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## **Immigrant Workers under the US Labor Law Enforcement**

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### **Abstract**

The article begins with a brief description of the US labor laws and operative agencies behind them. It examines how and to what degree the US labor protections and standards apply to both authorized and unauthorized employees. Moreover, the piece outlines separation of immigration and labor laws between two federal agencies described below. Arguably, this decentralization of power has paved a way to a (presumably) more effective law enforcement of two distinct sets of laws: (1) dealing with legal status of workers and, (2) referring to employees' universal working conditions. Finally, the concluding remarks recapture some observations, which can be useful in finding (practical) solutions to obstacles that immigrant employees encounter on their work-related paths.

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### **Introduction**

The United States is a prime example of a net immigration country. As a historical land of economic opportunity, it has attracted a large share of diversified populations from around the world. According to the Census Bureau's American Community Survey, approximately 38 million immigrants lived in the US in 2009, out of which 22 million engaged in the US civilian labor force (Batalova and Terrazas 2010). In theory, all workers in the US have a right to maximum benefit from their labor. In a case of worker's rights violation, an employee is urged to direct complaints not only to local and state labor organizations, but also to federal agencies. Therefore law-binding policies and regulations should provide necessary venues to settle down work-related disputes. However, the effectiveness of the legal code is often questionable because a large number of immigrant workers continue to face worksite violations.

## **The US Labor Protections with Relation to Immigrant Workers**

### *Characteristics of the US Labor Law Enforcement*

In order to get a clearer picture of the US labor law system, it is noteworthy to describe how and by whom the labor market is controlled. Briefly, federal and state governments mutually complement their distinct goals. Although the federal law undergirds the national system of labor law enforcement, there are instances where state-level agencies play a leading role in applying labor laws in the US, especially in states with stricter standards (Kerwin and McCabe 2011). For example, California, Illinois and Florida have minimum wage laws, which exceed federal regulations (Kerwin and McCabe 2011).

Nonetheless, the US labor controls are overly in the hands of federal bodies. Department of Labor is divided into sub-agencies, which are in charge of different responsibilities of the labor protection regime. The Wage and Hour Division and the Occupational Safety and Health Administration are two such agencies. As its name suggests, the former office deals with minimum hourly wage and overtime pay. That said, Wage and Hour Division monitors labor-related violations, committed in firms and industries, and administers penalties to employers via payment of back wages, civil monetary penalties and even imprisonment. On the other hand, Occupational Safety and Health Administration inspects working conditions of employees in order to guarantee that their safety is of the utmost importance. Therefore, both Wage and Hour Division and Occupational Safety and Health Administration investigators reference specific legal codes to enforce measures against violators of labor standards and protections.

### *Legal Status of Immigrant Workers with Respect to Core Labor Protections and Standards*

Similarly to work-related laws and regulations in other countries of immigration, certain US federal labor protections exempt undocumented immigrants from exercising their rights and privileges. The core labor laws are not wholly status blind; as they cover authorized immigrants, they tend to bypass unauthorized ones. In theory, however, all immigrant workers have equal rights under wage and hour laws. Also, exposing undocumented workers to harmful environment should not find a ground for justification. The proposed plan to implement a status-blind inclusion of all immigrant employees under the US labor law enforcement has its roots in the division of goals and responsibilities between two departments: Department of Labor and the Department of Homeland Security.<sup>1</sup>

Briefly, one legal case successfully highlighted the goal of equal treatment of all workers under wage and hour laws in the United States. On March 27, 2002, the US Supreme Court controversially ruled in *Hoffman Plastic Compounds, Inc. v. NLRB* that National Labor Relations

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<sup>1</sup> The Department of Homeland Security (DHS) was created in 2003 after the Immigration and Naturalization Service (INS) ceased to exist on March 1, 2003.

Board<sup>2</sup> had no authority to order back pay to undocumented workers who were illegally fired for union organizing (United States Department of Labor, Wage and Hour Division). Because the Supreme Court's decision only addressed the law of National Labor Relation Board, Wage and Hour Division has not enforced the decision and has continued to focus on wage-and-hour and child-protection standards without regard to employee's legal status.

Are undocumented immigrants indeed regarded as full benefactors of minimum wage, overtime pay, and paid holidays? Firms and industries have heavily depended on cheap labor, which is readily available 'without any strings attached.' As previously mentioned, undocumented immigrants constitute a high percentage of the overall US labor force. Aware of their inferior status, immigrants accept less favorable working conditions, in fear that, if they report an employer who violates labor rights, they may most likely face deportation.<sup>3</sup>

Migration laws researchers, policymakers and pro-immigration advocates have argued that all labor laws, which are applicable to US citizens and legal residents, should be extended to undocumented labor force in order to avoid instances of exploitative measures at workplaces. For instance, they have asserted that collective bargaining could empower the immigrant working class. In their work, Kerwin and McCabe (2011) have presented a series of supportive statistics and case studies. They have shown that, despite universal labor standards, undocumented immigrants continue to face nonpayment of wages, hazardous working conditions, and lack of collective voice.

### *Reaching out to Undocumented Workers*

Undocumented immigrants are largely disregarded from the worker's rights framework, which, if administered properly, could provide them with legal basis to protection from labor violations. Department of Labor affirms that all workers, irrespective of their legal status, have a right to collect unpaid salary, exercise minimum wage and overtime pay. Unsurprisingly, practice has rarely followed theory.

Two following examples of recent developments at both the state and federal levels have shed light on an overall tendency toward inclusion of undocumented immigrants under the US labor law framework. At the state level, the New York State Labor Commissioner, M. Patricia Smith, announced the creation of a new Bureau of Immigrant Workers' Rights in May, 2007. Moreover, Smith said that, "every worker, regardless of immigration status, deserves to have access to the

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<sup>2</sup> National Labor Relations Board is a US government agency in charge of conducting elections for labor union representation and investigating unfair labor practices. For more information, visit: <http://www.nlr.gov/>.

<sup>33</sup> For example, see Human Rights Watch, "Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards," *Human Rights Watch*, 2000, <http://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf>; Julia Preston, "Immigration Raid Draws Protest from Labor Officials," *New York Times*, 26 January, 2007; R.M. Arrieta, "'Silent Raids': ICE's New Tactic Quietly Wreaks Havoc on Immigrant Workers," *In These Times*, 27 January, 2011.

Department of Labor's programs" ("NYS Department of Labor Announces New Bureau of Immigrant Workers' Right"). Ever since, the new office has aimed at addressing needs of undocumented immigrant workers throughout the state of New York. It has also managed to engage in outreaches in immigrant communities. To many, this state-level approach to helping undocumented labor force to improve their working conditions has shown a more eye-to-eye, personal engagement of staff members with workers.

Moreover, in 2010, Department of Labor launched a federal-level program to provide multi-faceted assistance to unauthorized workers. The so-called "We Can Help" project, introduced by Labor Secretary Hilda Solis, has focused on enforcing wage and hour laws in industries, which are heavily dependent on underpaid, undocumented workers (US Department of Labor, Wage and Hour Division). Moreover, she assured that immigrants without working permits should not be denied their rightful pay for working long and hard hours. She addressed immigrants, saying that "if you work in this country, you are protected by our laws."<sup>4</sup>

### **Separation of Labor and Immigration Laws Enforcement between Federal Departments**

Department of Labor and Immigration and Naturalization Service/Department of Homeland Security recognized that their missions require distinct enforcement tactics (Kerwin and McCabe 2011). Currently, Department of Labor (i.e. via Wage and Hour Division and Occupational Safety and Health Administration) mainly focuses on regulating and inspecting workplaces for occurring cases of labor exploitation; Department of Homeland Security determines immigrant worker status. An investigative arm of Department of Homeland Security, the Immigration and Customs Enforcement Agency promotes "homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration" (US Immigration and Customs Enforcement). With respect to worksite activities, the agency plays important role in targeting employers who violate employment laws and engage in exploitative tactics towards workers. It also looks for evidence of visa and identification document fraud. In many instances, undocumented workers may face detainment by the federal body in cases of using a false Social Security Number or a borrowed Employment Authorization Document in order to secure a job (National Employment Law Project).

#### *Memorandum of Understanding*

The year of 1998 brought significant changes to worksite-based enforcement activities of both Department of Labor and Immigration and Naturalization Service (now Department of Homeland Security). The update to the so-called Memorandum of Understanding, which originally entered into force in 1992, aimed to enhance enforcement of labor standards and employer verification laws. Under the initial 1992 Memorandum of Understanding, Department

of Labor was required to check legal status of employees (via I-9 forms),<sup>5</sup> who were involved in a labor standards investigation. In cases of unauthorized employment, Department of Labor referred the case to Immigration and Naturalization Service. However, under the 1998 Memorandum of Understanding, Department of Labor was no longer in charge of inspecting legal status of workers during work-related complaints, when an investigation is based on a worker filing a complaint with Department of Labor (“INS and Department of Labor Sign New Memorandum of Understanding on Workplace Inspections”). The document aimed at preventing exploitation of unauthorized workers (Kerwin and McCabe 2011) and encouraging complaints from those employees who experienced labor standards violations.

The year 2011 witnessed another agreement between Department of Labor and Department of Homeland Security. Currently, the 2011 Memorandum of Understanding emphasizes that immigration enforcement will not interfere with employment and labor rights enforcement. Importantly, the revised Memorandum of Understanding limits enforcement powers of Immigration and Customs Enforcement Agency when a Department of Labor investigation is in process. It also stresses Department of Labor and Department of Homeland Security/Immigration and Customs Enforcement Agency commitment to protect immigrant workers against employers’ retaliations based on their employees’ legal status.

### **Concluding Remarks**

It would be a hyperbole to call the US labor law enforcement a role model to other national governments. Department of Labor and its sub-agencies reveal shortcomings with respect to precision in monitoring firms and industries and efficiency in penalizing law-breaching employers. Immigrant workers, mainly undocumented, continue to experience unacceptable working conditions, with instances of nonpayment of earned money.<sup>6</sup> Immigration and Customs Enforcement Agency activities do not conflict with Department of Labor enforcement tactics (at least as agreed ‘on paper’). However, immigrant employers still fear unexpected workplace raids by Immigration and Customs Enforcement Agency investigators (Gonzalez Gomez), which are officially not initiated by Department of Labor disputes, but rather by instances of federal crime. In such cases, the division of responsibilities between Department of Labor and Department of Homeland Security may seem utterly blurred because reoccurring visits of Immigration and Customs Enforcement Agency officials at worksites may in fact undermine labor law standards and protections.

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<sup>5</sup> The ‘I-9’ form is an employment eligibility verification document. For more information, visit <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=31b3ab0a43b5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>.

<sup>6</sup> For example, see Patrick Oppmann, “Illegal immigrants struggle to receive back pay,” *CNN Justice* (27 October, 2009), [http://articles.cnn.com/2009-10-27/justice/illegals.back.pay\\_1\\_illegal-immigrants-undocumented-workers-domestic-workers?\\_s=PM:CRIME](http://articles.cnn.com/2009-10-27/justice/illegals.back.pay_1_illegal-immigrants-undocumented-workers-domestic-workers?_s=PM:CRIME);

It is arguable that (1) immigrant workers, regardless of their immigration status, (should) have equal rights to back pay of salaries, minimum wage, overtime pay, and safe working environment; and (2) distinct purposes of Department of Labor and Department of Homeland Security, with respect to working conditions and one's nationality/legal status, (should) have given immigrant workers more leeway to exercise their human rights. Although it is a risky enterprise to file a complaint against an exploitative employer, laborers may seek support in pro-immigrant groups to demand equal treatment as employees.

Arguably, in cases where a national government awards one agency with control over both labor law standards and immigration status, workers may become victims of ineffective, bureaucratic activities of the centralized institution. Therefore, if such a scenario indeed occurs, a foreign-born employee, who is a protagonist of a labor dispute, may be initially perceived as an immigrant of a questionable legal status. His/her battle for improved working conditions or back payment of salary may terminate with arrest and/ or deportation.

In summary, one thread of thought leads to an argument that US labor law enforcement should unconditionally cover labor protections and standards in order to empower an immigrant against exploitative work tactics. As inferred, limited interference of Department of Homeland Security in responsibilities held by Department of Labor at least aims at decentralizing law enforcement and paving a more effective ground for Wage and Hour Division and Occupational Safety and Health Administration to fulfill their goals of safeguarding working conditions of employees, irrespective of their immigration status.

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