

Opportunities for New Alliances to Protect the Rights of Undocumented Immigrant Workers

By Marielena Hincapié

History has shown repeatedly that when the economy is strong antiimmigrant sentiments diminish and new opportunities that benefit immigrant communities arise. While a majority of low-wage workers have clearly not benefited from the "booming economy," the current climate favors legislative, political, and organizing efforts within and on behalf of immigrant communities. Due in large part to ongoing grass-roots campaigns responding to the draconian immigration and welfare reform laws of 1996, including the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, thousands of immigrants have been prompted to become naturalized citizens, actively participate in the political process, and speak in a united voice that elected officials must now heed.¹

The opportunities presented for immigrants, particularly undocumented workers, are most notably manifested by the landmark shift on immigration policy

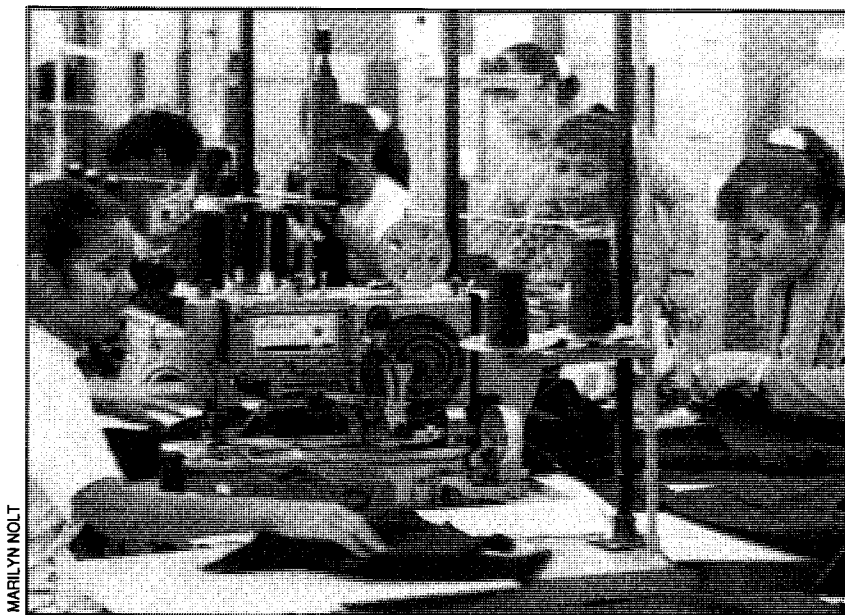
within the AFL-CIO (American Federation of Labor and Congress of Industrial Regulations). In February 2000 the labor federation called for a general legalization benefiting all undocumented immigrants currently in the United States, the repeal of employer sanctions, full rights for all workers, and whistle-blower protections for undocumented workers retaliated against by employers. The AFL-CIO's resolution strengthens the ties between organized labor and low-wage immigrant workers and their advocates. It has also helped create other alliances that are pushing for reforms that only two years ago would have been looked upon as idealistic.² These activities have led to a surge of legislation that aims to undo some of the harms created by the 1996 laws. The Latino and Immigrant Fairness Act of 2000 and related bills, along with the immigrant community's hope that another legalization bill will soon pass, has helped engender optimism and increased activism.³ In advocating steps toward full legalization, however, we must

¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C.); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

² The AFL-CIO's policy shift is particularly significant since organized labor had supported the 1986 passage of employer sanctions under the mistaken belief that sanctions would help reduce the flow of undocumented immigrants and thus assist the unions in protecting jobs for U.S. citizens and authorized workers.

³ Advocates had hoped that the Latino and Immigrant Fairness Act, S. 2912, 106th Cong. (2000), would pass, but it did not. Instead the Republican counterproposal has passed.

Marielena Hincapié is a staff attorney, National Immigration Law Center, 1212 Broadway, Suite 1400, Oakland, CA 94612; 510.663.8282 ext. 305; hincapie@nilc.org.



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press for labor protections for all workers, regardless of immigration status. As shown by the following discussion of problems that the Immigration Reform and Control Act of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act caused for both documented and undocumented workers, as long as some workers cannot assert basic labor law rights, everyone's rights are weakened.⁴

In this article I first give a background on how current immigration laws affect all workers' rights, in particular the problems created by employer sanctions and the employment verification process. Second, I briefly examine existing federal laws protecting undocumented workers from national origin and citizenship-based discrimination, as well as retaliation based on their immigration status. In the concluding section I discuss the need

to expand existing protections for immigrant workers and the opportunities this need presents for new alliances to work together to secure fundamental expansions of immigrant workers' rights.

I. Immigration Laws with an Impact on the Workplace

In 1986 Congress passed the Immigration Reform and Control Act, which for the first time prohibited employers from hiring undocumented workers.⁵ Employer sanctions were created to reduce employment's draw as the principal magnet attracting people to the United States. Employers are now subject to sanctions if they hire or continue to employ individuals they "know" to be unauthorized to work, and employers are also required to comply with the verification of employment eligibility through the use of the "I-9 form."⁶

A. Verifying Employment Eligibility

Within the first three days of being hired, employees must fill out the I-9 under penalty of perjury and present documents establishing their identity and work authorization. The employer is required to accept whatever documents the employee chooses to present from the list of acceptable documents appearing on the I-9. If an employee presents a document with a future expiration date, the employer is also required to reverify that worker's continuing eligibility.

From the outset immigrants' rights activists feared that employer sanctions and the employment eligibility verification process would cause widespread discrimination; the activists advocated additional protections.⁷ Due to these concerns,

⁴ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

⁵ *Id.* § 101(a)(1). Up until this point, for individuals to be in the United States without proper documentation from the Immigration and Naturalization Service (INS) had been unlawful, but to be employed without work authorization was not a separate violation. Indeed section 274(a) of the Immigration and Nationality Act of 1952 concluded by stating "[t]hat[,] for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring" of an alien; such harboring is unlawful under the Act. *Id.*, Pub. L. No. 82-414, § 274(a), 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.) (1952).

⁶ 8 U.S.C. § 1324a(a), (b). Individuals hired before November 6, 1986, are "grandfathered" in and thus exempt from the verification requirements.

⁷ H.R. CONF. REP. NO. 682, pt. I, at 70 (1986), *reprinted in* 1986 U.S.C.A.N. 5649, 5672.

Congress complemented the protections against national-origin discrimination provided under Title VII of the Civil Rights Act of 1964 by including national-origin protections and specific protections against citizenship-status discrimination in the Immigration and Nationality Act.⁸ Unfortunately the Immigration and Nationality Act's protections are quite limited and do not cover many immigrant workers.⁹ Congress also required the General Accounting Office to issue three annual reports to review the Immigration Reform and Control Act's impact and created an interagency task force charged with recommending appropriate remedies—including the possible repeal of sanctions—to be implemented if the Act resulted in widespread national-origin discrimination.¹⁰

In 1990 Congress amended the Immigration Reform and Control Act to add protections against retaliation and document abuse.¹¹ The latter occurs when an employer demands more specific or additional documents than are required or refuses to accept documents listed on the I-9 that on their face reasonably appear to be genuine. Document abuse can also occur in reverifying eligibility. Moreover, employers often decide suddenly to reverify employees' work authorization when workers are engaging in a union-organizing drive or some other protected activity. Undocumented workers, as well as authorized workers unable to produce an Immigration and Naturalization Service (INS) document because of that agency's delays in processing their applications, may end up

⁸ Immigration and Nationality Act, 8 U.S.C. § 1324b(a)(1)(B), (a)(3) (complementing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*); see *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (Clearinghouse No. 12,262) (finding that, while Title VII prohibits discrimination based on national origin, it does not prohibit discrimination based on alienage or citizenship). In enacting the antidiscrimination provisions of the Immigration and Nationality Act, the Conference Committee commented: "The Committee does not believe barriers should be placed in the path of permanent residents and other aliens who are authorized to work and who are seeking employment, particularly when such aliens have evidenced an intent to become U.S. citizens. It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status. Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so." H.R. CONF. REP. NO. 682, pt. I, at 70 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5674. The Immigration and Nationality Act proscribes national-origin discrimination against all work-authorized employees. The protection against citizenship-status discrimination is limited to U.S. citizens or nationals and "protected individuals," who are naturalized citizens, lawful permanent residents who file for citizenship within six months of being eligible, lawful temporary residents, refugees, and asylees. 8 U.S.C. § 1324b(a)(1)(B), (a)(3).

⁹ *Cf.* Civil Rights Act of 1866, 42 U.S.C. § 1981, *as amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(1)(b), 105 Stat. 1071 (protecting individuals from discrimination based on national origin and alienage); see *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), *reh'g denied*, 483 U.S. 1011 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (applying Section 1981 to national origin); *Duane v. Gov't Employees Ins. Co.*, 37 F.3d 1036 (4th Cir. 1994) (applying Section 1981 to alienage), *cert. granted*, 513 U.S. 1189, *cert. dismissed*, 515 U.S. 1101 (1995); *Nagy v. Baltimore Life Ins. Co.*, 49 F. Supp. 2d 822 (Md. 1999), *aff'd in part, vacated in part, remanded*, 2000 U.S. App. LEXIS 12307 (4th Cir. 2000) (same). While Section 1981's coverage of undocumented workers is not entirely clear, courts have held that Section 1981 and the Immigration Reform and Control Act can coexist. See *Anderson v. Conboy*, 156 F.3d 167, 180 (2d Cir. 1998), *cert. granted sub. nom. United Bhd. of Carpenters and Joiners of Am. v. Anderson*, 67 U.S.L.W. 3649 (U.S. Apr. 26, 1999).

¹⁰ 8 U.S.C. § 1324a(l)(1), (m–n). Employer sanctions were not repealed notwithstanding that in its third report the General Accounting Office found that 19 percent of the employers it studied had engaged in widespread discriminatory practices against prospective employees who were "foreign looking," "foreign sounding," or who had "strange surnames." See GEN. ACCOUNTING OFFICE, REP. NO. GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (1990).

¹¹ 8 U.S.C. § 1324b(a)(5), (6).

being fired. Authorized workers may be able to comply with the reverification process, but they are chilled from further asserting their workplace rights. Since the Immigration and Nationality Act's document-abuse protections are not widely known, and undocumented workers are not protected, charges are rarely filed against the abusive employer.¹²

B. Illegal Immigration Reform and Immigrant Responsibility Act's Amendments

The limited rights that the Immigration and Nationality Act's antidiscrimination provisions afforded to workers have been further restricted by the Illegal Immigration Reform and Immigrant Responsibility Act's amendments. Now individuals who claim document abuse must also establish that the employer intended to discriminate against them based on their national origin or citizenship status; this deters many potential charging parties from bringing claims.¹³ The Illegal Immigration Reform and Immigrant Responsibility Act also provides employers with a defense to sanctions. The employer must simply assert that it made a "good faith" attempt to comply with the employment-verification requirements.¹⁴

1. Changes in the I-9 List

The Illegal Immigration Reform and Immigrant Responsibility Act eliminated certain documents from the I-9 list and

thus prompted a number of INS regulatory changes.¹⁵ In September 1997 the immigration agency issued an interim rule changing the I-9's list of acceptable documents in order to comply with the Act's mandate that the changes be made within one year. However, in order to reduce confusion, the agency exercised its discretion not to enforce the interim rule until it could implement a more streamlined employment eligibility verification program, revise the I-9, and educate employers about the form's proper use.¹⁶ Shortly after the interim regulation was issued, President Clinton signed a bill extending the Act's deadline for revising the I-9 list by another six months. The agency then considered withdrawing the interim rule but decided instead not to enforce the interim rule until a final rule is issued.¹⁷

In February 1998 the INS issued proposed regulations that would further reduce the number of acceptable documents by half.¹⁸ A major problem with this change stems from the immigration agency's backlogs and delays in adjudicating applications. Immigrants frequently experience lengthy waits in obtaining initial and renewed employment authorization documents from the agency. Because immigrants' rights advocates across the country criticized the proposed changes, the agency is reexamining its proposed regulations. The changes have yet to go into effect.¹⁹

¹² Any work-authorized individual may file a claim of document abuse within 180 days of the employer's discriminatory act, so long as the employer has four or more workers. Charges must be filed with the Department of Justice's Office of Special Counsel, which is responsible for enforcing the Immigration and Nationality Act's antidiscrimination provisions. 8 U.S.C. § 1324b(b). The Office of Special Counsel can be reached at 800.255.7688 and via the Internet at www.usdoj.gov/crt/osc.

¹³ On the requirement to show employer intent, see, e.g., *United States v. Townsend Culinary Inc.*, 8 OCAHO 1032 (Aug. 11, 1999).

¹⁴ 8 U.S.C. § 1324a(b)(6).

¹⁵ Specifically the Illegal Immigration Reform and Immigrant Responsibility Act required that the certificate of U.S. citizenship, certificate of naturalization, an unexpired passport stating that the individual is authorized to work, and birth certificate be removed from the I-9 list. *Id.* § 412.

¹⁶ Interim Designation of Acceptable Documents for Employment, 62 Fed. Reg. 51001 (1997).

¹⁷ See Reduction in the Number of Acceptable Documents and Other Changes to Employment Verification Requirements, 63 Fed. Reg. 5287 (1998).

¹⁸ *Id.*

¹⁹ See GEN. ACCOUNTING OFFICE, REP. NO. GAO/GGD-99-33, *ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 14* (1999) [hereinafter *ILLEGAL ALIENS*].

2. Dangers of Document Fraud for Workers

Employer sanctions and the use of I-9 have forced undocumented workers to use false documents as a means of survival, subjecting themselves to drastic penalties. The Immigration Act of 1990 created civil penalties for document fraud, with civil fines and permanent immigration consequences.²⁰ In 1996 the Illegal Immigration Reform and Immigrant Responsibility Act expanded the definition of document fraud and intensified the severity of both the civil and criminal fines.²¹

Under the expanded definition, for any person or entity to “forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act or to obtain a benefit under this Act” is unlawful.²² Enacted under the Illegal Immigration Reform and Immigrant Responsibility Act, the statutory definition of “falsely make” may be interpreted to encompass an employee’s false statements on the I-9 since it expressly includes putting false information on

an “application or document.”²³ The regulations broadly define the term “document” to include “an application required to be filed under the Act and any other accompanying document or material.”²⁴ Again, since the Immigration and Nationality Act requires employees to fill out the I-9 and present documents establishing their identity and work authorization, a person who provides false documents or false information on the I-9 can be found to have engaged in document fraud.²⁵

Aside from the dangers posed by the breadth of activities potentially covered by document fraud, the stakes are extremely high for any worker, undocumented or otherwise, who at some point used false documents to obtain employment. An individual might be subject to a range of civil monetary penalties, be deported, be deemed to be inadmissible (which would prevent the individual from ever returning to the United States), or even be subject to incarceration.²⁶

Given the potentially grave consequences, a comprehensive outreach cam-

²⁰ Immigration Act of 1990, Pub. L. No. 101-649, § 544(a), 104 Stat. 4987 (enacting 8 U.S.C. § 1324c).

²¹ Illegal Immigration Reform and Immigrant Responsibility Act § 213.

²² 8 U.S.C. § 1324c(a)(1). The Illegal Immigration Reform and Immigrant Responsibility Act also makes it unlawful to “accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with the verification requirements of the employer sanctions section of the [Immigration and Nationality Act] or of obtaining a benefit under this Act.” *Id.* § 1324c(a)(4).

²³ *Id.* § 1324c(f). Prior to the Illegal Immigration Reform and Immigrant Responsibility Act, the interpretation of the term “falsely make” did not include the act of putting false information on the I-9 since the form was genuine and not forged or altered. *United States v. Remileh*, 5 OCAHO 724 (Feb. 7, 1995).

²⁴ 8 C.F.R. § 270.1 (2000).

²⁵ See, e.g., *Villegas-Valenzuela v. INS*, 103 F.3d 805 (9th Cir. 1996) (finding that the presentation of documents as part of using the I-9 is to satisfy a requirement of the Immigration and Nationality Act).

²⁶ Fines range from \$250 to \$2,200. 8 U.S.C. § 1324c(d)(3)(A); 8 C.F.R. § 270.3(b)(1) (2000). For individuals with previous document-fraud violations, fines can range from \$2,000 to \$5,500. 8 U.S.C. § 1324c(d)(3)(B). On deportation see *id.* § 1227(a)(3)(C)(i). A limited waiver is available for legal permanent residents who used false documents “solely to assist, aid, or support the alien’s spouse or child.” *Id.* § 1227(a)(3)(C)(ii). On admissibility see *id.* § 1182(a)(6)(F). A limited waiver is available for legal permanent residents who voluntarily and temporarily traveled abroad, are not under a deportation order, and are otherwise admissible, as well as for those individuals seeking admission or adjustment of status based on an immediate relative or family-based petition. Again, to qualify for the discretionary waiver, both categories of individuals must have committed the offense “solely to assist, aid, or support the alien’s spouse or child.” *Id.* § 1182(d)(12). The maximum term of incarceration for document fraud is generally fifteen years but is longer if the fraud is related to drug trafficking or terrorist activities. 18 U.S.C. §§ 929(a)(2), 1028(b), 2331.

campaign is needed to educate undocumented workers and their advocates on the legal ramifications of and the potential defenses to document fraud. Likewise, there must be strong links among the immigration, criminal defense, and plaintiff-side employment bars to develop litigation strategies challenging the overbroad use of document fraud charges.²⁷

C. Employment Verification Pilot Programs

The INS's efforts to simplify the use of I-9 through data bases plagued with inaccuracies are troubling, and the agency's lack of proper safeguards against discrimination is equally so. The Illegal Immigration Reform and Immigrant Responsibility Act authorized the immigration agency to test three new pilot programs over four years, a period soon to sunset.²⁸ These programs are as follows: (1) the Basic Pilot, which operates in five states with high percentages of immigrants (California, New York, Texas, Florida, and Illinois), allows employers to verify an individual's employment eligibility first through a Social Security Administration data base and then through an INS data base if the Social Security Administration cannot verify eligibility; (2) the Citizen Attestation Pilot gives employers in Arizona, Massachusetts, Maryland, Michigan, and Virginia access to the immigration agency's data base because these states' documents meet certain counterfeit-proof requirements; and (3) the Machine-Readable Document Pilot would

allow employers in Iowa to verify the employment authorization of new hires (Iowa issues driver's licenses and identification documents with a machine readable social security number).²⁹

Because pilot programs modify the established procedures for verifying employment authorization, they make it more difficult for immigrant workers to seek remedies for discrimination. For example, in circumstances not involving pilot programs, an employer's requirement that noncitizens present additional documents not required of U.S. citizens constitutes unlawful document abuse. By contrast, the Citizenship Attestation Pilot specifically requires employers to verify employment authorization only for noncitizens.

D. Enforcement at Work Sites

In January 1999 the INS announced its new "interior enforcement" strategy, aiming to reduce the size and annual growth of undocumented residents by purportedly focusing on employers who are in "flagrant or grave violation." Among its new priorities are to dismantle the criminal infrastructure that encourages and benefits unlawful migration and to block employers' access to undocumented workers.³⁰

In late 1998, well before the INS announced its new strategy, it had already begun "Operation Vanguard." Initially named "Operation Prime Beef," Operation Vanguard targets the meat-packing industry in Nebraska and Iowa; in recent years the industry has employed a high percentage of immigrant workers. Officials

²⁷ See, e.g., *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998) (finding INS forms and procedures used to charge immigrants with civil document fraud in violation of due process), *cert. denied*, 526 U.S. 1003 (1999).

²⁸ Illegal Immigration Reform and Immigrant Responsibility Act § 401.

²⁹ See Nat'l Immigration Law Ctr., Basic Information on Employment Verification Pilot Programs (Jan. 2001), www.nilc.org/immigrants and employment. Prior to the authorization by the Illegal Immigration Reform and Immigrant Responsibility Act, the INS was already operating the Employment Verification Pilot (originally named the Telephone Verification System) and the Joint Employment Verification Pilot, which were similar to the Basic Pilot program. See Immigration Reform and Control Act § 101(d). The INS has also expanded the Basic Pilot to Nebraska in conjunction with Operation Vanguard, discussed *infra* part II.D. See *INS Expands Employment Eligibility Verification Pilot Program to Nebraska*, 76 INTERPRETER RELEASES 459, 460 (Mar. 22, 1999).

³⁰ See *ILLEGAL ALIENS*, *supra* note 19, at 30-32; see also Sam Howe Verhovek, *New INS Tactic on Illegal Workers Puts Many Out of Jobs*, N.Y. TIMES, Apr. 2, 1999, at A1 (firings causing widespread resentment among workers, employers, and local officials in Yakima, Washington).

publicly described Operation Vanguard as a new model for work-site enforcement. Rather than conducting an I-9 audit of a single employer, as is normally done, the agency audited the entire meat-packing industry in Nebraska. Comparing the information in the I-9 forms against the agency's and the Social Security Administration's data bases, the immigration agency then drew up a list of employees whose employment authorization could not be verified. Employers had to notify these employees that they were required to reverify their work authorization or attend an interview with the INS at the workplace.³¹ Many workers abandoned their employment rather than meet with immigration officials. Nearly all of the workers who did meet with the officials—over 20 percent of the employees whose work eligibility was questioned—were found to be authorized to work despite the data bases' failure to confirm their status.³²

Because Operation Vanguard displaced many immigrant workers and disrupted production in the meat-packing industry, a coalition of immigrants' rights groups, labor advocates, churches, the business community, and both Republican and Democratic legislators joined in criticizing the INS's efforts.³³ In the fall of 1999 the Social Security Administration withdrew its participation due to privacy concerns regarding the immigration agency's use of the Social Security Administration data bases. Nonetheless, the immigration agency has continued to show interest in resuming Operation Vanguard, and officials have proposed using private credit-reporting companies to obtain information on employees' social security numbers.

E. Social Security Administration Programs with an Impact on Immigrant Workers

Another controversial program that has created havoc among the immigrant and labor community is the Social Security Administration's "no match" letters. The agency sends these letters to employers to inform workers that the information reported by their employers on wage reports does not match information in the agency's data base. The letters are meant simply to inform employees of potential discrepancies that must be corrected in order for earnings to be properly credited.³⁴ However, employers have misin-

That undocumented workers have some core rights is of limited value if they do not enjoy the full spectrum of remedies available to all other workers.

terpreted the letters to mean that the workers are undocumented, and consequently hundreds of workers have been fired.³⁵ Even worse, the letters have been used as a retaliatory weapon against workers attempting to improve their working conditions.

The Social Security Administration responded to advocates' concerns by clarifying in the letters that a "no match" is not indicative of immigration status and that employers should not take adverse actions based on the letters. However, the agency plans to increase the number of letters sent to employers; this is likely to lead to increased discrimination and retaliation.

³¹ See Art Hovey, *INS Brings Operation Vanguard to Southeast Nebraska*, LINCOLN J. STAR, May 11, 1999.

³² See Allison Stevens, *Congressmen Question INS Crackdown Effect*, LINCOLN J. STAR, May 14, 1999; David Hendee, *INS Interviews Are Continuing*, OMAHA WORLD HERALD, May 19, 1999.

³³ See David Bacon, *INS Declares War on Labor*, NATION (Oct. 25, 1999), at 18.

³⁴ The Social Security Administration reports that each year employer reports of employee earnings contain approximately 21 million entries for which the social security number for the employee does not match the number in the agency's data base. According to the agency, most inconsistencies are due to data-entry errors or name changes.

³⁵ See H.E.R.E. Union Local 2 v. Central Travelodge No. TRC(4)-1-99 (Oakland, Cal., May 3, 2000) (Arb.) (arbitrator found "no match" letters were not "just cause" for employer to fire workers and ordered back pay and reinstatement).

The Social Security Administration also has plans to establish an online employee verification service to give employers access to the agency's data base via the Internet 24 hours a day. The agency announced the service in mid-2000 but suspended it after immigrants' rights advocates expressed deep concerns over the lack of antidiscrimination and privacy protections. This unfettered access can only lead to increased exploitation by employers aiming to get rid of immigrant workers who assert their rights. The verification service's threats to privacy rights present a tremendous organizing opportunity for immigrant, labor, and civil libertarian activists. Together they can challenge these invasive and discriminatory governmental programs that jeopardize the rights of all workers, especially the undocumented.

II. Rights of Undocumented Workers

Contrary to what many people believe, undocumented workers have numerous rights. In enacting the Immigration Reform and Control Act, Congress clearly stated its intent not to repeal or undermine the rights of and protections for undocumented workers.³⁶ To do otherwise, Congress realized, would create an eco-

nomically incentive for employers to hire undocumented workers.³⁷

A. Statutory Protections

Since the inception of the sanctions program, employers have been challenging the rights of undocumented workers by arguing that undocumented workers have no employment rights since they lack authorization to work in the first place. Courts, for the most part, have consistently held that, despite the Immigration Reform and Control Act, undocumented workers enjoy the same protections as other employees. The following are basic rights provided under federal laws.

Title VII prohibits employment discrimination and harassment based on race, color, sex, national origin, or religion.³⁸ Specifically national origin refers to one's place of birth or the country where one's ancestors originated and includes language discrimination.³⁹ Individuals who work for employers with fifteen or more employees are protected against discrimination and retaliation under Title VII and must file a claim with the Equal Employment Opportunity Commission within 300 days of a discriminatory act.⁴⁰ In addition to their Title

³⁶ The House Judiciary Committee comments that "[i]t is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine in any way the protections for undocumented workers and their ability to exercise their rights under the relevant labor statutes." H.R. REP. NO. 99-682, pt. I, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662.

³⁷ The House Education and Labor Committee comments that "[t]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies . . . in conformity with existing law to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counterproductive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions." H.R. REP. NO. 682, pt. II, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5662.

³⁸ 42 U.S.C. § 2000e-2.

³⁹ 29 C.F.R. § 1606.1 (2000) (describing national-origin discrimination as including that based on "the physical, cultural or linguistic characteristics of a national group").

⁴⁰ 42 U.S.C. §§ 2000e(b), 2000e-2. The Immigration and Nationality Act proscribes national-origin discrimination against only employees who are authorized to work, but undocumented workers in smaller businesses might be covered under state and local laws. Employers may not discriminate in the hiring, recruitment or referral, or firing stages, or in decisions affecting promotions, wages, benefits, or any other term and conditions.

VII rights, undocumented workers are protected from other types of workplace discrimination, including those based on disability, pregnancy, age, and gender-based pay inequities.⁴¹

The National Labor Relations Act provides employees, irrespective of immigration status, with the right to organize and join a union, engage in concerted activity, and be free of retaliation for doing so.⁴² The National Labor Relations Board has consistently issued holdings, which have been affirmed by the courts, that undocumented workers are equally protected by the National Labor Relations Act.⁴³

The Fair Labor Standards Act affords all workers the right to earn at least the statutory minimum wage and an overtime premium after working beyond forty hours in a week.⁴⁴ Furthermore, the Act's antiretaliation provision protects undocumented workers who engage in protected activities, such as filing a claim for unpaid wages with state or federal authorities.⁴⁵

B. Remedies Available to Undocumented Workers

That undocumented workers have some core rights is of limited value if they

do not enjoy the full spectrum of remedies available to all other workers. Since undocumented workers are most vulnerable to substandard working conditions and bravely lead many organizing drives, the issue of remedies not surprisingly has been vigorously litigated under the National Labor Relations Act. The National Labor Relations Board has been at the forefront of creatively tailoring remedies for undocumented workers by ordering back pay and conditional reinstatement, which allows workers a "reasonable period" of time to comply with the Immigration Reform and Control Act's verification requirements.⁴⁶ However, traditional reinstatement is still appropriate for all workers, except when the employer has independent knowledge that a worker is unauthorized, and the employee complied with the I-9 requirements when the employee first began working for that employer.⁴⁷

The Equal Employment Opportunity Commission also issued a guidance following the legal developments under the National Labor Relations Act. The guidance reaffirms the right of undocumented workers to be free of workplace discrimination and specifically sets forth their

⁴¹ On Title VII rights see *EEOC v. Tortillería "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991); *EEOC v. Hacienda Hotel,* 881 F.2d 1504 (9th Cir. 1989); *cf. Egbuna v. Time-Life Libraries Inc.,* 153 F.3d 184 (4th Cir. 1998) (unauthorized workers do not have a claim of discrimination in the hiring stage), *cert. denied,* 525 U.S. 1142 (1999). The Equal Employment Opportunity Commission enforces the Americans with Disabilities Act, the Pregnancy Discrimination Act, the Rehabilitation Act, the Age Discrimination in Employment Act, and the Equal Pay Act as well as Title VII.

⁴² 29 U.S.C. §§ 151 *et seq.*

⁴³ See *NLRB v. A.P.R.A. Fuel Oil Buyers Group Inc.,* 134 F.3d 50 (2d Cir. 1997); *Rios v. Enter. Ass'n of Steamfitters Local Union 638,* 860 F.2d 1168 (2d Cir. 1988); *NLRB v. Ashkenazy Prop. Mgmt. Corp.,* 817 F.2d 74 (9th Cir. 1987); *cf. Del Rey Tortillería v. NLRB,* 976 F.2d 1115 (7th Cir. 1992).

⁴⁴ 29 U.S.C. §§ 201 *et seq.*; see *Patel v. Quality Inn S.,* 846 F.2d 700 (11th Cir. 1988) (minimum wage and overtime provisions of the Fair Labor Standards Act protect undocumented workers for work performed), *cert. denied,* 489 U.S. 1011 (1989).

⁴⁵ See *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.,* 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (employer liable for retaliatory reporting of undocumented worker to INS).

⁴⁶ See *A.P.R.A. Fuel Oil Buyers Group Inc.,* 134 F.3d at 62.

⁴⁷ See Nat'l Labor Relations Bd., Memorandum No. GC 98-15 (Dec. 4, 1998) (citing *A.P.R.A. Fuel Oil Buyers Group Inc.,* 134 F.3d at 50; 8 C.F.R. § 274a.2(b)(1)(viii)(5) (2000) (prohibiting reverification when victim of discrimination is reinstated under arbitration or court order.) *Cf. Hoffman Plastics v. NLRB,* 208 F.3d 229 (D.C. Cir. 2000) (tolling back pay to the date employer first acquired knowledge that employee used false documents to obtain employment), *vacated, reh'g en banc granted,* 2000 U.S. App. LEXIS 15647 (2000).

right to back pay, reinstatement (or conditional reinstatement if the employer knows the worker lacks employment authorization), injunctive relief, and compensatory and punitive damages.⁴⁸

Under the Fair Labor Standards Act, undocumented workers who have been retaliated against are entitled to injunctive relief and compensatory and punitive damages for emotional harm.⁴⁹

III. Expanding the Rights of Undocumented Workers

For undocumented workers, the greatest obstacle to asserting existing labor and employment rights is the fear of being reported to the INS. As long as employees risk ending up in removal proceedings after filing a claim against an employer for a labor violation, there is little reason to expect consistent enforcement of labor and employment laws.

A. INS Enforcement During Labor Disputes

Since the Supreme Court's decision in *Sure-Tan v. NLRB*, where the Court found that an employer committed an unfair labor practice in calling the INS in retaliation against workers trying to organize a union, but limited the available remedies, workers have found themselves in similar distressing situations.⁵⁰ Over the years, labor and immigrants' rights groups have advocated and taken a small step toward addressing retaliation by negotiating with the immigration agency to issue an internal guidance on work-site enforcement in situations of retaliation. The result was Operations Instruction 287.3a, which

applies to the agency's work-site enforcement activities when it receives a lead regarding undocumented workers and the presence of an underlying labor dispute.⁵¹ However, the instruction is discretionary and has not been uniformly followed throughout the different regional immigration offices. Nonetheless, in a limited number of cases, unions and advocacy organizations have been able to invoke the instruction and thus prevent work-site enforcement during organizing drives.

Taking advantage of the current climate, advocates have resumed discussions with the INS to make Operations Instruction 287.3a mandatory and to require agency accountability when it is not followed. Any such instruction must provide opportunities for workers to regularize their status in situations where the agency fails to follow its own internal guidance and, on the basis of an illegal employer tip, apprehends undocumented workers.

B. Whistle-Blower Visa Protections

The immigrant community is close to obtaining whistle-blower protections for victims of exploitative practices. This is evident through the new "T" and "U" visas created by Congress as part of the Victims of Trafficking and Violence Protection Act of 2000.⁵² While the "T" and "U" visas are aimed at addressing the legal status of trafficking victims, they also offer advocates an opportunity to argue creatively that certain employer abuses rise to the level of exploitation envisioned under this legislation. Moreover, this potential remedy creates a bridge for immigrant work-

⁴⁸ See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GUIDANCE NO. N-915.002, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (1999).

⁴⁹ See *Contreras v. Corinthian Vigor Ins. Brokerage*, 6 Wage & Hour Cas. 2d (BNA) 845 (N.D. Cal. Oct. 5, 2000) (No. C-98-2701 SC) (ordering damages for emotional harm resulting from employer's retaliatory tip to the INS).

⁵⁰ *Sure-Tan v. NLRB*, 467 U.S. 883 (1984).

⁵¹ U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., OPERATIONS INSTRUCTIONS 287.3a (effective 1996).

⁵² H.R. 3244, 106th Cong. (2000). "T" and "U" visas lead to legal permanent residency after three years. These visas are an expansion of the "S" visa, which grants lawful status to criminal-activity victims who assist the government in investigation and prosecution. The "S" visa has been successfully used in cases of worker exploitation reminiscent of modern-day slavery, which led Attorney General Janet Reno to create the Worker Exploitation Task Force within the Civil Rights Division of the Department of Justice.

ers' advocates to work closely with advocates concerned with the international trafficking of humans, particularly women and children forced into labor.

C. Repeal of Employer Sanctions

If employers are sanctioned at all, the fines levied against them are seen simply as a cost of doing business. Employer sanctions have actually facilitated the exploitation of undocumented workers.⁵³ The real sanction is felt by the unauthorized workers who are placed in removal proceedings without having had an opportunity to vindicate their rights and by the remaining employees who continue to toil under substandard working conditions.

A diverse group of advocates, including the U.S. Catholic Conference, has joined the AFL-CIO in calling for sanctions to be replaced by alternative policies that focus on preventing and eradicating employment discrimination, affording full workers' rights and remedies, and prosecuting employers who exploit undocumented workers.⁵⁴ The repeal of sanctions is a mid- to long-term goal, but it has already engendered the kind of alliances necessary to build a critical political mass capable of ensuring that new policies enhance rather than curtail workers' rights.

IV. Conclusion

Labor protections have been undermined by employer sanctions and the threat of

immigration enforcement, leading to a new momentum for grass-roots organizing that seeks creative means of securing and expanding rights for all individuals. The labor movement's recognition of this situation has made possible new and broader alliances. Coalitions of community-based organizations, interfaith groups, and responsible members of the business community all generally agree that immigrant workers must be able to exercise their rights without fear of immigration enforcement.

International alliances of labor leaders, human rights activists, and fair trade movements are also necessary to help us learn from workers' experiences in a global economy. Such lessons will introduce us to alternative immigration policies that recognize both the increased migration caused by a global economy and free trade agreements, and the need for stronger international labor protections. We are now at a critical juncture where the partnerships formed will play an integral role in enhancing labor protections for all workers, regardless of immigration status. The most vital of these coalitions has already begun to form, as organized labor and immigrant workers realize they need each other to ensure greater protections for workers within this country and abroad.

⁵³ See *ILLEGAL ALIENS*, *supra* note 19, at 21–23 (finding that during the period of October 1, 1996, to May 29, 1998, sanctions were infrequently imposed in 83 percent of the lead-driven investigations the INS undertook and completed and that the INS issued a Notice of Intent to Fine in about 17 percent of those cases).

⁵⁴ See Cardinal Roger Mahony, *Immigrant Workers Deserve Legal Status and Respect*, *L.A. TIMES* (June 8, 2000), at B13.