuals. Although the Department of Labor has issued a draft Guidance, the final has not yet been issued; final guidances have not yet been published by any federal labor agency.[21] Therefore, immigrants who do not speak English well enough to navigate state and federal bureaucracies often have their claims unheard and their applications for benefits delayed or disregarded.

In 2001, the U.S. Supreme Court dealt a further blow to immigrant workers who would enforce Title VI. In its ruling in *Alexander v. Sandoval*, the Court decided that individuals had no private right of action to sue directly under Title VI. Rather, they would have to wait for the government to take up the cause of enforcing the right to be free from the discriminatory impact of "English only" state administration of benefits and services.[22]

The U.S. Supreme Court's decision in *Alexander v. Sandoval* makes it all the more critical that advocates use whatever tools are available at the state and local level to protect immigrant workers' rights to access state services and benefits.[23] Though workers may not be able to bring suit directly under Title VI against an agency that discriminates, they may have private rights of action to enforce national origin discrimination laws at the state level. Advocates must pursue these avenues of litigation, but they must also focus on passage of more detailed state statutes that will give agencies clear direction on their obligations to provide access to state benefits and services to limited English-speaking workers.

LEP Access to Work-Related Benefits and Enforcement of Workers' Rights on the State Level

The Court's decision in *Alexander v. Sandoval* and the delays in implementation of Title VI at the federal level make it extremely important that immigrant worker advocates both urge state agencies to comply with Title VI and use whatever state law is available to protect immigrant workers' access to publicly-funded programs.

Many state bureaucracies that administer services are ill-equipped to provide access to immigrant workers with limited English proficiency. Several state unemployment agencies

[21] *See*, http://www.lep.gov for these and other relevant documents at the federal level.
[22] *Alexander v. Sandoval,* 532 U.S. 275 (2001*).*

indicate that they simply provide no forms or translated brochures to any immigrants in any language. [24] At least two states, Connecticut and Illinois, explicitly (and illegally) require that those immigrants who need interpreters at public hearings on their cases must provide their own.[25] In 22 states, more than half of unemployment insurance claims are filed through a telephone system, which makes it even more complicated for LEP workers to negotiate the system.[26] New York typifies the problems that are characteristic around the country, where agency measures to reach LEP individuals have been patchwork at best. In New York, all regular walk-in unemployment offices were closed in 1997, leaving most immigrant workers to file their unemployment claims through a telephone system that does not offer services in Chinese, Russian, or Creole until after a series of English prompts are answered.

Despite the lack of enforcement of these federal rights by federal agencies against the state agencies that receive their funds, some states have provided language access to their state services, most notably public benefits and unemployment insurance, for many years. This paper reviews those state programs that specifically provide for translation of written materials and oral interpretation in their unemployment insurance and other programs.

Model Laws on Access to State Agency Services for LEP Workers

State Language Access Laws

The California Dymally-Alatorre Bilingual Services Act of 1973 requires any state agency to distribute non-English language written materials through its local offices or facilities that serve a substantial number of non-English-speaking persons.[27] In the 2002 legislature, in SB 987, California revised the Bilingual Services Act's criteria for what constitutes a "substantial number of non-English-speaking people." The new law is the country's most comprehensive. It requires every state agency and state department to establish an effective bilingual services program that develops, implements, coordinates, and monitors a departmental implementation plan, including a procedure for accepting and resolving complaints. The agency or department's survey and plan to provide services to non-English-speaking people must be updated every two years.[28]

Also in 2002, **Maryland** enacted SB 265, an access law that requires all state agencies to provide services to individuals with limited English proficiency, and all vital documents offered by state agencies to be translated into any language spoken by three percent of the overall population within a geographic service area. The law also requires all other state entities to regularly review their functions to determine the need to create further access for LEP individuals. Maryland licensing boards must present evidence to the General Assembly within two years regarding whether English should be a bona fide requirement of professional licensing.[29]

Massachusetts unemployment compensation law provides that all notices and materials be available in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian, and any other

---

[24] Wayne Vroman, *Low Benefit Recipiency in State Unemployment Insurance Programs* (2001), Table VI-3 Main Methods of Claims Filing, Specialized Claims and Claimants in Special Circumstances.
[25] Conn. Agencies Regs § 31-237g.23; 56 Ill.ADC § 2720.210.
[26] U.S. Department of Labor, *Initial Claims Filing Methods CY2000, available at* http://www.workforcesecurity.doleta.gov/unemploy/initclaims.asp.
[27] Cal. Gov. Code § 7290-7299.
[28] S.B. 987 (Cal. 2002), *available at* http://www.leginfo.ca.gov.
[29] S.B. 265 (Md. 2002), *available at* http://mlis.state.md.us/2002rs/bills/sb/sb0265e.rtf

language that is the primary language of at least 10,000 or .5% of all residents of the commonwealth.[30] (The Massachusetts law is reprinted in full in the Appendix of this report.)

Florida law requires that educational and instructional materials produced by state agencies to describe their services and benefits be translated.[31]

Texas and **New Jersey** statutes explicitly address bilingual services for Spanish-speaking claimants only.[32]

A number of states require, either as a matter of law or policy, interpreters to be provided in administrative hearings. These states include Arkansas, District of Columbia, Indiana, Maine, Minnesota, New York, Oregon, Rhode Island, Texas, and Washington.[33]

Local Language Access Ordinances

Along with the states mentioned above, some cities have proposed or enacted local language access ordinances that guarantee access to local services. The most comprehensive of these are in San Francisco and Oakland.

San Francisco City and County Ordinance

This ordinance is a local version of California's state language access law.[34] The local ordinance requires city departments to offer bilingual services and materials if a substantial or concentrated portion of the public utilizing their services does not speak English effectively because it is not their primary language. In addition, it sets aside a budget for a language bank. LEP communities themselves identified problem agencies through their requests for assistance to the Employment Law Center's language hot line and to Chinese for Affirmative Action. Immigrants in the communities lent their personal stories to the effort and spoke out at hearings and dealings with the press.

The greatest challenge for advocates was in dealing with cost issues. They employed several strategies, including educating agencies about the use and costs of paid translators and about the difficulties in using volunteer translation. The city's purchasing department entered into discussions about negotiating lower rates for the city on a volume basis.

After intensive efforts by advocates over the span of two years, the ordinance was passed by the San Francisco Board of Supervisors on June 4, 2001[RAS1]. Once it passed, Chinese for Affirmative Action hired a staff member to oversee implementation of the new ordinance.

City of Oakland Ordinance

The city of Oakland "Equal Access to Services" ordinance establishes, over a period of two years, equal access for LEP individuals to city services and programs. The ordinance states that city departments must employ

[30] Mass. Gen. Laws Ch. 151A § 62A.
[31] Fla. Stat. Ch. 443.151.
[32] N.J. Stat. Ann. § 31:9A-7.2; Tex. Lab. Code § 301.064.
[33] Ark. Code Ann. § 25-15-101; D.C. Code Ann. § 31-2702; Ind. Code § 4-21.5-3-16; Maine (statement on agency website at *www.janus.state.me.us/labor/uibennys*); Minn. Stat. § 15.441; N.Y. Unemp. Law Tit. 12, Ch. 7 § 461.4; Or. Rev. Stat. § 45.275; R.I. (statement on website at *www.dlt.state.ri.us/bor*); Tex. Lab. Code § 301.064; Wash. RCW 2.43.030.
[34] Text of each ordinance available on the web page of the Employment Law Center, at http://www.las-elc.org/origin.html.

sufficient bilingual employees to provide services to persons speaking languages spoken by 10,000 city residents. All agencies must maintain recorded telephone messages in each language. Agencies must submit a compliance plan to the City Council on an annual basis.[35]

Proposed Local Language Access Ordinances

New York City

At the writing of this report, the New York City Council is considering a language rights bill that affords access to all city services to LEP individuals. It obligates agencies to track the language preference of applicants for services. It affords differing levels of availability of translated documents to different language groups, based on the data gathered. Most notably, it includes a private right of action to sue to enforce individual violations of the law.[36]

Model State Anti-Discrimination Laws

While some states lack a specific state law provision guaranteeing access to state services and benefits for LEP individuals, some state laws guarantee that state agencies will refrain from national origin discrimination. This means that advocates in such states may be able to negotiate with state agencies, or litigate if necessary, for their failure to provide access to limited English-speaking individuals.

The U.S. Supreme Court's decision in *Alexander v. Sandoval,* that affected individuals cannot sue in federal court under Title VI to enforce their rights, makes it all the more critical that advocates use whatever tools are available at the state and local level to protect immigrant workers' rights to access state services and benefits. Though workers may not be able to bring suit directly under Title VI against an agency that discriminates, they may have private rights of action to enforce national origin discrimination laws at the state level.

A number of states have enacted state anti-discrimination laws that provide for either state agency enforcement or enforcement through private rights of action. These laws often obligate state agencies to refrain from activities that have the effect of discriminating on the basis of national origin. Thus, even where states do not have a specific language access law that is enforceable through a private right of action, these laws can be used by advocates to undercut the ill effects of *Alexander v. Sandoval.*

Connecticut specifically provides for an independent, private right of action against a state agency that engages in discriminatory practices, including discrimination based on national origin.[37] (A model state law, adapted from the Connecticut law, is included in the Appendix to this report.)

The state of **Kansas** provides a private right of action for enforcement of its national origin discrimination law, after filing a complaint with the state Human Rights Commission. The Kansas statute covers practices, such as an "English only" state policy, that have a discriminatory impact on persons of particular races or national origins.[38]

---

[35] Chap. 2.30.030, Oakland Municipal Code, *available at* http://bpc.iserver.net/codes/oakland.
[36] The New York City proposal is reprinted at http://www.nelp.org.
[37] Conn. Gen. Stat. § 46a-71 – 76 § 46a-99.
[38] Kan. Stat. Ann. § 44-100; KS ADC 21-40-1.

A number of additional states have anti-discrimination laws that cover national origin discrimination by state agencies, but do not specify whether or not private enforcement is possible. These are Minnesota, Missouri, North Dakota, and Virginia.[39]

State Laws That Offer Special Protections to Non-English Speaking Employees

Some states have enacted legislation that provides certain workplace protections to non-English-speaking employees. These include California's anti-"English only" workplace law and several state laws that deal with issues of language access and migrancy.

Highlighted Campaign: California

California became the only state in the nation to protect employees from "English only" rules in the workplace in September 2001. Governor Davis signed AB 800, an amendment to the California Fair Employment and Housing Act that prohibits employers from requiring employees to speak only in English without a valid business necessity. AB 800 requires employers to provide employees with notice of the policy and consequences for violation.

The bill was enacted after intense work to promote it over a ten-year period, spearheaded by the California American Civil Liberties Union (ACLU) and the Employment Law Center's Language Rights Project, and a strong coalition including Mexican American Legal Defense and Education Fund (MALDEF), National Council of La Raza, the California Immigrant Welfare Collaborative, Chinese for Affirmative Action, and others. (The California law is reprinted in the Appendix.)

A number of states have enacted specific laws that provide additional bilingual notices of rights to non-English speakers. **Nebraska's** law states that an employer who recruits any non-English-speaking persons who reside more than five hundred miles from the worksite, must provide a bilingual employee*:*

1) to explain and respond to questions regarding the terms, conditions, and daily responsibilities of employment; and
2) to serve as a referral agent to community services for the non-English-speaking employees.[40]

Iowa's law is similar to the Nebraska law and also requires that return transportation to the place of recruitment be provided to the worker under certain circumstances.[41] (The Iowa law is reprinted in the Appendix.)

Highlighted Campaign: Connecticut

The Connecticut Act to Prohibit the Employment Exploitation of Immigrant Labor that prohibits the exploitation of immigrant labor was signed in July 2001. The Act requires the Commissioner of Labor to produce outreach materials to immigrant workers, in their languages, that explain their workplace rights. The Act "... prevent(s) illegal advantage being taken of such laborers by reason of their lack of information about their rights, credulity or lack of proficiency in the English language."[42] This LEP program is funded by employer penalties.

[39] Minn. Stat. § 363.12(4); Mo.Rev. Stat. § 213.070(3); N.D. Cent. Code 14-02.4-15; Va. Const. Art. I, §11.
[40] Neb. Rev. Stat. § 48-2402.
[41] Iowa Code § 91E.3.
[42] SHB 6657 (2001). *See* Appendix., *infra.*

After a series of successful actions against employers of undocumented immigrant workers, the New England Council of Carpenters decided they needed a change in state law to educate immigrant workers about their rights under state law. This was an effort by a coalition of immigrant-rights activists to ensure enactment of the law and to build a base for future campaigns. The coalition included the Latino and Puerto Rican Affairs Commission, NELP, SEIU Local 32 B-J, the Connecticut Department of Labor and Waterbury Good Jobs Now.

Talking Points on Language Access

- Use data from your own state. State level data on languages spoken at home in each state from the 2000 census are published by Grantmakers Concerned with Immigrants and Refugees.[43] Substate level data can be obtained directly from the Census Bureau.[44]

- Emphasize that language access is already the law, and has been since at least 1974. Under federal law, if an organization receives public funding, it must make its services available to all of the public, including those that cannot speak English.

- Limited English-speakers are not asking for special accommodations or privileges. The issue is equal access to government services. If applicable, emphasize the high number of immigrants/limited English speakers in the relevant area. Immigrants pay taxes, represent a significant portion of the workforce, operate small businesses, and contribute to civic life.

- Use sympathetic stories from your own state of immigrant workers denied access to unemployment insurance, as well as other employment services and complaint mechanisms operated by agencies that receive federal funds. Immigrant workers who do not speak English proficiently are routinely denied the full range of protections and services available to all other workers, due to the absence of specific state policies implementing Title VI.

- Emphasize that providing access to benefits is not necessarily costly: In 2001, California's Department of Social Services spent a total of $648,312 to staff an internal team of 13 employees to translate documents into Spanish, Chinese, Cambodian, Russian, and Vietnamese, and an average of approximately $22,000 per year in contracts with outside vendors for translations into other languages. This is a negligible cost for an $18 billion budget.

- Lack of services in their language keeps workers from applying for unemployment compensation. Some statistics say that 53% of people who do not apply for unemployment compensation do not apply because they do not even know they are covered by unemployment insurance. A simple outreach program can go a long way toward increasing access.[45]

---

[43] GCIR, *U.S. Immigration Statistics by State, available at* http://www.gcir.org/about_immigration/usmap.htm.

[44] Substate data is at http://www.census.gov. Use the "American Factfinder" tool on the website. For help with searching, contact Andrew Stettner at NELP, e-mail astettner@nelp.org.

[45] Washington State has a large Spanish-speaking farm worker population, that is subject to winter layoffs. In winter 1999-2000 the state conducted a simple outreach program by means of a Spanish-language flier and short radio advertisements and ads and articles in Spanish-language newspapers. Unemployment

- To counter the argument that immigrants should learn English instead of expecting services in their language: emphasize the length of time it takes to learn English as an adult, characterize limited English speakers as "individuals in the process of learning English" (or if applicable, as elderly) and explain that rights and obligations begin the moment one enters the country.

- Meet with potential opponents individually to address their concerns before the legislation is introduced. Oftentimes, their concerns are either unfounded, or can be addressed by minor modifications to the legislation.

- The most important part of the legislation is implementation and enforcement. The relevant government agencies need to take the legislation seriously from the beginning. Make sure that advocates will monitor implementation and be able to tell whether government agencies are complying (for example, from reports that the agencies are required to submit, not only from anecdotal evidence).

What Can Advocates Do?

√ Publicize sympathetic stories about the consequences to immigrants who have been denied services because of language.

√ Survey the community about problems encountered in dealing with state agencies. Do immigrants have access to job training programs, unemployment insurance systems, workers' compensation systems, human rights agencies, and agencies that enforce their health and safety and wage and hour laws?

√ Bring claims under state anti-discrimination statutes or file complaints with the U.S. Department of Labor for state programs that receive federal financial assistance.

√ Insist that state agencies follow the DOL Guidance, including requesting a specific inventory of forms translated and interpreters provided, a study of local demographics and the input of community groups in developing an LEP plan, and providing the state with model plans.

√ Work to pass state laws with specific guarantees of access to government benefits, including work-related benefits.

√ Work for the passage of state laws mandating employers to give language-appropriate notice of workplace rights.

---

insurance claims among Spanish-speakers rose by 17.7% from fourth quarter 1999 to the fourth quarter of 2000.

Chapter 2: Focus on Community Health and Safety: Ensuring Immigrant Access to Public Services without Fear of Deportation

Statement of INS Commissioner James Ziglar during the Fall 2002 D.C. sniper investigation after two immigrants making a telephone call from a phone booth being staked out by D.C. police were arrested and turned in to INS:[46]

> I want to personally urge the immigrant community to come forward if they have information that
> will assist in this investigation, and assure everyone that INS will not seek immigration status
> information provided to local authorities in this effort.

Experience shows that many immigrants will not access essential social services if doing so could result in sharing of information related to immigration status with the INS or other federal agencies. This section discusses state and local strategies to encourage immigrant access to social services, as well of aiding and seeking the help of law enforcement.

Confidentiality Provisions in State Administered Benefits and Programs

Eligibility for benefits sometimes hinges on an applicant's "lawful presence." Determining whether an individual is "lawfully present" is a complicated process. Often a person's status is dependent on a familial relationship. Sometimes a person may be eligible to adjust his or her status due to certain circumstances such as status as a victim of domestic violence. The complexities and often private nature of the inquiries necessary in determining a person's immigration status call for clear laws that protect the confidentiality of all applicants.

The complexities and often private nature of the inquiries necessary to determine a person's immigration status call for clear laws that protect the confidentiality of all applicants.

The complex immigrant eligibility requirements for many state administered benefits call for careful consideration of state procedures used to seek, record, and disseminate immigration information. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) includes provisions that prohibit states from placing restrictions on the exchange of information with the INS regarding immigration status.[47] Specifically, state

[47] Personal Responsibility and Work Opportunity Reconciliation Act § 434, 8 U.S.C.S § 1644 (2002).

agencies are required to report to the INS persons "known to be not lawfully present in the United States."[48] The Illegal Immigration Reform and Responsibility Act (IIRIRA) restricts agency policies that prohibit "maintenance" of immigration status information, but notably does not preclude adopting policies for not recording immigration information at all.[49] The first step in increasing immigrant access to social services and protecting confidentiality is to understand what information is required or can permissibly be sought by state agencies. Second, advocates must discern how this information is recorded, maintained, and shared with other agencies, particularly with the INS.

Limitations on Inquiry

Recognizing that unnecessarily intrusive inquiries regarding immigration status and social security numbers can deter immigrants from accessing services, the U.S. Department of Agriculture, the U.S. Department of Human Services, and the Office of Civil Rights of the U.S. Department of Justice have issued policy guidance detailing when states may inquire into immigration status, citizenship, and social security numbers.[50] The guidance clarifies that only the immigration status of the "applicant" is relevant. States may not require an applicant to provide information about the citizenship or immigration status of any non-applicant family or household member. States may not deny an eligible applicant benefits because a non-applicant family or household member has not shared her citizenship or immigration status. The guidance reminds states of their obligation to comply with the Privacy Act and other federal laws when inquiring about social security numbers. Unless disclosure of a social security number is required by law, states are prohibited from denying a right, benefit or privilege provided by the law because of an individual's refusal to provide a social security number. Although a state may not require disclosure of an individual's social security number, it may request voluntary disclosure.[51] The state must inform the individual of whether the disclosure is mandatory or voluntary, by what statutory authority the information is requested and what the information will be used for.[52] It is important to remember that eligibility requirements for benefit programs vary greatly. Thus, permissible inquiries vary with each program.

Limitations on Reporting

The Social Security Administration, the U.S. Departments of Health and Human Services, Labor, and Housing and Urban Development clarified PRWORA's reporting requirements in a joint notice in the Federal Register.[53] PRWORA's established reporting requirements to the following federal programs: the Temporary Assistance for Needy Families program

---

[48] *Id.*

[49] Illegal Immigration Reform and Responsibility Act § 642(b)(2), 8 U.S.C.A. § 1373 (2002).

[50] Olivia Golden, Assistant Secretary Administration for Children and Families, Nancy-Ann Min DeParle, Administrator Health Care Financing Administration, Shirley R. Watkins, Under Secretary Food, Nutrition, and Consumer Services, Thomas Perez, Director Office for Civil Rights, *Policy Guidance Regarding Inquiries Into Citizenship, Immigration Status and Social Security Numbers in state applications for Medicaid, State Children's Health Insurance Program (SCHIP), Temporary Assistance to Needy Families (TANF) and Food Stamp Benefits* (last modified Sept. 21, 2000) *available at* http://www.hhs.gov/ocr/immigration/triagency.html.

[51] Privacy Act of 1974, Sec. 7 of Pub.L. 93-579.

[52] *Id.*, at § 7(b).

[53] Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" Is Not Lawfully Present in the United States, 65 Fed. Reg. 58,301(Sep. 28, 2000). *See also*, National Immigration Law Center, *New Rule Explains Limits of INS Reporting Requirements Under the 1996 Welfare Law*, IMMIGRANTS' RIGHTS UPDATE, (Oct. 19, 2000) available online at http://www.nilc.org/immspbs/vr/verifreptg004.html.

or Welfare-to-Work programs under Title VI(A) of the Social Security Act; Supplemental Security Income (SSI); or the Public and Assisted Housing Program provided under the United States Housing Act of 1937, or Section 6 or Section 8 housing assistance programs.[54] According to the multi-agency notice, the reporting requirements only apply when an agency has officially determined the applicant's immigration status based on formal finding of fact or conclusion of law that is made by the agency as part of a determination of the applicant's eligibility for one of the aforementioned benefits. A formal determination or conclusion of law that the individual is unlawfully present must be supported by a determination by the INS or the Executive Office for Immigration Review. The reporting requirements do not apply if an agency discovers an individual's immigration status outside of the context of an application for one of the specified benefits.

Model Confidentiality Provisions

The following are provisions that should be included in state and local confidentiality laws. Each point is followed by model language:

- **Inquire into immigration status, citizenship, and social security numbers only when required by federal laws and regulations.**

"No agency, officer, or employee shall inquire about the immigration status of any individual applying for or receiving any service of benefit, on behalf of oneself or another, unless immigration status information is specifically required by federal or state law as a condition of receipt of such service or benefit.

a. Where immigration status information is a condition of receipt of the service or benefit, the agency, officer, or employee shall make only those inquiries necessary to determine whether an applicant or recipient is an immigrant qualified for such service or benefit. Because not all undocumented immigrants are eligible for services and benefits, it is not necessary to ask whether a person is lawfully present in this country, but only whether he or she has the requisite status for benefits or services.
b. This section shall apply to any application, questionnaire, interview sheet, or other form used in relation to benefits or services provided by the City."[55]

- **Minimize the recording of unnecessary immigration related information.**

"No agency, officer, or employee shall record information regarding the immigration status of an applicant for or recipient of any service or benefit unless required by federal or state law. Where federal or state law requires the recording of immigration status information, only that information specifically required shall be recorded."[56]

[54] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 404(b),(d); 42 U.S.C. A. §§ 611(a), 1423(y) (2002).
[55] ACLU Immigrants' Rights Project, *Model City Policy to Protect Client Confidentiality*, 1997. Reprinted in the Appendix.
[56] *Id.*

- **Prohibit sharing of confidential information regarding a person's immigration status with federal agencies except where mandated by federal law.**

No city personnel shall "request information about or disseminate information regarding, the immigration status of any individual except as required by federal or state statute or regulation."

Existing State and Local Confidentiality Laws

Cities and counties in Marion and Salem, Oregon[57] and San Francisco, California have administrative laws restricting the role of local officials in immigration enforcement.[58] San Francisco's Administrative Code provides for the most comprehensive confidentiality protections for immigrants. Below is a summary of the protections and guidelines provided for in the San Francisco Administrative Code. The relevant sections of the San Francisco Administrative Code are available at http://www.nelp.org.

San Francisco Administrative Code

The most comprehensive and protective city policy regarding protection of immigration status, the San Francisco Administrative Code provides for the following:[59]

- Declares the city and county of San Francisco a City of Refuge.[60]
- Prohibits the use of any city funds or resources to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the city and county of San Francisco. Exceptions are made where federal or state statutes, regulations or court decisions which require the city or county to provide such assistance.[61]
- Prohibits city and county officials from assisting or cooperating with any INS investigation, detention, or arrest procedures, relating to alleged civil provisions of the federal immigration law.[62]
- Prohibits inquiries into immigration status, disseminating information regarding immigration status or conditioning the provision of services or benefits of the city and county upon immigration status,

[57] The Marion and Salem county policies are *available at* http://www.nelp.org.

[58] It should be noted that the specificity of San Francisco's Administrative Code to immigration status could raise questions similar to those in *The City of New York and Rudolph Giuliani v. The United States and Janet Reno*, 971 F. Supp. 789 (1997); 1997 U.S. Dist. LEXIS 10448. "[The Executive Order] singles out a particular federal policy for non-cooperation while allowing City employees to share freely the information in question with the rest of the world. It imposes a policy of no voluntary cooperation that does not protect confidential information generally but does operate to reduce the effectiveness of a federal policy . . . . Whether these Sections [of federal law] would survive constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status is not before us and we offer no opinion on that question. *The City of New York and Rudolph Giuliani v. The United States and Janet Reno*, 179 F.3d 29 at 37 (1999); 1999 U.S. App. LEXIS 10940. This ruling indicates that the Constitution could invalidate the communications provisions of IIRIRA and PRWORA in the context of a generalized confidentiality policy that does not single out the INS.

[59] San.Fran. CA, Admin.Code § 12H.1 (1989).

[60] San.Fran. CA, Admin.Code § 12H.2 (1989).

[61] San.Fran. CA, Admin.Code § 12H.2(a) (1989).

except as required by federal or state laws, court decisions of city and county public assistance criteria.[63]

- Prohibits questions regarding immigration status on any application, questionnaire or interview form used in relation to services or benefits provided by the city and county unless required by federal or state statute, regulation or court decision.[64]
- Allows for identification and reporting of individuals suspected of violating the civil provisions of the immigration laws if they are in custody after being booked for the alleged commission of a felony.[65]
- Prohibits an officer, employee, or law enforcement agency of the city or county from stopping, questioning, arresting, or detaining an individual solely because of her national origin or immigration status.[66]
- Prohibits an officer, employee, or law enforcement agency of the city or county from discriminating among individuals on the basis of their ability to speak English or perceived or actual national origin in deciding whether to report an individual to the INS.[67]
- Requires this law to be distributed to all departments, agencies, and commissions in the city and county of San Francisco.[68]
- Requires each city and county employee to receive written directions for implementation of this chapter.[69]
- Enables the City Human Rights Commission to review compliance with this law.[70]

Highlighted Campaigns

Around the country, communities are taking a stand against cooperation with the INS. City and county councils in Salem and Marion, Oregon; San Francisco, California; Santa Fe, New Mexico; Austin and Dallas, Texas; Chicago, Illinois and other areas have passed local resolutions declaring an "INS Raid Free Zone," "City of Refuge," or area of non-cooperation with the INS. While such resolutions do not offer the level of detail or accountability of a law or administrative regulation, they can be effective organizing tools to raise awareness of the need for public agencies and elected officials to affirm their commitment to increased immigrant access to social services. These resolutions clarify the relationship between the INS and local authorities by stating that city or county programs and personnel will not be used for the purpose of enforcing immigration laws. They also bar discrimination based on immigration status or national origin and establish task forces to monitor immigrant rights. The Salem and Marion, Oregon ordinances and the Los Angeles, CA and Chicago, IL resolutions are available at http://www.nelp.org.

New York

Since 1989, Executive Order No. 124 has protected the confidentiality of immigrants in New York City. The Order prohibits city officers and employees from providing information

[63] San.Fran. CA, Admin.Code § 12H.2(c) (1989).
[64] San.Fran. CA, Admin.Code § 12H.2(d) (1989).
[65] San.Fran. CA, Admin.Code § 12H.2-1 (1989).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] San.Fran. CA, Admin.Code § 12H.4 (1989).

"respecting any alien to federal immigration authorities" unless it is required by law, written permission has been obtained from the individual, or criminal activity is suspected.[71] Seeking to continue enforcement of Executive Order No. 124, the Giuliani administration challenged the IIRIRA and PRWORA provisions prohibiting state and local officials from restricting the exchange of information with the INS.[72]

The City lost its facial challenge in both the district court and the 2nd Circuit Court of Appeals. The court's opinion focused on the fact that Executive Order No. 124 sought to specifically protect immigration status as opposed to offering general confidentiality protections. The court did not invalidate the Executive Order and the opinion suggests that general confidentiality protections could be extended to include immigration status.

There is ongoing advocacy in New York City to provide general confidentiality protections of information pertaining to an individual's health status, tax records, sexual orientation, status as a victim of domestic violence, status as a crime victim or witness, public assistance status, or immigration status. On December 4, 2002, City Councilmember Monserrate, along with over 25 other sponsors, introduced Bill Intro. No. 326. [73] If enacted, the bill would prohibit disclosure of confidential information to anyone except another city officer or employee acting in the scope of her official duties. Exceptions to this rule would be made for criminal investigations, compiling statistical data, instances where person consents, or when federal or state law requires disclosure. Advocates are also proposing safeguards and accountability procedures for when confidential information is to be disclosed. For example, each agency must designate an officer responsible for approving the release of confidential information. City employees may not release confidential information without approval from the designated officer.

Turning local police into the INS is a dangerous trend that deters immigrants from accessing or cooperating with the police for fear of immigration consequences.

Ensuring Immigrants' Access to Law Enforcement by Restricting State and Local Law Enforcement of Civil Immigration Laws

Since 1996, the INS has increased its cooperation with local police and other law enforcement agencies, both formally and informally.[74] Turning local police into the INS is a dangerous trend that deters immigrants from

[71] 43 RCNY § 3-02 (2001).

[72] The City of New York and Rudolph Giuliani v. The United States and Janet Reno, 179 F.3d 29 at 37 (1999); 1999 U.S. App. LEXIS 10940.

[73] NY CITY COUNCIL INT. NO. 326 (2002), *available at*,http://www.council.nyc.ny.us/textfiles/Int%200326-2002.htm.

[74] For example, in 11 states around the country, the INS deploys Quick Response Teams (QRTs) made up of special agents and detention and deportation officers who detain and remove undocumented immigrants encountered by local law enforcement. Colorado has 31 quick response team personnel, followed by Missouri with 25 and Nebraska with 23. Tennessee follows with 21 agents, Utah and Iowa each have 20, Georgia and North Carolina each have 16, Kentucky 13, Arkansas 10, South Carolina 3, and Louisiana 2.

accessing or cooperating with the police for fear of immigration consequences. When immigrants are afraid to file claims with administrative agencies, call the police, or go to court, immigrants can not benefit from the protections of law enforcement.

The Immigration and Nationality Act (INA) and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) authorize state and local police to enforce the criminal provisions of federal immigration laws. Recently at issue is the power of state and local law enforcement to make arrests or otherwise enforce the civil provisions of the immigration laws.

Current Law Regarding State and Local Enforcement of Immigration Law

During the summer of 2002, the Department of Justice concluded that state and local police have the inherent authority to arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center (NCIC).[75] The NCIC is a national database maintained by the Federal Bureau of Investigations and used by federal, state, and local law enforcement officers to identify those labeled as "high-risk aliens."

Historically, the Department of Justice's position has been that state and local police lack any inherent authority to make arrests for civil infractions of the immigration laws.[76] The New York Attorney General's Office also issued an opinion stating that state and local officers may not make arrests based on civil infractions of the INA.[77] These opinions support the principle that civil immigration enforcement can only occur under circumstances expressly provided for by Congress.[78] This principle flows from the longstanding and near absolute power of the federal government over immigration matters.

State authority to enforce the *criminal* immigration violations rests in explicit provisions in both the INA and in the AEDPA. In contrast, Congress has not granted states a similarly broad power to enforce civil immigration violations. The most relevant sections of the INA are §§103(a)(8) and 237(g).[79] Both sections afford state and local authorities limited power to enforce the civil provisions of the immigration laws under specifically delineated situations, while always under the direction and supervision of the Department of Justice.

Rules implementing INA §103(a)(8) went into effect on August 23, 2002. The authority of state and local law enforcement to exercise federal immigration power under INA §103(a)(8) is proscribed by "contingency agreements" between the Commissioner of the INS and state or local law enforcement officials.[80] The

---

[75] Letter from Alberto Gonzales, Counsel to the President of the United States, to the Migration Policy Institute (Jun. 24, 2002) *available at* http://www.migrationpolicy.org/files/whitehouse.pdf.

[76] Memorandum opinion fromTheresa Wynn Roseborough, Deputy Assistant Attorney General, *Office of Legal Counsel*, for the U.S. Atty., for the S.D.Cal. (Feb.5, 1996) 1996 WL 33101191 (O.L.C.).

[77] 2000 Op. Atty Gen. N.Y. (Inf.) 1001.

[78] *See generally* Migration Policy Institute, *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Immigration Law* (arguing against broad inherent authority of state and local officers to exercise federal immigration authority) *available at* http://www.migrationpolicy.org./files/authority.pdf.

[79] Immigration and Nationality Act §.103(a)(8), 8 U.S.C. § 1103.(2002).

[80] 28 C.F.R. § 65.83(d).(2002).

contingency agreements authorize state and local officials to exercise immigration authority under specific conditions within geographically defined boundaries.[81]

Contingency agreements do not authorize the state or local officers to perform immigration functions until the Attorney General declares that a "mass influx of aliens" is imminent or occurring, and specifically authorizes such performance.[82] Amongst the many things the agreements provide for is a prohibition on state and local officers from performing any functions of the INS pursuant to this rule without undergoing trainings in immigration law, immigration law enforcement fundamentals and procedures, civil rights law, and sensitivity and cultural awareness issues.[83] IIRIRA added INA § 287(g), which provides for written agreements between the Attorney General and a state to "perform a function of an immigration officer."[84]

The section goes on to outline the criteria under which state and local officers may enforce immigration laws.[85] These include written certification of training and knowledge of immigration law and a written agreement with the Attorney General about the specific duties to be performed by the local officers and the duration of the authority of local officers to perform these duties.[86]

Claiming that state and local law enforcement officers have the inherent authority to enforce federal immigration laws wholly contradicts the long-standing principle that immigration matters are a federal concern. By providing specific circumstances for state and local exercise of federal immigration powers in this section, like § 103(a)(8), Congress legislates with the presumption that state and local law enforcement officers may exercise immigration powers only within the scope of limited circumstances defined by the statute. To take the position that state and local law enforcement possess inherent authority to enforce immigration matters would render sections of the INA detailing the conditions for state and local enforcement of immigration laws meaningless.

Model Language to Prohibit State and Local Enforcement of Immigration Laws

Comprehensive model language would include the points outlined in the Model Confidentiality Provisions in addition to a clear prohibition on the use of state and local resources for immigration enforcement.

Ensure that state and local resources and personnel are not used for immigration enforcement.

No city personnel or resources "shall be used to assist in the enforcement of federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City unless such assistance is required by federal or state statute, regulation or court decision."[87]

[81] 28 C.F.R. § 65.83(d)(1)(4).(2002).
[82] 28 C.F.R. § 65.84.(a)(1).(2002).
[83] 28 C.F.R. § 65.84(a)(3)(iv).(2002).
[84] *Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g)(1) (2002).*
[85] 8 U.S.C. § 1357(g)(2) (2002).
[86] 8 U.S.C. § 1357(g)(3) (2002).
[87] San.Fran. CA, Admin. Code §12H.2.1 et seq. (1989).

States and Localities Attempting to Enforce Immigration Laws

Colorado

In April of 2002, the Colorado General Assembly passed the Illegal Alien Enforcement Act (HB02-1448), which would have allowed local police to enforce federal civil immigration laws.[88] Less than a month after it was introduced, the Senate Committee on the Judiciary postponed it indefinitely.[89]

Florida

Florida became the first state as of the writing of this report to enter into an agreement with the Department of Justice to deputize local police officers as INS agents. Pursuant to this agreement, on July 9, 2002, 35 state law enforcement officers began training to enforce civil as well as criminal immigration laws.[90]

New York

In New York, the director of the state Office of Public Security, James Kallstrom, has asked the Justice Department for authorization to arrest undocumented immigrants.[91] In addition, the NYPD in New York City has been involved in the INS's initiative to arrest immigrants from targeted countries who have outstanding deportation orders. In response to criticism, however, the NYPD issued a statement declaring that it will only cooperate with the INS in apprehending criminal aliens. It will not enforce civil violations of immigration laws.[92] This is consistent with an opinion issued by of the New York Attorney General. The opinion states that state and local enforcement authority is limited to the criminal provisions of the INA.[93] Since unlawful presence in the country is a civil violation, it is not a sufficient basis for making an arrest.[94]

Oregon

Oregon law prohibits the use of state and local law enforcement funds or personnel to detect or apprehend persons simply because they are in the country in violation of federal immigration laws. The statute allows verification of immigration status if the person is arrested for any criminal offense.[95]

Utah

Conflicting immigration enforcement practices continue to spur debates about the role of local police in immigration enforcement. Despite the absence of any deputization agreement with the INS, Washington County Sheriff Kirk Smith claims to have inherent authority to enforce the immigration laws. In contrast, the Utah Department of Public Safety has stated that it would never arrest someone on an immigration violation. The Utah Advisory Committee to the United States Commission on Civil Rights also opposes local enforcement of

---

[88] Michael A. De Yoanna, *Colorado Immigrant Enforcement Bill Passes*, UNIVERSITY WIRE (May 2, 2002).

[89] Illegal Alien Enforcement Act, CO H.B. 1448, 63rd Gen. Assembly (2002). *See also*, Michael A. De Yoanna, Colorado Immigrant Enforcement Bill Passes, UNIVERSITY WIRE (May 2, 2002); Deborah Kong, Immigrants Fear New Proposal That Would Allow Local Police to Enforce Federal Immigration Laws, ASSOCIATED PRESS (May 23, 2002).

[90] Mireidy Fernandez, *FDLE Cross-Training 35 Police Officers to Also Serve as INS Agents,* NAPLES DAILY NEWS (Jul. 23, 2002).

[91] Brendan Lyons, *Police Ready to Fill INS Gap*, THE TIMES UNION (Mar. 23, 2002).

[92] Chisun Lee, *Arabs and South Asians Dodge Authorities, Even When in Need: NY Immigrants Underground*, THE VILLAGE VOICE (May 22, 2002).

[93] 2000 N.Y. AG LEXIS 2 (2000) at 2.

[94] *Id*.

[95] OR. REV. STAT. § 181.850 (2001).

immigration laws.[96] The Utah Hispanic Advisory Council and the Utah Republican Hispanic Assembly, two statewide organizations, have scheduled meetings in Moab and St. George with local law enforcement officials, the INS, and interested residents to discuss the issue.[97]

The debate over local police enforcement of immigration laws has been a topic of heated debate in Utah since at least 1998. In 1998, the Salt Lake City Council rejected a proposal to deputize local police to enforce immigration laws. Subsequently in April of 2002, Utah enacted legislation "designed to prohibit unconstitutional racial profiling."[98]

South Carolina Attorney General Charlie Condon has also expressed interest in deputizing state law enforcement officers as INS agents.[99]

States and Localities Rejecting Enforcement of Immigration Laws

Arizona

In the aftermath of "Operation Restoration," a collaboration between local police and Border Patrol agents that resulted in findings of rampant civil rights violations, Governor Jane Hull remains opposed to local enforcement of immigration laws. An investigation into "Operation Restoration" by the State Attorney General's office concluded "without a doubt that residents of Chandler, Arizona were stopped, detained, and interrogated by officers…purely because of the color of their skin." Furthermore, the roundups "greatly harmed the trust relationship between the Chandler Police and many of the city's residents."[100] In 1999, the Chandler City Council unanimously approved a $400,000 settlement of a *lawsuit stemming from the police role in the roundups.*[101] *In response to agreements for the INS to deputize local police officers, Francie Noyes, Governor Hull's press secretary, said, "If they need help, then they should add to the federal resources."*

California

San Diego

The San Diego Police Department has a policy of not becoming involved in enforcing immigration violations. David Cohen, San Diego Police spokesman said, "We've spent decades establishing trust…with our very diverse immigrant communities. If there is an immigration emergency tied to a criminal activity, of course we'll assist….But if it is simply an immigration violation we will not be involved."[102] The Department's procedures also prohibit INS involvement with undocumented persons who are material witnesses to a crime, family disturbances, minor traffic offenses, and persons seeking medical treatment.

---

[96] Statement of Utah Advisory Committee Concerning Racial Profiling and Immigration Law Enforcement, PR NEWSWIRE (Apr. 26, 2002).
[97] Tim Sullivan, *Should Police, Deputies Help INS Enforce the Law?*, THE SALT LAKE TRIBUNE (Aug. 26, 2002).
[98] Shawn Foster, *S.L. Latinos Swayed Councilman; He Voted Against INS Plan After Foes Packed Meeting*, SALT LAKE TRIBUNE (Sept. 9, 1998).
[99] Eric Schmitt, *Ruling Clears Way to Use State Police in Immigration Duty*, THE NEW YORK TIMES (Apr. 4, 2002).
[100] Karen Brandon, *U.S. Weighs Local Role on Immigration*, CHICAGO TRIBUNE (Apr. 14, 2002).
[101] American Immigration Lawyers Association, *DOJ Opinion on State and Local Police Enforcing Immigration Laws Bodes Ill for Law Enforcement Communities* (Apr. 9, 2002) *available at* http://www.aila.org.
[102] Kris Axtman, *Police Can Now Be Drafted to Enforce Immigration Law*, THE CHRISTIAN SCIENCE MONITOR (Aug. 19, 2002).

Los Angeles
Special Order 40 of the Los Angeles Police Department Manual provides that undocumented status is not in and of itself a matter for police action. It prohibits officers from initiating police actions with the objective of discovering the immigration status of a person. Finally, police are prohibited from arresting or booking persons for illegally entering the United States.

San Francisco
The San Francisco Administrative Code prohibits city or county departments, agencies, and employees from using city resources to enforce federal immigration laws.[103] The Code also specifically prohibits cooperating with the INS to enforce alleged violations of civil provisions of the immigration laws.[104]

Iowa
Iowa localities rejected a proposal by the INS to deputize local law enforcement officers in 1999. The INS had proposed a plan that would give city police in Iowa some federal immigration powers, but no city acted on the proposal.[105]

Kansas
It is the Kansas State Attorney General's position that the state laws empower a "law enforcement officer" in Kansas to make arrests for the laws of the state or the ordinances of any municipality. Thus, a law enforcement officer in Kansas "does not have the power of arrest for violation of federal immigration laws."[106]

Nevada
The State Attorney General issued an opinion stating that Nevada State police are empowered to arrest persons suspected of "violating federal criminal laws."[107] The opinion advises that this power should be "cautiously exercised" in the context of civil immigration law violations. Specifically, a state or local officer may not detain or arrest a person solely on the basis that the individual may be a "deportable alien."

New Mexico
Albuquerque
Section 3-1-11(b)(4) of the Albuquerque Code of Resolutions provides that "no municipal resources shall be used to identify individuals' immigration status or apprehend persons on the sole basis of immigration status, unless otherwise required by law to do so."[108]

Oregon
Oregon State statute § 181.850 provides that no state law enforcement agency shall use "agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship residing in the United States in violation of federal immigration laws."[109] This statute forms the basis of the policies and procedures adopted in Marion County and the city of Salem.

---

[103] San. Fran. Admin. Code § 12H.2 (1989).
[104] San. Fran. Admin. Code § 12H.2(a) (1989).
[105] Mike Sherry, *Iowa Town Considers INS Powers for Police*, OMAHA WORLD-HERALD (Mar. 1, 1999); Cindy Gonzalez, *Immigration Policing Shift Gets Mixed Reviews*, OMAHA WORLD-HERALD (Apr.6, 2002).
[106] Kan. Atty. Gen. Op. No. 79-149 (1978).
[107] 1983 Nev. Op. Atty. Gen. 79.
[108] Albuquerque Code of Res. § 3-1-11(b)(4). Full text of the resolution is *available at* http://www.nelp.org.
[109] ORS § 181.850 (2001).

Marion County

Marion County has adopted administrative policies and procedures regarding the relationship between the county and the INS. The policy states that the INS has the authority to enforce the immigration laws and that county programs are not operated for the "sole or primary purpose of enforcing federal immigration laws."[110] The policy also provides that county law enforcement entities will not use resources or personnel to "detect or apprehend persons solely for violations of immigration laws."

City of Salem

Salem has also adopted policy guidelines and procedures clarifying the relationship between the city and the INS. The Salem provisions mirror the Oregon State policy.[111]

In addition, mayors in New York, Los Angeles, San Francisco, Chicago, and elsewhere have rejected the deputization of police officers because they knew it would interfere with community policing.[112] A directive that prevented police from asking people about their immigration status has been the "touchstone" of law enforcement policy in Los Angeles since 1979. Shortly after the Justice Department's new approach was announced, police there seemed uninterested. An LAPD spokesperson said, "That's just not our policy. Hasn't been for twenty years."[113]

Numerous representatives of local police departments have also criticized the idea of participating in the enforcement of federal immigration laws, including the President of the Dallas Police Association, the Chief of the Houston Police Department, the Los Angeles Police Department, the Chief of Police in Newark, California, the Assistant Chief of Police in El Paso, Texas, police officials in several cities in New Jersey, Sheriff George Epp of Colorado, and chiefs of police in cities throughout Colorado.[114]

Washington

Seattle

Led by the Northwest Immigrants' Rights Project, 31 community organizations have proposed changes to the Seattle Municipal Code that would prohibit police from cooperating with the INS. The proposal would provide that no city officer or employee should inquire into a person's immigration status of any individual or apprehend individuals for violation of immigration laws. It would apply to city police and to city agencies administering public benefits. Police in Washington State, including the Seattle police chief, are opposed to enforcing immigration law.

---

[110] Marion County Administrative Policies and Procedures as adopted by the Board of Commissioners. Full text *available at* http://www.nelp.org.

[111] Role of City of Salem in relation to the Immigration and Naturalization Service. Full text *available at* http://www.nelp.org.

[112] National Immigration Forum, *DOJ Proposal Drives Wedge between States and Local Police and Immigrant Communities* (Apr.3, 2002) *available at* http://www.immigrationforum.org/press/articles/040402_doj.html.

[113] Patrick J. McDonnell, *Police Want no Part in Enforcing Immigration Law*, LA TIMES (Apr. 26, 2002).

[114] Edward Hegstrom, *Houston Police Department Shuns Taking Role in Tracking Immigrants: Officers Say They Need Foreigners' Trust*, THE HOUSTON CHRONICLE (May 15, 2002); Edward Hegstrom, *HPD Shuns Taking Role in Tracking Immigrants: Officers Say They Need Foreigners' Trust*, THE HOUSTON CHRONICLE,(May 15, 2002); Michael A. De Yoanna, *Colorado Immigrant Enforcement Bill Passes*, UNIVERSITY WIRE (May 2, 2002); *Border patrol and local police working together*, CHRISTIAN SCIENCE MONITOR (May 2, 2002); Eric Schmitt, *Administration Split on Local Role in Terror Fight*" NEW YORK TIMES (Apr.29, 2002); Elizabeth Llorente, *Policing Immigration*, THE RECORD (Apr. 22, 2002); Michael Riley, *Immigration Bill Has Police Uneasy*, DENVER POST (Apr. 22, 2002); Patrick J. McDonnell, *Police Want No Part in Enforcing Immigration Law,* LOS ANGELES TIMES (Apr. 5, 2002); Michelle Mittelstadt and Alfredo Corchado, *U.S. May Let State, Local Authorities Enforce Federal Immigration Laws*, THE DALLAS MORNING NEWS (Apr. 4, 2002).

Talking Points Against State and Local Enforcement of Immigration Laws

Talking points from the National Immigration Forum and the American Immigration Lawyers Association are summarized below.[115]

- Immigration enforcement by local police officers undermines trust between immigrant communities and the police. Many police departments have spent years nurturing the trust of immigrant communities. Adopting policies that enable local police to act as de facto INS agents seriously erodes community-police relations.

- Immigration laws and determinations of a person's immigration status are extremely complex and constantly changing. There are many ways for people to be lawfully present in the United States, and the INS issues numerous different documents that verify a person's legal presence. Proper understanding and enforcement of these laws requires intensive training. Without structured guidance, local law enforcement officials add nothing meaningful to immigration enforcement efforts.

- Asking local law enforcement agencies to enforce federal immigration law will drain these agencies of scarce dollars and limited resources and lead to problems in enforcement. In many communities, scarce law enforcement resources already result in dangerously slow 911-response times and limited efforts to investigate certain crimes. Diverting local resources to perform federal immigration duties is a disservice to the local community.

- Past attempts by local law enforcement agencies to enforce immigration law have led to false arrests or detention of people who look or sound foreign but are legally in the country and civil rights violations. (See above section on Arizona.)

- Local officials from across the country have come out in opposition to turning their police into INS agents. These officials include but are not limited to mayors in New York, Los Angeles, San Francisco, and Chicago. Police departments from San Diego, Los Angeles, and San Francisco, CA and Houston and San Antonio, TX have all taken firm stances against local enforcement of immigration laws.

- Legal authority the Department of Justice reportedly cites to support the opinion for state and local authorities enforcing immigration law is questionable at best.

What Can Advocates Do?

√ Find out your state's human services' office and local police department's position regarding confidentiality protections for immigrants. Learn about agency and police practices pertaining to: inquiries about immigration status, maintenance of records relating to immigration status, and sharing immigration information with other state and federal agencies.

√ Advocate for state, municipal, and administrative agency policies that protect the confidentiality of immigrants.

---

[115] American Immigration Lawyers Association, *DOJ Opinion on State and Local Police Enforcing Immigration Laws Bodes Ill for Law Enforcement and Communities* (April 9, 2002) *available at* http://www.aila.org.

√ Work for adoption of a formal policy of non-cooperation with the INS by your City Council, Governor, human services office, and your police force.

√ Push for statements from law enforcement officials speaking out against using local police resources for immigration enforcement.

Chapter 3: Focus on Public Safety: Increasing Access to Drivers' Licenses[116]

There are an estimated seven to eight million undocumented immigrants in the United States, most of who have to drive, whether or not they can get a drivers' license.[117] Like everyone else, immigrant workers often depend on state-issued drivers' licenses to get to work, bring their children to school, shop, and go to the doctor. They may work at night or early in the morning, when public transportation is unavailable, or in areas that are poorly served. Or they may work in occupational sectors, such as construction or agriculture, where driving is an essential part of the job. Like their U.S. citizen counterparts, they use their drivers' licenses to cash their paychecks when the day is done.

The states are free to establish their own procedures for verifying identity in order to issue drivers' licenses, and the requirements have varied from extremely flexible (allowing use of an affidavit of residency in Virginia) to extremely strict (requiring social security numbers, verification of the SSN, and proof of lawful residency in the United States in California).

Drivers' License Proposals in 2001

Prior to September 11, 2001, many states were considering legislation to make drivers' licenses more accessible to their residents. At least thirteen states were considering changes to their drivers' license laws to allow applicants who lacked social security numbers to use other identity documents to get a driver's license.

- Four states – Utah, Tennessee, North Carolina, and Virginia – had liberalized their rules to be clear that either the IRS-issued Individual Taxpayer Identification Number (ITIN) or foreign documents would be acceptable to prove identification.

- At least 13 states – Alaska, Delaware, Idaho, Kansas, Maine, Maryland, Michigan, Montana, Oklahoma, Oregon, Rhode Island, Vermont, and Washington – did not require a social security number for those who did not have one, and allowed a person to use proof of identity that is available to undocumented people, like rent receipts, school transcripts, marriage licenses, or certain accepted foreign documents to prove identity.

- About half of the states had no formal requirement that an applicant prove she was lawfully present in the United States in order to obtain a license. About 20 states issued drivers' licenses only to those who could show that they had a social security number.

- Only five states, plus the District of Columbia, required both a social security number and that an applicant proves she was lawfully present in the United States.

[116] The authors would like to acknowledge the valuable contributions made to this report by the work of Tyler Moran at the National Immigration Law Center and Michele Waslin at the National Council of La Raza on immigrant drivers' license issues. Much of the research presented in this section of the paper is a result of their work.

[117] Passel, *Id., supra,* n.8.

2002: Small Gains Against Large Odds

September 11 began a reversal of efforts to broaden access to drivers' licenses. Early reports of the tragedy stated that several of the terrorists had U.S. state-issued drivers' licenses which allowed them to rent cars, board airplanes, and blend into society more easily. These reports spawned an avalanche of drivers' licensing proposals, many of them regressive.

The 2002 state legislatures saw 24 states considering 61 separate pieces of legislation affecting drivers' licenses.[118] There is mounting pressure on state drivers' licensing agencies to institute stringent documentation requirements and costly verification procedures with two federal agencies, the Social Security Administration and the Immigration and Naturalization Service.

Of the 50 restrictive proposals, eight states passed anti-immigrant measures. These are Colorado, Florida, Kentucky, Iowa, Louisiana, New Jersey, Ohio and Virginia. In addition, some states have enacted restrictive policies by administrative rule. These are Connecticut, Indiana, Minnesota, Pennsylvania, South Carolina and Tennessee. Rhode Island issued emergency regulations that would allow applicants for drivers' licenses to submit an Individual Taxpayer Identification number (ITIN) in lieu of a social security number, but no longer accepting an affidavit in lieu of the social security number.

These new laws generally require that an immigrant show "lawful presence" in the United States in order to procure a driver's license. Most provide that immigrants' drivers' licenses must expire when a visa expires. Florida now requires that immigrants must renew their drivers' licenses in person, unlike U.S. citizens. Florida also requires that biometric identifiers be used to establish identification.[119]

Many of the new restrictive measures face legal, fiscal, practical, and political obstacles. Connecticut's Attorney General issued an opinion that its provision eliminating employment authorization documents as a form of ID violated the U.S. Constitution. The Kentucky provision has been submitted to U.S. Attorney General John Ashcroft for his review, and the Indiana and Minnesota proposals are being challenged in court.

In Iowa, the Department of Transportation issued a policy requiring that non-citizens' licenses be stamped with the legend, "Nonrenewable – Documentation Required." The policy was withdrawn after pressure from advocates and threat of litigation in September 2002.

Restrictive rules in the states have also started to give rise to media reports of immigrant drivers unlawfully harassed and even arrested when state agency workers mistakenly believe they have presented forged documents.

[118] National Immigration Law Center, *2001-2002 Drivers' License Proposals, available at* http://www.nilc.org/immspbs and http://www.nelp.org.pub136.pdf.
[119] *Id., 2001-2002 Drivers' License Proposals.*

In Minnesota, after a legislative proposal failed, the Commissioner of Public Safety attempted to pass restrictive policies through emergency rulemaking procedures. An Administrative Law Judge ruled that administrative procedures had not been followed, but it is assumed that the agency will now undertake those procedures.

Restrictive rules in the states have also started to give rise to media reports of immigrant drivers unlawfully harassed and even arrested when state agency workers mistakenly believe they have presented forged documents.[120]

Of the fifteen expansive proposals before legislatures in 2002, two have become law, (in New Mexico and South Carolina). New Mexico slightly broadened its law to allow persons who lack a social security number access to drivers' licenses. Texas has a proposed rule that would allow an affidavit to be submitted by those who do not have social security numbers.

Advocates are gearing up for more action in the 2003 legislatures, to stem the anti-immigrant tide of drivers' license legislation and make the roads safer for all drivers. To help advocates in these efforts, charts of current state laws and the proposals in the 2002 legislatures are available on both the NILC and NELP websites.

Highlighted Campaign: Coalition for a Safer Tennessee Drivers' License Campaign

One example of the many creative and active campaigns going on around the country is the Coalition for a Safer Tennessee campaign.

Coalition for a Safer Tennessee is a statewide partnership of community, religious, business, and government organizations that support expanding access to drivers' licenses. The coalition first formed in February of 2001, shortly after a bill was introduced in the legislature to expand access to drivers' licenses for Tennesseans. The Tennessee statute, signed into law in May of 2001, enabled individuals who do not possess a social security number to apply for Tennessee drivers' licenses.[121] In 2002, the coalition successfully defeated take-away proposals that would gut the new law.[122]

Highlighted Campaign: California 2002

In California, a state with one of the most restrictive drivers' licensing laws, an expansive proposal was vetoed by the Governor. The bill, AB 60, would have allowed persons who have applications for lawful immigration status pending to get a driver's license. Immigrants' rights groups waged a hard-fought campaign for access. Latino activists and other community leaders pressured the governor for his signature by engaging in letter-writing campaigns, days-long vigils, and demonstrations in Southern California and Sacramento.[123] Davis' veto of the bill prompted the Latino legislative caucus to refuse to endorse his gubernatorial campaign.[124] Senator Gil Cedillo, the author of the vetoed bill, has stated that in 2003, he will propose a broader bill allowing all immigrants access to drivers' licenses.[125]

---

[120] Lourdes Medrano Leslie, *Immigrant's Treatment at License Office Prompts Complaint, Questions,* MINNEAPOLIS STAR TRIBUNE (Aug. 16, 2002); Bob Braun, *Treated Like a Criminal, and No One's Sorry* (NEWARK NJ) STAR LEDGER (Aug. 14, 2002).

[121] Tenn. Code Ann. § 55-50-321(c) (2001).

[122] The Governor subsequently announced that drivers' licenses for individuals who did not provide a social security number will be marked with the notation, "none provided."

[123] Minerva Canto and Hanh Kim Quach, *Migrant drivers' licenses urged*, ORANGE COUNTY REGISTER (Aug. 10, 2002).

[124] Edwin Garcia, *Latino Group Refuses to Back Davis*, SAN JOSE MERCURY NEWS (Oct. 3, 2002).

[125] Hanh Kim Quach, *Drivers' License measure, Part 3,* ORANGE COUNTY REGISTER (Jan. 6, 2003).

Model State Legislation: 2003 and Beyond

Restricting drivers' licenses does nothing to increase community safety; in fact, it may encourage unlicensed driving. It also results in a proliferation of false documents, erodes public safety, and leads to higher insurance premiums for all licensed drivers. If states enact restrictive measures, unlicensed drivers will constitute a true underground, completely unknown to law enforcement authorities. Instead, states should consider expanding access to drivers' licenses for immigrants who can prove their identity via reliable forms of identification, such as the IRS Individual Taxpayer Identification Number (ITIN), or the Mexican government-issued matricula consular. At the same time that states are being pushed to make their drivers' license laws more restrictive, smart banks and police agencies are beginning to accept alternative forms of identification such as the matricula and the ITIN. The Mexican Foreign Ministry reports that 800 police departments, including those in some of the largest cities in the country such as Los Angeles, Chicago and Houston, accept the matricula as identification. The Foreign Ministry says that 66 banks, including Wells Fargo, Bank of America, Citibank, and others also accept alternative forms of identification.[126] The U.S. Department of Treasury recently proposed regulations pursuant to the USA PATRIOT Act that would allow banks to continue to use identification such as the ITIN and the matricula to identify bank customers.[127]

Advocates in Tennessee, Utah, and North Carolina have engaged in successful affirmative campaigns to expand access to drivers' licenses. Additional campaigns are anticipated in 2003.

At present, advocates in Tennessee, Utah, and North Carolina have engaged in successful affirmative campaigns to expand access to drivers' licenses. Additional campaigns are anticipated in 2003 in Illinois, New York, Colorado, Massachusetts, and New Mexico. Meanwhile, advocates in states that defeated restrictive proposals are developing model lists of identification for negotiations with the state agencies. (A proposed model statute based on an effort in 2001 in Texas, as well as the Utah law, is in the appendix to this paper.)

Talking Points for Immigrant Access to Drivers' Licenses

These talking points are offered to support the ongoing campaigns and those that will be developed in 2003, either in response to restrictive proposals or as affirmative proposals. These points have largely been adapted from talking points developed by the National Council of La Raza (NCLR) and are available on NCLR's website.[128]

---

[126] Secretaria de Relaciones Extranjeros, *La SRE ha emitido 740 mil matriculas consulares a Mexicanos en el extranjero,* Oct. 13, 2002, *availabale at* http://www.ser.gob.mx; Mary Beth Sheridan, *An Entry Card for Immigrants,* WASHINGTON POST (Jul. 26, 2002).

[127] Customer Identification Programs for Banks, Savings Associations, and Credit Unions, 67 Fed. Reg. 48290 (proposed Jul. 23, 2002).

[128] *Michele Waslin*, Safe Roads, Safe Communities: Immigrants and State Drivers' License Requirements, National Council of La Raza (2002), *available at http://www.nclr.org/policy/briefs/drivers_license_issue_brief_6.pdf.*

Safety on the Road

Licensed drivers have been tested; unlicensed drivers have not. People who need to drive to earn a living will do so illegally if they have to. By denying individuals who lack social security numbers (SSNs) legal access to licenses, we forgo the opportunity to ensure compliance with safety standards. Allowing individuals without SSNs access to drivers' licenses would ensure that many more drivers know and are trained in the proper driving techniques and laws of the state, making our roads safer.

Unfair Impact on Legal Immigrants

Requiring a Social Security number penalizes legal immigrants. Certain categories of legal immigrants, such as political asylum applicants and beneficiaries of certain family-based petitions, are not eligible for SSNs. In addition, many immigrants in the process of becoming legal do not yet have documentation from the INS.

Policy Arguments Against Using Drivers' Licenses to Identify Immigration Status

Licensing agencies cannot reliably determine immigration status. INS documentation and immigration law are extremely complex and subject to frequent changes. State drivers' licensing agencies do not have the expertise to navigate through the variety of immigration status documents. States often do not understand that verifying legal presence can also be very costly. California taxpayers pay $1.8 million a year to have Department of Motor Vehicle (DMV) staff persons check the legal status of applicants. The INS database is not updated quickly enough to contain current immigration status for all persons, and the accuracy and reliability of the databases are problematic; INS and SSA databases have been shown to have error rates approaching 20%. As a result, many legal immigrants and U.S. citizens may be unfairly denied drivers' licenses by restrictive policies.

Insurance Costs

Unlicensed drivers raise insurance rates and losses because they cannot obtain auto insurance. Nationally, uninsured motorists cause over $4.1 billion in insurance losses per year. Claims made because of at-fault uninsured drivers are paid for either by insured drivers personally or by their insurance companies. The more claims paid by insurance companies, the greater auto insurance premiums are for everyone.[129]

Economic Impact

An increase in drivers' license applicants would increase state revenue. In order to obtain a driver's license, applicants must pay a fee. In Tennessee, enactment of the statute enabling individuals of legal age who do not possess a social security number to obtain a driver's license if they can prove their identity and residency in the state and pass required tests resulted in additional state revenues totaling more than $558,233.

Prevention of Terrorism

Requiring that drivers' license applicants possess a social security number does not prevent terrorism. All of the 9/11 terrorists possessed social security numbers. It is not necessary to possess a U.S. driver's license to board an airplane. Sophisticated terrorists with substantial financial resources are likely to have the ability to obtain drivers' licenses and other documents when they find them necessary.

[129] Insurance Research Council, Uninsured Motorists 2000 Edition, Malvern, PA (2001).

Federal Child Support Funding

Eliminating the social security number requirement would not affect federal child support funding. Although the federal Child Support Performance and Incentive Act of 1998 requires states to have a database available to the federal government which contains SSNs, the Department of Health and Human Services has interpreted this requirement to apply only to individuals who actually possess a SSN. The Commissioner of the DHHS's Office of Child Support Enforcement has stated that the law "does not require that an individual have a social security number as a condition of receiving a license."[130] Therefore, states need not require all individuals to have a social security number in order to get a license.

Federal Drivers' License Legislation 2002

U.S. Representative Richard J. Durbin (D-IL) advocates the use of national standards for state-issued drivers' licenses. The measure would set federal rules for granting licenses, build in high-tech anti-counterfeiting measures, and provide funding for states to make changes within three to five years. The idea is that such standardization would permit rapid data sharing among government agencies.

While Congressman Durbin has announced that he has no intention of harming immigrant workers, the measure he supports could set standards which the undocumented would be unable to meet, and deny licenses to millions of undocumented drivers. It was introduced on October 10, 2002 as the Driver's License Fraud Prevention Act -- S. 3107. At the same time, Congressman Jeff Flake of Arizona introduced a bill that would require all states to have special rules for persons with temporary "nonimmigrant" visas such as student visas and temporary worker visas, and would require that a driver's license issued to a nonimmigrant expire no later than the date of expiration of the nonimmigrant visa.[131] While the bill was not an absolute mandate to the states, it offered strong incentives to comply because drivers' licenses from states that do not comply would not be accepted by federal agencies. Failure to accept drivers' licenses from those states punishes all residents of those states who would not be able to use their licenses as proof of identity.

Two additional restrictive proposals were been put forth by Representatives Cantor (R-VA) and Moran (R-VA), HR 5322 and HR 4633, respectively. The Cantor bill would provide that drivers' licenses expire with the expiration of a non-immigrant visa. The Moran bill would essentially create a national ID card, with computer chips embedded in them, with biometric data. They would include tamper-resistant features. It would also link motor vehicle databases across states. Each bill is likely to be proposed again in the 108th Congress.

The *matricula consular*, issued by the Mexican government, is now accepted as identification by 66 banks and 801 police agencies nationwide.

Which forms of ID are most reliable?

It is useful in many campaigns to educate legislators on the reliability and integrity of various forms of identification that immigrants may have. Many legislators may feel, wrongly, that the social security number is the only reliable form of identification. The source documents for a social security number are remarkably similar to those used for ITINs and consular identification:

---

[130] David Gray Ross, Commissioner, Office of Child Support Enforcement, *Inclusion of Social Security Numbers on License Applications and Other Documents,* PIQ-99-05 (July 14, 1999).The memo issued by DHHS is *available at* http://www.acf.dhhs.gov/programs/cse/pol/piq-9905.html.

[131] H.R. 4043, *available at* http://thomas.gov.

In order to obtain a social security number, a person needs to show the Social Security Administration two forms of identification that show age, identity, and U.S. citizen, or lawful alien status. These include:

- **to show age,** a birth certificate or hospital record of birth or passport;
- **to show identity**, a photo identification including drivers' license, marriage or divorce records, military records, employer identification cards, adoption records, life insurance policies, school identification; and
- **for citizenship**, documents that show birth in the United States, plus various INS cards and certificates of citizenship.[132]

In order to obtain an **ITIN**, a person must show the Internal Revenue Service:

- **documents that prove both identity and foreign status, including:** a passport, drivers' license, INS document, foreign military identification card, foreign voter registration card, birth, marriage or baptismal certificate, or school records.[133]

In order to obtain a **consular ID**, a person must show the consulate:

- **her original birth certificate**,
- **an official Mexican ID**, such as a foreign military identification card, school certificates, voter registration card, or Mexican driver's license.[134]

Mexican consulates are now offering a new theft-proof version of its *matricula consular* identification cards. The holographic cards are now available consulates across the country.

What Can Advocates Do?

√ Use the chart of Drivers' License Requirements to locate the current policy in your state, and look up the 2001-2002 proposals. These are available on both the NILC and NELP on the websites, at http://www.nilc.org/immspbs/DLs/index.htm and http://www.nelp.org.pub136.pdf.

√ Work on passage of a state policy or law that increases access to drivers' licenses, using the model legislation and talking points outlined here.

√ Make sure your Congressional representatives know how you feel about the federal proposals.

√ Publicize abuses and hardships for immigrants, both documented and undocumented, from a harsh state policy.

[132] Social Security Administration, *How to Apply for a Social Security Card, available at* http://www.ssa.gov/replace_sscard.html.
[133] Internal Revenue Service, *Application for an IRS Individual Taxpayer Identification Number*, *available at* http://www.irs.gov/pub/irs-pdf/fw7.pdf.
[134] Consulate of Mexico at Seattle, *Consular Identification*, *available at* http://www.sre.gob.mx/seattle/ing_ser_matriculas.htm.

Chapter 4: Focus on Enforcing the Labor Rights of all Workers: Post Hoffman Plastics Issues

The U.S. Supreme Court's Decision in *Hoffman Plastic Compounds* v. NLRB

In March 2002, the U.S. Supreme Court decided a case called Hoffman Plastic Compounds v. NLRB[135] that has generated concern among immigrant workers, communities, and advocates. In Hoffman, the Supreme Court held that a worker who is undocumented could not recover the remedy of backpay under the National Labor Relations Act (NLRA).

The case involved a worker named José Castro who was working in a factory in California. Mr. Castro was fired in clear violation of the NLRA for his organizing activities. The National Labor Relations Board (NLRB) ordered the employer to cease and desist, to put up a posting that it had violated the law, and to reinstate Castro and provide him with backpay for the time he was out of work because of the illegal discharge.

During an NLRB hearing, it came out that Castro had used false documents to establish work authorization and that he was actually undocumented. The D.C. Circuit Court of Appeals rejected the employer's argument that Mr. Castro should not receive backpay because he is undocumented and held that backpay can be tolled to the date when the employer obtained "after-acquired" evidence of a worker's undocumented status. However, the Supreme Court held that Mr. Castro could not be awarded backpay because he is undocumented.

There is a strong argument that, whatever the outcome of these issues at the federal level, states are free to make their own policy choices under their own state laws regarding what remedies are available to the undocumented.

This decision has raised concern about whether courts will extend its application to other federal worker protections. Prior to the Supreme Court's decision in *Hoffman,* various lower federal courts had addressed the question of what relief undocumented workers may seek for discrimination under Title VII of the Civil Rights Act,[136] as well as wage and overtime violations under the Fair Labor Standards Act (FLSA),[137] and violations of the National Labor Relations Act.

Effect of *Hoffman* Ruling on Workers

Availability of remedies under NLRA and federal anti-discrimination laws

Federal case law as well as federal agency guidances regarding eligibility of undocumented workers for relief leave concern about the ability of undocumented workers to adequately enforce their rights under the NLRA and

[135] 535 U.S. ____; 122 S.Ct. 1275 (2002).
[136] *See, e.g., Rios v. Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).
[137] *See*, *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

the federal anti-discrimination laws. As discussed above, in *Hoffman*, the Supreme Court held that an undocumented worker is not eligible for backpay if he or she is unlawfully discharged under the NLRA.

While the Supreme Court has not spoken on whether undocumented workers are eligible for backpay under the federal anti-discrimination laws, it is possible that courts following *Hoffman* will conclude that they are not. Prior to *Hoffman,* one circuit, the Fourth Circuit Court of Appeals, had already held that an undocumented job applicant was not covered by Title VII of the Civil Rights Act, because he was not eligible to be employed in the United States;[138] the same court had held that a Mexican national applying for a job through the H-2A guestworker program was not protected by the Age Discrimination in Employment Act.[139] Following *Hoffman*, the EEOC rescinded its guidance on remedies available to undocumented workers, indicating that it no longer holds the policy that undocumented workers are eligible for all forms of monetary relief under the anti-discrimination laws.[140] It is not yet clear, at this point, whether employers may be able to persuade some courts that undocumented workers are not eligible for compensatory and punitive damages.[141]

Availability of remedies under federal minimum wage and overtime law

Of least concern is the effect of *Hoffman* on undocumented workers' rights to recover "backpay" for work actually performed under the FLSA. "Backpay" under FLSA is different from backpay under the NLRA and the anti-discrimination laws. Under the other laws, backpay is payment of wages that the worker would have earned if not for the unlawful termination or other discrimination. Under FLSA, "backpay" is payment of wages the worker actually earned but was not paid.[142] Following the Supreme Court's decision in *Hoffman*, federal courts have held that *Hoffman* is not relevant to backpay under the FLSA, and have made rulings favoring plaintiffs.[143]

The U.S. Department of Labor has stated that the Department will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), the FLSA, the Migrant and Seasonal Worker Protection Act (AWPA), and the Mine Safety and Health Act without regard to whether an employee is documented or undocumented.[144] The DOL statement leaves open the issue of backpay for undocumented workers who suffer retaliation on the job.[145]

Concerns about discovery of workers' immigration status

Statements by the NLRB General Counsel and the EEOC following the *Hoffman* decision suggest that a worker's immigration status may be relevant in determining remedies under the NLRA and the federal anti-discrimination

[138] *Egbuna v. Time Life*, 153 F.3d 184 (4th Cir. 1998).
[139] *Reyes Gaona v. NCGA* 250 F.3d 861 (4th Cir. 2001).
[140] 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/docs/undoc-rescind.html (rescinding E.E.O.C. Enf. Guidance 915.002).
[141] *See, Charanjit Jutla, et al*, No. C-02 1130, 2002 U.S. Dist. LEXIS 14978 (N.D.C.A. Aug. 2, 2002) (ruling that *Hoffman* did not bar the remedies of injunctive and declaratory relief, and compensatory and punitive damages in a retaliation case under the FLSA where the employer had knowingly employed the undocumented worker).
[142] There is one form of backpay under the FLSA that resembles backpay under the NLRA and the anti-discrimination laws. This form of backpay appears in the anti-retaliation provision of the FLSA – and is payment of wages that the worker would have earned if not for his or her unlawful termination by the employer in retaliation for having initiated a complaint under the FLSA. 29 U.S.C. § 215(a)(3).
[143] *See*, Flores *v Albertson's, Inc,* 2002 WL 11623 (CD Cal 2002); *Liu v Donna Karan International, Inc,* 2002 WL 1300260 (SD NY 2002).
[144] U.S. Department of Labor, HOFFMAN PLASTIC COMPOUND, INC, V NLRB, QUESTIONS AND ANSWERS
[145] *See also*, U.S. Department of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division (2002) available at* http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm.

laws. The NLRB General Counsel, in a guidance memorandum dated July 19, 2002, has stated that immigration status may become relevant in determining remedies.[146]

The EEOC has stated that it will not consider an individual's immigration status when examining the underlying merits of a charge.[147] However, with regard to the availability of remedies, EEOC stated that "[t]he Commission will evaluate the effect *Hoffman* may have on the availability of monetary remedies to undocumented workers under the federal employment discrimination statutes."[148]

Moreover, at least one court following *Hoffman* has suggested that *Hoffman* has made the issue of immigration status relevant to a worker's standing to sue for relief under the anti-discrimination laws. In denying a defendant's motion to dismiss in *Lopez v. Superflex, Ltd.,*[149] a judge in the Southern District of New York remarked:

> If Hoffman Plastics does deny undocumented workers the relief sought by plaintiff, then he would lack standing. As that issue is not ripe for decision, we decline to rule on it at this time. However, if plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether Hoffman Plastics applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.[150]

The Court goes on to observe in a footnote: "If we do ultimately reach this issue, it could result in a judicial finding that plaintiff is illegally residing in the United States and therefore is subject to deportation."[151]

In addition to concern about whether undocumented workers continue to be covered by the labor and employment laws and eligible for the same relief as other workers, this raises questions about what happens to a worker whose undocumented status is revealed in the course of proceedings. Determination that immigration status is relevant to determination of remedies or even standing to sue would mean that undocumented workers could no longer invoke protective orders to keep their immigration status out of the proceedings. As observed by the Court in *Lopez*, there could result a judicial finding that the worker is undocumented and subject to deportation. Such a possibility would have a severe chilling effect on workers seeking to enforce their rights.

Given the pessimistic outlook for obtaining some forms of relief under some federal laws, it becomes increasingly important, to the extent possible, to look to the states to enforce workers' rights.

---

[146] NLRB General Counsel, *Procedures and Remedies for Discriminatees Who may be Unauthorized Aliens after Hoffman Plastic Compounds, Inc.* (Jul. 19, 2002)*available at* http://www.nlrb.gov/gcmemo/gc02-06.html (pointing out that "Regions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue.… A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented." At this point, the Region is to "investigate the claim by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence.… a mere assertion is not a sufficient basis to trigger such an investigation.")

[147] *Id.*

[148] *Id.*

[149] 01 Civ. 10010, 2002 U.S. Dist. LEXIS 15538 (S.D.N.Y. Aug. 21, 2002).

[150] *Id., slip op.* at 6-7.

[151] *Id.,* at n.4.

State Enforcement of Workers' Rights

Regardless of the outcome of issues regarding backpay and other forms of damages in the federal courts, there is a strong argument that states are free to make their own policy choices under their own state laws regarding what remedies are available to undocumented workers. Of the cases litigated thus far, none has squarely addressed the issue of the continuing availability of backpay under state law.

State Agency Enforcement

A useful action that advocates can urge on the state level is for state agencies to develop pro-worker policies for enforcing labor and employment laws as well as providing benefits, such as workers' compensation. Such a policy would reaffirm a commitment to performing its duties without regard to the immigration status of workers who come before it. Shortly after the *Hoffman* decision, state agencies in California and Washington delivered such statements.

The *California Department of Industrial Relations* recently posted a statement on its website clarifying that it will "Investigate retaliation complaints and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about wages or workplace safety and health, without regard to the worker's immigration status."[152]

The Director of the *Washington State Department of Labor and Industries* has issued a statement that undocumented immigrants continue to be entitled to both time loss and wage replacement after the *Hoffman* decision:

> The 1972 law that revamped Washington's workers' compensation system is explicit: All workers must have coverage. Both employers and workers contribute to the insurance fund. The Department of Labor and Industries is responsible for … providing workers with medical care and wage replacement when an injury or an occupation disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.[153]

Following *Hoffman*, there is still a great deal state agencies can do to continue to enforce the labor and employment rights of all workers, regardless of immigration status. Below is a model policy state agencies should be encouraged to adopt and publicize.

Model State Labor Agency Statement

Anti-discrimination laws: State agencies responsible for enforcing wage and hour laws may adopt the following policy:

All workers, regardless of immigration status, are covered by state anti-discrimination employment laws, and are eligible for all remedies under the law unless explicitly prohibited by federal law.

1) The [Agency Name] will:

---

[152] CALIFORNIA DEPT. OF INDUSTRIAL RELATIONS, "All California workers are entitled to workplace protection," *available at* http://www.dir.ca.gov.

[153] Statement dated May 21, 2002 by Gary Moore, Director, *available at* http://www.nelp.org.

a. Investigate complaints of violations of the anti-discrimination in employment laws and file court actions to seek and collect backpay, compensatory and punitive damages, and all other appropriate remedies, including equitable relief. This shall be done without regard to the worker's immigration status, unless explicitly prohibited by federal law.
b. Investigate retaliation complaints and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about unlawful discrimination, without regard to the worker's immigration status, unless explicitly prohibited by federal law.[154]

2) The [Agency Name] will not ask a complainant or witness for their social security number (SSN) or other information that might lead to disclosing an individual's immigration status, will not ask workers about their immigration status and will not maintain information regarding workers' immigration status in their files.

3) During the course of court proceedings, the [Agency Name] will oppose efforts of any party to discover a complainant's or witnesses' immigration status by seeking a protective order or other similar relief.

4) In the rare occasion that [Agency Name] must know the complainant's immigration status, it will keep that status confidential, and will have a policy of nondisclosure to third parties (including to other state or federal agencies), unless otherwise required by federal law.

5) If a party raises the issue of an employee's immigration status in the course of proceedings, the party must show that the evidence is more probative than prejudicial, and that it obtained such evidence in compliance to 8 CFR § 274a.2(b)(1)(vii).

6) [Agency Name] will train its staff (including intake officers, investigators, attorneys, and other relevant staff) on this policy and will work closely with community-based organizations to conduct this training.

7) [Agency Name] will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.

Wage and hour laws: State agencies responsible for enforcing wage and hour laws may adopt the same policy, except the first paragraph should read:

All workers, regardless of immigration status, are covered by state wage and hour laws, and are eligible for all remedies under the law unless explicitly prohibited by federal law.

1) The [Agency Name] will:

[154] Based on California Dept. of Industrial Relations, *All California workers are entitled to workplace protection*, *available at* www.dir.ca.gov.

a. Investigate complaints of violations of the wage and hour laws and file court actions to seek and collect unpaid wages and all other remedies authorized under state law without regard to the worker's immigration status, unless explicitly prohibited by federal law.
b. Investigate retaliation complaints and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about unpaid wages, without regard to the worker's immigration status unless explicitly prohibited by federal law.

Occupational safety and health laws: State agencies responsible for enforcing occupational safety and health laws may also adopt the same policy, except the first paragraph should read:

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

1) The [Agency Name] will:

a. Investigate complaints of violations of the occupational safety and health laws and file court actions to enforce the law without regard to the worker's immigration status unless explicitly prohibited by federal law.
b. Investigate retaliation complaints [if state law includes an anti-retaliation provision] and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about unpaid wages without regard to the worker's immigration status unless explicitly prohibited by federal law.

Workers' compensation: State agencies responsible for enforcing workers' compensation laws should adopt the following policy:

The [Agency Name] is responsible for providing workers with medical care and wage replacement when an injury or an occupational disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.[155]

1) The [Agency Name] will provide medical expenses, wage replacement and all other benefits and remedies authorized under state law to all workers regardless of immigration status unless explicitly prohibited by federal law.

2) The [Agency Name] will not ask injured workers or their witnesses for their social security number (SSN) or other information that might lead to disclosing an individual's immigration status, and will not ask injured workers or their witnesses about their immigration status and will not maintain information regarding immigration status in their files.

3) Worker's immigration status is not relevant to determine eligibility for medical expenses or wage replacement.[156]

[155] Based on Statement dated May 21, 2002 by Gary Moore, Director of Washington State Department of Labor and Industries.

4) During the course of court proceedings, the [Agency Name] will oppose efforts of any party to discover an injured worker's or witnesses' immigration status by seeking a protective order or other similar relief.

5) In the rare occasion that [Agency Name] must know the injured worker's or witnesses' immigration status, it will keep that status confidential, and will have a policy of nondisclosure to third parties (including to other state or federal agencies), unless otherwise required by federal law.

6) If a party raises the issue of an injured worker's or witnesses' immigration status in the course of proceedings, the party must show that the evidence is more probative than prejudicial, and that it obtained such evidence in compliance to 8 CFR § 274a.2(b)(1)(vii).

7) [Agency Name] will train its staff (including intake officers, investigators, attorneys, and other relevant staff) on this policy and will work closely with community-based organizations to conduct this training.

8) [Agency Name] will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.

State Legislative Action

Another approach to ensuring undocumented workers that their rights will be protected after *Hoffman* focuses on state legislation. The California legislature has become the first in the country to adopt an affirmative state law post-*Hoffman.*

Highlighted State Legislation: California Law

The bill, SB 1818, which was signed into law by California Governor Gray Davis on September 29, 2002, was introduced in the California legislature on February 22, 2002, as a means of protecting the employment rights of workers, regardless of immigration status, under state law. The law amends the Civil, Government, Health and Safety and Labor Codes and makes declarations of existing law. It reaffirms that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment who are or who have been employed, in this state."[157] It also reaffirms that:

> For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.[158]

---

[156] However, immigration status may be relevant to determine employer's obligation to provide vocational rehabilitation. *See Tarango v. State Industrial Insurance System,* 25 P.3d 175 (Nev. 2001); *Foodmaker v. Workers' Compensation Appeals Board,* 78 Cal. Rptr.2d 767 (Cal Ct. Apps, Div 2 1999).

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

[158] Id. The full text of California's law is reprinted in the Appendix.

What Can Advocates Do?

√ Help educate undocumented workers about their rights.[159]

√ Continue to encourage undocumented workers to assert their labor rights. Assist them in filing claims and protect the confidentiality of their status.

√ If you can do it safely for the workers involved, publicize stories of unscrupulous employers who take advantage of immigrant workers.

√ Work to get your state labor agency and/or legislature to reaffirm undocumented immigrant workers' rights and to publicize their will to protect the undocumented.

[159] Use the NELP fact sheets for workers and advocates, published at http://www.nelp.org/publications/immigrant

Chapter 5: Focus on Worker Health and Safety: Equal Access to Workers' Compensation Benefits

Immigrant workers toil in some of the most hazardous employment in this country. Injuries and deaths of Hispanic workers engaged in hazardous employment are extremely high and increasing. The numbers of fatal work injuries among white and black workers were lower in the year 2000, but in that year, there was a 24 % jump in construction fatalities involving Hispanic workers. Total Hispanic employment was up only six percent in 2000.[160]

In California in 2001, 49 agricultural workers were killed on the job. A recent death of a farm worker in California resulted in a manslaughter charge against the farm owner for an egregious violation of the health and safety code.[161] Agriculture is second only to construction and mining in accident rates. Construction is also an industry hiring large numbers of immigrant workers.

New York has the nation's highest rate of immigrants killed on the job, with foreign-born workers accounting for three of every ten deaths.

New York has the nation's highest rate of immigrants killed in the workplace, with foreign-born workers accounting for three of every 10 deaths. In a most recent accident, five immigrant workers were killed and 14 workers injured in an accident in Manhattan in October 2001.[162]

Economist Paul Leigh has quantified the overall costs of occupational injuries and deaths.[163] Leigh's findings include that the occupations in which immigrants are overrepresented, including heavy truck drivers, non-construction laborers, machine operators, janitors, nursing orderlies, construction laborers, assemblers, retail sales workers (not elsewhere specified), miscellaneous machine operators, and carpenters, are also those that contribute the most to total costs.

State Workers' Compensation Laws

All 50 states have state laws that give workers' compensation benefits to workers who are injured on the job.

Workers' compensation legislation arose out of conditions produced by the modern industrial workplace and the inability of common-law remedies to address injuries suffered by workers. Under workers' compensation, workers give up the right to sue their employers for workplace injuries. In return, they get the swift and sure, if smaller, remedy of medical coverage and some compensation, in the form of time loss benefits, permanent partial disability awards, and pensions. The basic test of workers' compensation liability is work connection, rather than fault, and liability is imposed as an incident of the employment relationship, a cost to be borne by the business enterprise.

---

[160] U.S. Department of Labor,Bureau of Labor Statistics, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000 (Aug. 14, 2001).
[161] Andy Furillo, *Farm death sparks manslaughter charge*, SACRAMENTO BEE (Dec. 18, 2001).
[162] Thomas Maier, *Death on the Job: Immigrants at Risk,* NEWSDAY (Dec. 16, 2001).
[163] J. P. Leigh, and Miller, T. R., *Ranking occupations based upon the costs of job-related injuries and diseases,* J OCCUP. ENVIRON. MED (1997). 39:(12)1170-1182.

Workers' compensation programs vary from state to state. The programs are typically financed through payroll taxes. Workers' compensation generally covers an injured worker's medical costs, and provides some portion of wage replacement for periods that a worker is unable to perform his or her job duties. Finally, they provide for compensation for disabilities and fatalities on the job. They provide benefits to the individual worker and his family, and the overall community similar to other social insurance programs.

The majority of the states' workers' compensation laws include "aliens" in the definition of covered employees.[164] Entitlement to lost wages under state workers' compensation laws turns on state statutes and their definition of "worker" or "employee." State courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas have specifically held that undocumented workers are covered under their state workers' compensation laws.[165]

Model State Legislation

In 1999, the Supreme Court of Virginia held that an undocumented immigrant was not entitled to workers' compensation benefits.[166] Virginia is the only state in which a court has reached this conclusion in the absence of a clear statutory mandate to exclude undocumented immigrants from its worker compensation system. Virginia employers soon realized that the prospect of being sued in tort for workplace injuries was much less appealing than paying workers' compensation premiums. Employers, concerned about facing huge judgments in tort litigation, went back to the legislature to amend state law so that it specifically includes, "Every person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed."[167] When the governor vetoed the inclusive legislation, the bill had enough support in the legislature to override the veto. Surprisingly, Virginia has thus become one of the model

---

[164] *See,* ARIZ. REV. STAT. § 23-901(5)(b) (Matthew Bender, LEXIS); CAL. LAB. CODE § 3351(a) (Deering, LEXIS); FLA. STAT. ch. 440.02(14)(a) (LEXIS); IL COMP. STAT. 820/305(1) b (West 2002); KY. REV. STAT. ANN. § 342-0011(21) (Matthew Bender, LEXIS); MICH. STAT. ANN. § 17.237(161)(1)(l) (Michie, LEXIS); MINN. STAT. § 176.011 subd.9(1) (LEXIS); MISS. CODE ANN. § 71-3-27 (LEXIS); MONT. CODE ANN. § 39-71-118(1)(a) (LEXIS); NEB. REV. STAT. § § 48-115(2), 48-144 (Matthew Bender, LEXIS); NEV. REV. STAT. ANN. § 616A.105 (Matthew Bender, LEXIS); N.M. STAT. ANN. 52-3-3 (Matthew Bender, LEXIS); N.C. GEN. STAT. 97-2(2) (Matthew Bender, LEXIS); N.D. CENT. CODE § 65-01-02(17)(a)(2) (Matthew Bender, LEXIS); OHIO REV. CODE ANN. 4123.01(A)(1)(b) (Anderson, LEXIS); S.C. CODE ANN. § 42-1-130 (LEXIS); TEX. LAB. CODE § § 401.011, 406.092 (LEXIS); UTAH CODE ANN. § 34A-2-104(1)(b) (Matthew Bender, LEXIS); VA. CODE ANN. 65.2-101 (Matthew Bender, LEXIS).

[165] *See, Champion Auto Body v. Gallegos*, 950 P.2d 671 (Colo. Ct. App. 1997); *Gene's Harvesting v. Rodriguez*, 421 So.2d 701, 701 (Fla. Dist. Ct. App. 1982); *Pablo D. Artiga v. M.A. Patout and Son*, 671 So.2d 1138, 1139 (La. Ct. App. 1996); *Lang v. Landeros*, 1996 Ok Civ. App. 4; 918 P.2d 404 (Okla. Ct. App. 1996); *Gayton v. Gage Carolina Metals Inc.*, 560 S.E.2d 870 (N.C. Ct. App. 2002); *Ruiz v. Belk Masonry Co.*, 559 S.E.2d. 249 (N.C. Ct. App. 2002); *Rivera v. Trapp*, 519 S.E.2d 777 (N.C. Ct. App 1999); *Mendoza v. Monmoth Recycling Corp.*, 672 A.2d 221 (N.J. Super. Ct. 1996); *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 749 A.2d 1036, 1038 (Pa. Commw. Ct. 2000); *Dowling v. Slotnik*, 712 A.2d 396, 403 (Conn. 1998); *Dynasty Sample Company v. Beltrain*, 224 479 S.E.2d 773 (Ga. 1996); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972); *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super 14, 20; 671 A.D.2d 1051, 1054 (N.J. Super. Ct. App. Div. 1996). *See, also, Iowa Erosion Control v. Sanchez*, 599 N.W.2d 711 (Iowa, 1999) ("The employer has furnished no authority to support its view that, on grounds of policy or morality, [decedent worker's surviving mother's] immigration status has any bearing on her entitlement to benefits." Id*,* at 715); *Del Taco v. Workers' Compensation Appeals Board*, 79 Cal. App. 4th 1437 (Cal. Ct. App. 2000) (Holding that the California workers' compensation laws apply to aliens but do not "expressly authorize vocational rehabilitation benefits for an 'illegal worker'" who is not otherwise "medically eligible." Id., at 1439 –1442).

[166] *Granados v. Windson Dev. Corp,* 509 SE2d 290 (1999).

[167] VA. CODE ANN. 65.2-101 (Matthew Bender, LEXIS).

states to cover immigrant workers under its workers' compensation system. (Its statute is reprinted in the Appendix.)

Twelve state courts have specifically held that undocumented workers are covered under their state workers' compensation laws.

Like Virginia, a number of other states also explicitly provide for workers' compensation benefits for "lawfully or unlawfully employed" employees. They are: Arizona, California, Colorado, Florida, Montana, North Carolina, South Carolina, and Utah.[168] There is only one state, Wyoming, which has a statute specifically limiting coverage to documented "aliens."[169]

The workers' compensation laws in most states have special provisions for nonresident alien dependents, with some expressly including them on equal terms with other dependents, some excluding them from benefits altogether, some providing for reduced benefits or the commutation of benefits to a lump sum on a reduced basis, and many restricting the classes of beneficiaries. In 1993, a Kansas court held that a statute that limited workers' compensation nonresident alien dependents' death benefits to $750, while all other dependents, including resident alien dependents, were entitled to compensation benefits of up to $200,000, was unconstitutional.[170]

Undocumented Workers and Vocational Rehabilitation

Vocational rehabilitation benefits are paid during retraining of an injured worker. They generally include payment for retraining so the worker can perform a new job. Courts in two states, California and Nevada, have found that undocumented workers are not entitled to vocational rehabilitation benefits under certain circumstances. In both cases, state law established a hierarchy of benefits to be offered to an injured worker, which focused first on return to the prior job, then other employment that would accommodate the injury or limitations of the worker, then the more expensive training. In both cases, the employer had innocently discovered the worker's status and could not rehire the worker because to do so would violate the immigration laws. In both cases, the courts found that the workers' compensation system should not have to provide more expensive vocational rehabilitation benefits to a worker who does not qualify for the other, less expensive remedies, only by reason of his immigration status.[171]

Undocumented Workers and Time Loss after *Hoffman*

A worker in Pennsylvania was rendered unconscious after being struck with a steel beam in the head, neck and back, and sustained a concussion, head injury and back strain and sprain. He was ill for many months before being terminated by his employer. Apparently after the injury, the employer verified with the INS that he was unlawfully in the United States. It claimed that he was not entitled to workers' compensation. Although the Pennsylvania Supreme Court held that the worker is entitled to medical benefits, it found

[168] ARIZ. REV. STAT. § 23-901; CAL LAB CODE § 3351 (2001); C.R.S. 8-40-202; FLA. STAT. § 440.02; MONT. CODE ANNO., § 39-71-118; N.C. GEN. STAT. § 97-2; S.C. CODE ANN. § 42-1-130 (2001); UTAH CODE ANN. § 34A-2-104; VA.CODE ANN. § 65.2-101

[169] WYO. STAT. ANN. § 27-14-102 (a)(vii) (LEXIS).

[170] *Jurado v Popejoy Constr. Co.*, 853 P2d 669 (Kan. Sup. Ct. 1993).

[171] *See Tarango v. State Industrial Insurance System,* 25 P.3d 175 (Nev. Sup. Ct. 2001); *Foodmaker v. Workers' Compensation Appeals Board,* 78 Cal. Rptr.2d 767 (Cal Ct. Apps, Div 2 1999).

that illegal immigration status would justify terminating benefits for temporary total disability.[172] In a second case, decided January 7, 2003, the Michigan Court of Appeals held that wage loss compensation could be suspended for an undocumented worker from the date that the employer "discovered" that the worker did not have authorization to be employed, under a specific state law that allows suspension of wage loss benefits if a worker commits a "crime" that prevents him or her from working or obtaining work.[173] In neither case did the court engage in a meaningful discussion of the prime cause of the workers' inability to work: the injury, rather than the use of false documents to obtain a job in the first place.

It is likely that other cases will come up around the country as employers learn that hiring an undocumented worker could mean that if the worker is injured, the employer gets a "free pass" on the time loss portion of her bill, yet faces no tort liability. (See Discussion of *Hoffman* in Chapter 4, *supra*.). However, *Hoffman* does not stand for the proposition that undocumented workers have no right to time loss benefits under workers' compensation statutes. There are many reasons to distinguish the discretionary federal NLRA remedy of backpay from a mandatory payout of insurance under state law. It is important in the first instance to resist discovery requests aimed at an injured workers' immigration status, and to resist any argument that undocumented workers' compensation rights are diminished by *Hoffman.*

Highlighted Campaign: New York: Workers file NAFTA complaint against the U.S. and the New York State Workers' Compensation Board

In October, 2001, injured and concerned workers leading the National Mobilization Against Sweatshops' "It's About TIME!" Campaign for Workers' Health and Safety exposed to the world New York State's violations of workers' human rights by filing a complaint based on the labor rights agreement of the North American Free Trade Agreement (NAFTA). A delegation went to Mexico City to initiate the NAFTA complaint against the United States and the New York State Workers' Compensation Board.

The NAFTA complaint charges that the New York State Workers' Compensation violates workers' rights by allowing endless delays to injured workers' cases, forcing injured workers into poverty and worsened health, and permitting insurance companies to profit from millions of dollars of unpaid benefits. Additionally, the complaint holds New York State guilty of not protecting the health and safety of all working people. Under the labor side agreement to NAFTA, called the North American Agreement on Labor Cooperation (NAALC), the Mexican government must review the complaint and make recommendations for its resolution.

The failure of the workers' compensation system to protect immigrant farmworkers is also the subject of a pending NAALC complaint in Washington State. This complaint is at the level of consultations between the Mexican Labor Department and the United States Department of Labor. Advocates are considering whether to push the complaint to the next level of review, provided under the NAALC, in particular because of the state's failure to address issues surrounding the workers' compensation system.

[172] The Reinforced Earth Company v. Workers' Compensation Appeal Board, 2002 WL 31476901, __A. 2d ___ (Pa, 2002).
[173] *Vazquez v. Eagle Alloy,* 2003 WL 57544, ___N.W.2d ___ (Mich. Ct. Apps. 2003).

What Can Advocates Do?

√ Make sure that undocumented workers are entitled to workers' compensation in your state.
√ Make sure that undocumented workers continue to have workers' compensation protection after *Hoffman* by getting state agencies to adopt policies such as those outlined in Chapter 5.
√ Make sure that LEP workers have access to translations and interpretations.
√ Study the efficiency of your workers' compensation system and consider filing legal claims, including additional NAFTA claims.

Conclusion and Recommendations

This report seeks to advise advocates on the steps they can take to ensure that all immigrant workers have equal access to work-related benefits and the services of state agencies who would protect their rights. Unless state laws clearly protect undocumented immigrant workers, unless state agencies understand that they must enforce the laws for the benefit of these workers, and unless they can be served in their own language, immigrant workers, and especially the undocumented, will continue to suffer the most egregious forms of workplace abuse without recourse.

The five areas for advocacy selected in this report have several things in common: they are each the subject of ongoing advocacy from which advocates can learn. They each concentrate on changes that can be made at the state, rather than federal, level. Finally, each involves protection of a fundamental workplace right or a right central to a worker's ability to continue at a job. The authors urge advocates across the country to learn from each other and use this report as a tool to continue their advocacy.

This section summarizes our conclusions and recommendations:

1) Language access state agency services, including enacting state anti-discrimination laws that protect immigrant workers and enacting anti-English only workplace rules.

Advocates should work to ensure that their state law contains express provisions for language access to vital work-related benefits and services, such as unemployment compensation, workers' compensation, and the assistance of state labor agencies. Advocates should also review the practices of state agencies that are assigned the task of protecting the labor rights of all workers, to make certain that they are accessible to the limited English proficient. Advocates should consider specific state and local legislation, and litigation under state statutes that protect language access or, more broadly, guard against national origin discrimination by state agencies. In particular, states should provide in-person access to interpreters in locations with large immigrant populations. Advocates should also consider specialized laws that require employers and state agencies to communicate information about labor rights in a workers' primary language.

2) State and local amnesty and sanctuary or confidentiality rules concerning police enforcement of immigration laws.

Advocates should review the practices of their state and local government entities, including social services and policy agencies, to be certain that they assist immigrants regardless of their legal status, and that they make no reports regarding status to the INS. Using the models outlined here, advocates can work for better assurances

from these agencies, and help them to publicize their policies in immigrant communities, for the safety of all our communities.

3) State rules expanding access to drivers' licenses.

Using the all-state charts referenced here, advocates should make certain that their state does not discriminate against immigrants based on their lack of social security numbers, legal status, or the length of their visa in its provision of drivers' licenses. State laws expanding access to drivers' licenses make us all safer. Advocates should join together to defeat restrictionist licensing policies and to expand access to licenses, using reliable alternative forms of identification, such as the Individual Taxpayer Identification Number (ITIN), and the *matricula consular.*

4) Post-*Hoffman* – looking to states to enforce labor rights.

Using the model language here, advocates should work with labor agencies to adopt policies protecting the labor rights of all workers, including those who may be undocumented. Advocates should stress with state labor agencies that, in order to protect the most vulnerable workers, they must have a firewall between their agencies and the INS, and they must publicize their policies in immigrant communities.

5) Access for immigrant workers to workers' compensation.

Advocates can work to ensure that undocumented immigrants retain their right to be compensated for injuries sustained on the job by either working for a specific state policy on the issue or an amendment to state law. Should undocumented workers be left uncovered by certain aspects of the workers' compensation system, employers will have a powerful incentive to hire only the undocumented. Such an approach would also incentivize negligence in terms of workplace safety. Employers will be encouraged to hire undocumented workers, neglect their workplace safety needs, and take a "free pass" on workers' compensation when these workers are injured on the job.