

## U.S. MIGRANT WORKER LAW: THE INTERSTICES OF IMMIGRATION LAW AND LABOR AND EMPLOYMENT LAW

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### INTRODUCTION

The work visa program for temporary foreign workers in the United States is “not only the longest-running, but also the largest such program in the world.”<sup>1</sup> Close to one million foreign workers receive work visas each year for both skilled and unskilled temporary jobs in the United States.<sup>2</sup> Nevertheless, the number of foreign workers laboring in the United States that *do not* have the legal documentation necessary to work in the United States (“undocumented migrant workers”) dwarfs the number of temporary foreign workers that receive visas to work in the United States (“documented migrant workers”). As of 2008, there were an estimated 8.3 million, mostly low-wage and low-skilled, undocumented migrant workers in the U.S. labor force.<sup>3</sup> Some estimates suggest that the number of undocumented migrant workers in the United States may be even higher.<sup>4</sup> Thus, when discussing “migrant worker law,” the laws that affect undocumented migrant workers deserve special attention in the U.S. context.

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1. Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 524 (2007) (citing Global Comm’n on Int’l Migration, *Migration in an Interconnected World: New Directions for Action* 83 (2005), available at <http://www.gcim.org/en/finalreport.html>).

2. See Office of Immigration Statistics, U.S. Dep’t. of Homeland Security, TEMPORARY ADMISSIONS OF NONIMMIGRANTS TO THE UNITED STATES: 2006, at 2 (2007). For additional cites, see Elmore, *supra* note 1, at 523 n.1.

3. Jeffrey S. Passel & D’Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (2009), 12–17, available at <http://pewhispanic.org/files/reports/107.pdf>.

4. See generally Brad Knickerbocker, *Illegal Immigrants in the US: How Many are There?*, CHRISTIAN SCI. MONITOR, May 16, 2006, at 1.

Migrant workers, both documented and undocumented, are currently the subject of a significant amount of debate in the United State. Some of the concern centers on the treatment of low-wage migrant workers in low-skill occupations. A host of new studies and reports graphically depict how low-wage migrant workers too often work in unsafe conditions and suffer severe mistreatment from their employers.<sup>5</sup> For example, a *New York Times* article revealed a host of alleged labor abuses that came to light in the aftermath of a large-scale immigration raid at a meatpacking company in May 2008. The immigration raid resulted in the arrest of hundreds of workers suspected of using fraudulent documents to obtain employment.<sup>6</sup> A search warrant issued before the immigration raid detailed one occasion when “a floor supervisor had blindfolded an immigrant [worker] with duct tape” and “then took one of the meat hooks and hit the [worker] with it.”<sup>7</sup> While the incident reportedly did not result in “serious injuries” it represented the tip of the iceberg of alleged labor and employment law violations.<sup>8</sup> Immigration agents also identified child workers, “some as young as 13.”<sup>9</sup> These children reported that they were working “shifts of twelve hours or more wielding razor-edged knives and saws to slice freshly killed beef.”<sup>10</sup> Other alleged labor and employment violations included complaints from migrant meatpackers of discrimination, sexual harassment, and wage and hour violations.<sup>11</sup>

Not all of the concern over migrant workers, however, is focused on low-wage or undocumented migrant workers. Some of it involves workers “who toil in air-conditioned offices [and] earn up to six-figure salaries.”<sup>12</sup> For instance, calls for increases in the number of visas for skilled temporary

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5. See, e.g., Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* (2007); STEVE STRIFFLER, CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA'S FAVORITE FOOD (2005); Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants* (2005), available at <http://hrw.org/reports/2005/usa0105/usa0105.pdf>; LEON FINK, THE MAYA OF MORGANTON: WORK AND COMMUNITY IN THE NUEVO NEW SOUTH (2003); Abel Valenzuela, Jr., *Day Labor Work*, 29 ANN. REV. SOC. 307, 327 (2003).

6. Julia Preston, *Immigrants' Speedy Trials After Raid Become Issue*, N.Y. TIMES, Aug. 9, 2008, at A12.

7. Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, N.Y. TIMES, July 27, 2008, at A1.

8. *Id.*

9. *Id.* See also Julia Preston, *Meatpacker Faces Charges Of Violating Child Laws*, N.Y. TIMES, Sept. 10, 2008, at A16 (“The Iowa attorney general . . . brought an array of criminal charges for child labor violations against the owners and top managers of a meatpacking plant where nearly 400 workers were detained”).

10. *Id.*

11. Preston, *supra* note 7. See also Julia Preston, *Meatpacker Is Fined Nearly \$10 Million*, N.Y. TIMES, Oct. 30, 2009, at A22 (reporting on state fines for wage violations). For another recent story about widespread labor and employment violations, see Sonia Nazario & Doug Smith, *Workers Getting Soaked at Southland Carwashes*, L.A. TIMES, Mar. 23, 2008, at A1 (“[C]arwashes -- automotive beauty shops . . . often brazenly violate basic labor and immigration laws with little risk of penalty”).

12. Mitra Kalita, *Most See Visa Program as Severely Flawed*, WASH. POST, Mar. 31, 2006, at D01.

migrant workers in “specialty occupations,” such as information technology occupations,<sup>13</sup> have fueled intense debate.<sup>14</sup> In 2007 and 2008, Microsoft Chairman Bill Gates went to the U.S. Congress on behalf of business leaders to testify about the shortage of temporary work visas for skilled information technology workers and its effect on “America’s continued competitiveness in the global economy.”<sup>15</sup> The proposals of Gates and others to increase the numbers of temporary work visas for skilled workers have received significant opposition, which has further intensified as the U.S. economy falters.<sup>16</sup> Some commentators believe that employers pay foreign employees less than domestic workers<sup>17</sup> and are disingenuous about the labor shortage.<sup>18</sup> Similarly, fears exist that domestic workers will lose jobs and existing working conditions will deteriorate if the government issues more skilled worker visas.<sup>19</sup>

At the heart of much of the current debate surrounding both skilled and unskilled migrant workers in the United States is whether, and to what extent, these workers have an effect on the wages and working conditions of domestic workers. Studies on the effect of immigrant workers on labor standards for domestic workers arrive at “contradictory conclusions.”<sup>20</sup> Some find that migrant workers have increasingly “caused a major

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13. Ruth Ellen Wasem, Congressional Research Serv., *Immigration: Legislative Issues on Nonimmigrant Professional Specialty (H-1B) Workers-RL30498* 7–8 (2007); *Beauty and the Geek; Visas*, THE ECONOMIST, June 21, 2008 (“Only 65,000 H-1B visas are awarded annually and they get snapped up within days of becoming available, most of them going to tech workers.”).

14. Todd H. Goodsell, Note, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 B.Y.U. J. PUB. L. 153, 153 (2007) (“The legal entry of high-skilled foreign workers into the United States . . . also divided the nation.”).

15. Peter Elstrom, *Gates to Senate: More Visas*, Businessweek.com, Mar. 8, 2007, available at [http://www.businessweek.com/bwdaily/dnflash/content/mar2007/db20070308\\_624948.htm](http://www.businessweek.com/bwdaily/dnflash/content/mar2007/db20070308_624948.htm); Moira Herbst, *Microsoft: Layoffs for Some, Visas for Others; The software giant that has pushed for more H-1B visas faces tough questions as it lays off 5,000*, Businessweek.com, Feb. 2, 2009, available at [http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db2009021\\_893728.htm](http://www.businessweek.com/bwdaily/dnflash/content/feb2009/db2009021_893728.htm).

16. *Id.*

17. See, e.g., *Lou Dobbs Tonight, Presidential Politics and H-1B Visas* (CNN television broadcast Mar. 10, 2008), available at <http://transcripts.cnn.com/TRANSCRIPTS/080310/ldt.01.html> (mentioning reports that “show H-1B tech workers are typically paid less than an American worker doing the same job.”).

18. See Wasem, *supra* note 13, at 12; Norm Matloff, *On the Need for Reform of the H-1B Non-immigrant Work Visa in Computer-related Occupations*, 36 U. MICH. J.L. REFORM 815, 816, 863 (2003).

19. See, e.g., Tyrone Beason, *On Temporary Visas, Skilled Workers are Putting Down Real Roots*, SEATTLE TIMES, Apr. 13, 2008, at 16 (“Workers’ groups . . . argue American companies are using the program to shift jobs to foreign nationals who can be easily fired and replaced, and possibly paid less.”); Simone M. Schiller, *Does the United States Need Additional High-Tech Work Visas or Not? A Critical Look at the So-Called H-1B Visa Debate*, 23 LOY. L.A. INT’L & COMP. L. REV. 645, 650 (2001) (“Many U.S. labor unions and the Institute of Electrical and Electronics Engineers allege that the high-tech industry prefers hiring foreign workers . . . as a means to suppress wages.”).

20. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1180 (2008).

competitive problem” for U.S. workers<sup>21</sup> and may have reduced wage rates of some domestic workers.<sup>22</sup> Others point out that, at the aggregate level, migrant workers do not negatively affect labor conditions for domestic workers.<sup>23</sup> Much of this debate centers on “whether low-income [domestic] workers are hurt a lot or just a little.”<sup>24</sup> While the direct causal relationship between the presence of migrants and declining labor standards in the U.S. remains hotly contested, there is no doubt that many migrant workers, especially undocumented migrant workers, are concentrated in low-wage workplaces<sup>25</sup> where workplace rights are poorly followed and poorly enforced.<sup>26</sup>

This article provides an overview of U.S. law governing documented and undocumented migrant workers. In doing so, it also illustrates the tensions and questions raised by the current interconnections between two largely separate statutory regimes—U.S. immigration law and U.S. labor & employment law. These two regimes have “sometimes contradictory legislative impulses.”<sup>27</sup> Generally speaking, U.S. immigration law is the set of rules governing the admission, employment, naturalization, and deportation of foreigners. Immigration law, by definition, contains “an ascending scale of rights that privileges legal immigrants *over* undocumented ones.”<sup>28</sup> United States labor law is often used as shorthand to refer to laws that protect certain forms of collective action and organizing among employees in the workplace. Employment law, which also provides

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21. Paul Weiler, *Comparative Labor and Employment Law and Policy in the Next Quarter Century: Enhancing Worker Lives through Fairer Labor and Worklife Law in Comparative Perspective*, 25 COMP. LAB. L. & POL'Y J. 143, 147 (2003).

22. See, e.g., George J. Borjas, *The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 QUART. J. OF ECON. 1335 (2003) (indicating that immigrants reduce wages of non-immigrants); Bruce Stokes, *The Lost Wages of Immigration*, NAT'L J., Jan. 7, 2006 (citing studies that indicate that immigrants reduce wage rates).

23. See, e.g., David Card, *Is the New Immigration Really So Bad?*, 115 ECON. J. 300, 300–23 (2005) (contending that there is “no strong evidence that immigration has overall effects on aggregate employment, participation, unemployment and wages”). However, “the estimated effect of immigration on the wage of native workers varies widely from study to study and sometimes even within the same study.” Simonetta Longhi, Peter Nijkamp & Jacques Poot, *A Meta-Analytic Assessment of the Effect of Immigration on Wages*, 19 J. OF ECON. SURVEYS, 451, 472 (2005). For a discussion of recent studies see Jonathan G. Goodrich, *Looking for a Visa System that Promotes the U.S. Economy and National Security*, 42 U. RICH. L. REV. 975, 991 n.131 (2008); Gordon & Lenhardt, *supra* note 20, at 1183.

24. Roger Lowenstein, *The Immigration Equation*, NY TIMES MAG., July 7, 2006, at 36.

25. Passel & Cohn, *supra* note 3, at ii–iii, 10–14.

26. See generally Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 58 (2002) (“The lower the wages, the more likely that fundamental employment laws, including safety, health, and wage and hour laws, will be violated. Low-wage employees are apt to lack the knowledge and the resources to enforce their rights, and there simply are too few government inspectors to ensure compliance with basic safety, health, and wage and hour laws in workplaces all over the country.”).

27. Catherine Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights without Remedies for Undocumented Immigrants*, in LABOR LAW STORIES 399, 400 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

28. *Id.* at 399 (emphasis added).

some protection of collective action,<sup>29</sup> is generally used to refer to protections for the workplace rights of employees as individuals. The U.S. labor and employment law regime, unlike immigration law, views the equal and wide application of the rights of employees as necessary for “public deterrence.”<sup>30</sup> In other words, an underlying rationale is that “the fate of all workers depends on the treatment of each.”<sup>31</sup>

Section I describes U.S. immigration law as it applies to documented and undocumented migrant workers. It outlines the legal regulation of several key temporary migrant worker visa categories and identifies U.S. immigration law restrictions on the employment of undocumented migrant workers. It highlights the particular aspects of immigration regulation that may unintentionally create barriers to the effective enforcement of workplace protections for employees. Sections II and III of the article examine the legal rights and remedies available to documented and undocumented migrant workers pursuant to federal labor and employment laws. These sections will underscore how the current intersection of federal immigration law and labor and employment law, including the unresolved legal questions it has created, may undermine the viability of the workplace law regime more broadly. For instance, it explores the ways that workplace-based immigration regulation strategies, which largely originated in the 1980s and have intensified recently, may affect employees’ workplace protections. Section IV will provide a brief overview of advocacy efforts on behalf of documented and undocumented migrant workers. Section V assesses the status of U.S. “Migrant worker law” and explores the interstices of federal labor and employment law and immigration law.

## I. U.S. IMMIGRATION LAW AND MIGRANT WORKERS

In 1952, the U.S. Congress centralized immigration laws into one federal statute, the Immigration and Nationality Act (INA).<sup>32</sup> Congress has amended the INA many times since 1952 but the statute continues to serve as the central node of U.S immigration law.<sup>33</sup> The INA sets out temporary worker visa requirements that apply to documented migrant workers and,

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29. See generally Benjamin I. Sachs, *Employment Law as Labor law*, 29 CARDOZO L. REV. 2685 (2008) (making a persuasive case that employment law has provided underappreciated protections for collective action among workers).

30. Fisk & Wishnie, *supra* note 27, at 399.

31. *Id.* at 400.

32. 8 U.S.C. §§ 1101 *et seq.* For a comprehensive account of U.S. immigration law and the emergence of the concept of the “illegal alien,” see MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

33. See *id.*

through the Immigration Reform and Control Act of 1986 (IRCA),<sup>34</sup> sets out restrictions on the employment of undocumented migrant workers. In the following sections, I describe the INA's regulation of migrant workers and its potential effects on workplace protections for employees.

A. *The INA and Documented Migrant Workers*

The INA specifies under what circumstances foreign workers can come to the United States as temporary workers.<sup>35</sup> Temporary workers, which the INA formally deems "nonimmigrants," are permitted to come to the United States "for a temporary period and for a specific purpose."<sup>36</sup> As mentioned above, the United States issues approximately one million temporary work visas per year. While there are a number of temporary worker visa categories, including one for individuals with "extraordinary ability,"<sup>37</sup> another for exceptional entertainers and athletes,<sup>38</sup> and a third for foreign nurses in "medically underserved areas,"<sup>39</sup> this section discusses the larger, better-known, and perhaps most controversial categories of temporary migrant worker visas:<sup>40</sup> (1) temporary workers in specialty occupations (H-1B visa holders)<sup>41</sup> and (2) temporary agricultural and non-agricultural workers (H-2A and H-2B visa holders).<sup>42</sup>

Unlike some of its counterparts, the so-called "H" visa program requires an employer to satisfy what I will loosely refer to here as a "labor market test" before it hires H visa workers.<sup>43</sup> The labor market tests, which are not very rigorous, are intended to ensure that the influx of foreign labor does not displace or adversely affect the wages and working conditions of domestic workers.<sup>44</sup> A federal agency, the U.S. Department of Labor

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34. See 8 U.S.C. §§ 1324a, 1324b, 1324c.

35. For information on longer term work visas, see U.S. Dep't of State, Employment Visas, available at [http://travel.state.gov/visa/immigrants/types/types\\_1323.html](http://travel.state.gov/visa/immigrants/types/types_1323.html).

36. Ruth Ellen Wasem & Chad C. Haddal, Congressional Research Serv., *U.S. Immigration Policy on Temporary Admissions-RL31381*, 2 (2007).

37. For information on O-1 visas, see U.S. Dep't of State, Temporary Workers, available at [http://travel.state.gov/visa/temp/types/types\\_1271.html](http://travel.state.gov/visa/temp/types/types_1271.html) (describing O-1 classification as applying "to persons who have extraordinary ability in the sciences, arts, education, business, or athletics, or extraordinary achievements in the motion picture and television field").

38. *Id.* (describing P-1 classification as applying to "individual or team athletes, or members of an entertainment group that are internationally recognized.").

39. *Id.* (describing H-1C visa and stating that this visa category comes out of Nursing Relief for Disadvantaged Areas Act, which will expire on December 20, 2009).

40. For reference to H visas as the "major nonimmigrant category for temporary workers," see Wasem, *supra* note 12, at 2.

41. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h).

42. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h).

43. Ruth Ellen Wasem, Congressional Research Serv., *Immigration of Foreign Workers: Labor Market Tests and Protections* 8 (2007) (stating that many temporary work visas "do not trigger the requirement [of a labor market test].").

44. *Id.* at 1.

(DOL), is in charge of administering the labor market tests for the H-1 and H-2 programs through a certification process.

### 1. Temporary Skilled Workers: H-1B Visa Program

Congress originally created the H-1 temporary work visa for skilled foreign workers in 1952.<sup>45</sup> In 1990, in the context of a “technological explosion,” the U.S. Congress altered the H-1 program and created the current H-1B temporary worker visa category<sup>46</sup> to address U.S. business demands for a “brain gain” of skilled foreign workers.<sup>47</sup> Congress was, in part, “responding to fears concerning the U.S. workforce’s ability to compete in the global economy.”<sup>48</sup> These visas are mainly granted to those who are qualified, with a bachelor’s degree or equivalent, for a “specialty occupation”<sup>49</sup> and to fashion models “of distinguished merit and ability.”<sup>50</sup> While a number of skilled foreign workers are eligible to obtain H-1B visas, the program focuses largely on information technology workers.<sup>51</sup> There is a cap of 65,000 H-1B workers per year but the numbers of H-1B visas issued are often higher than the cap and vary year to year due to a number of statutory exceptions to the cap.<sup>52</sup>

Several aspects of the H-1B temporary visa program differ from other temporary visa categories. H-1B visas are generally issued for three years and can be extended for a total of six years.<sup>53</sup> Although the INA considers

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45. Joseph Tiger, Note, *Re-bending the Paperclip: An Examination of America’s Policy Regarding Skilled Workers and Student Visas*, 22 GEO. IMMIGR. L.J. 507, 511 n.45 (2008).

46. Brian John Halliday, *In Order to Hire the Best Person for the Job, We Have to Do What?*, 11 U. FLA. J.L. & PUB. POL’Y 33, 37 (1999).

47. Alejandro Portes, *Migration, Development, and Segmented Assimilation: A Conceptual Review of the Evidence*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 81-87 (2007) (describing the “brain gain” and “brain drain” aspects of migration of professional workers); Jung S. Hahm, Note, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1682 (2000) (“In formulating the H-1B visa program, Congress recognized the increasing reliance of U.S. businesses on highly skilled foreign professionals.”).

48. Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 181 (2006) (quoting DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE 34 (3d ed. 1992)).

49. See 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(4).

50. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h). H-1B visas also apply to certain individuals performing services for a “cooperative research and development project or a coproduction project” related to the Secretary of Defense. See *id.*

51. See, e.g., Bradly J. Condon & J. Brad McBride, *Do You Know the Way to San Jose? Resolving the Problem of Illegal Mexican Migration to the United States*, 17 GEO. IMMIGR. L.J. 251, 280-81 (2003).

52. Wassem, *supra* note 43, at 8 (“[M]ost H-1B workers enter on visas that are exempt from the ceiling.”). See 8 U.S.C. § 1184(g).

53. 8 U.S.C. § 1184(g)(4) (referring to the six year limit); Shachar, *supra* note 48, at 182 (“[T]he H-1B is a temporary three-year employment visa that can, and often is, extended for up to six years.”). See also Stephen W. Yale-Loehr, *H-1B Nonimmigrant Workers*, in BASIC IMMIGRATION LAW 127 (2007) (PLI N.Y. Practice Skills Course Handbook Series No. F-167, 2007) [hereinafter referred to as

the visas “temporary,” many H-1B holders have the option to obtain permanent residency and eventually citizenship in the United States.<sup>54</sup> A U.S. employer, however, must sponsor the H-1B’s application for permanent residence. Beneficiaries of temporary work visas in other categories, such as the H-2 category, do not have a similar option. Moreover, while a specific employer must petition for an H-1B visa initially, H-1B workers may be able to change employers while they are working in the United States.<sup>55</sup> The American Competitiveness in the Twenty First Century Act, which Congress passed in 2000, made it easier for H-1B visa holders to change employers (“visa portability”) if a new employer files a legitimate petition for employment and the visa holder complies with other requirements.<sup>56</sup> However, the process is not seamless. H-1B workers still “may have difficulties changing jobs if their first job does not work out.”<sup>57</sup>

The other unique feature of the H-1B program is the labor market test. Unlike the H-2 program, an H-1B employer does not have to actively recruit domestic workers. The labor market test for H-1B visas, which requires a short application, is less rigorous than the H-2 labor market test for temporary seasonal agricultural and non-agricultural workers.<sup>58</sup> For H-1B visas, the Labor Certification Application (LCA) to the U.S. Department of Labor (DOL) requires an employer attestation, which is “a statement of intent rather than a documentation of actions taken.”<sup>59</sup> Specifically, as part of the attestation to the DOL, the employer attests (1) that the H-1B worker will be paid the higher of the prevailing wage and the actual wages paid to

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“Basic Immigration Law”] (“The American Competitiveness in the Twenty First Century Act (AC21), however, provides for the extension of the H-1B employee’s status beyond six years in cases where the foreign national’s immigrant visa petition or adjustment of status application is pending. . .”).

54. U.S. General Accounting Office (GAO), *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157, at 6 (2000) (“Unlike most temporary worker visa categories, H-1B workers can intend both to work temporarily and to immigrate permanently at some future time.”).

55. Yale-Loehr, *supra* note 53, at 127–28.

56. *See id.*; American Competitiveness in the Twenty-First Century Act of 2000—Immigration and Infrastructure, Pub. L. No. 106-313, 114 Stat. 1251 (2000); Yan Chen, Comment, *An Examination on Regulating the Employment of Foreign Skilled Workers in the United States*, 6 U. PA J. LAB. & EMP. L. 179, 183 (2003) (stating that the change in 2000 “improved the portability of H-1B visas so that a worker may begin new employment immediately upon the filing of a change-of-job petition by a new employer and need not wait months for the actual approval by the INS.”).

57. Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 521 (2002) (“H-1B visa holders’ most frequent requests are that they would like a smoother transition to permanent resident status and increased mobility among jobs that are not with their original visa sponsor.”). *See also Alien Who Changed Jobs Before New Boss Filed Visa Petition Is Deportable, Court Says*, DAILY LAB. REP. (BNA) (Sept. 15, 2008), at A-1 (“An H-1B visa holder may be deported because he began a new job before his new employer filed a visa petition for him”).

58. *See* Wassem, *supra* note 43, at 10–11, 14.

59. *Id.* at 11.

employees who work in the same occupation; (2) that the working conditions of the H-1B worker will not adversely affect the working conditions of domestic workers; and, (3) that currently there are no lockouts or strikes at the workplace.<sup>60</sup> The H-1 program's wages requirement is the main protection against the adverse effect on domestic workers. To determine the prevailing wage, an employer can use "a wide variety of sources of wage data," including data from state agencies or surveys from private firms.<sup>61</sup> Many have argued that "there is wide variation from one survey to another, thus allowing the employer to select the lowest of many widely varying figures."<sup>62</sup>

The DOL certifies the vast majority of LCA applications.<sup>63</sup> Once the DOL certifies the LCA application, the employer submits a petition to the U.S. Customs and Immigration Services (USCIS) that contains (1) the certified LCA; (2) attestation that the employer will comply with the LCA; and, (3) documentation related to the applicant's qualifications.<sup>64</sup> As mentioned above, the U.S. employer does not have to show that it engaged in active recruitment of domestic workers or that there were no qualified domestic applicants. The USCIS then reviews the application and decides whether to grant the employer's application for an H-1B visa. There are additional LCA requirements for H-1B employers that have a workforce comprised of 15% or more H-1B workers (H-1B dependent employers) or who have violated LCA requirements willfully.<sup>65</sup> Among other things, before filing an LCA, H-1B-dependent employers must first try to recruit domestic workers and must offer the job to qualified domestic workers who are willing and able to take the job.<sup>66</sup>

Finally, one should note that although H-1B workers have a number of workplace rights, there are often significant barriers to their enforcement.<sup>67</sup>

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60. *Id. See also id.* ("The firm must provide a copy of the LCA to representatives of the bargaining unit or—if there is no bargaining representative—must post the LCA in conspicuous locations at the work site.").

61. Matloff, *supra* note 18, at 902.

62. *See, e.g., id.*

63. Yale-Loehr, *supra* note 53, at 135; Philip Martin, *Guest Workers: New Solution or New Problem?*, 2007 U CHI LEGAL F 289, 311 (2007) ("[M]ost employers simply 'attest' that they are paying at least the prevailing wage to a college-educated foreigner who is to fill a job normally requiring a college education; there are typically no investigations of employer assertions unless the government receives complaints."); Wasem, *supra* note 13, at 3 (stating that the DOL "reviews the application for completeness and obvious inaccuracies" and that the DOL investigates "[o]nly if a complaint subsequently is raised.").

64. Yale-Loehr, *supra* note 53, at 131–37.

65. U.S. Wage and Hour Div., "Fact Sheet #620: Must an H-1B employer recruit U.S. workers before seeking H-1B workers?" (July 2008), available at <http://www.dol.gov/esa/whd/regs/compliance/FactSheet620/whdfs620.pdf>.

66. *See id.*

67. *See, e.g.,* Sabrina Underwood, Note, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers Under the H-1B Visa Program*, 15 GEO. IMMIGR. L.J. 727, 736 (2001); Matloff, *supra* note 18, at 913 ("The H-1B program

H-1B visa holders can sometimes enforce terms of their LCAs, such as their wage rate, by filing a complaint with the U.S. Department of Labor.<sup>68</sup> Moreover, as will be discussed below, many H-1B workers also have state and federal labor and employment law rights to engage in collective action and to work free of certain forms of discrimination. However, the difficulty H-1B workers have in changing employers during the visa term creates a disincentive against making a workplace law complaint. Moreover, H-1B workers may be particularly “vulnerable to exploitation” because, as mentioned above, they often rely on their employer for their permanent residency applications and have to wait long periods of time before those applications are processed.<sup>69</sup> There is little doubt that “[v]isa holders, by the very nature of their situation as workers dependent upon employers for the right to remain in the country—either permanently or temporarily—remain less likely to protest against unfair working conditions than their counterparts with permanent resident status.”<sup>70</sup>

As I will discuss below, the INA’s regulation of the H-2 temporary work visa program also poses challenges to the effective enforcement of employee workplace protections.

## 2. Temporary Agricultural and Non-agricultural Workers: H-2 Visa Program

Congress designed the H-2 program to supply temporary workers to the U.S. labor market in 1952.<sup>71</sup> Unlike H-1B visa applicants, the H-2 program does not require particular skills or achievement. In 1986 Congress split the H-2 temporary visa program into two separate categories: H-2A visas for temporary agricultural workers<sup>72</sup> and H-2B visas for temporary non-agricultural workers who work in seasonal industries.<sup>73</sup> H-

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has a long history of abuse by IT employers of all types and sizes. The abuse is largely, but not exclusively, due to the de facto indentured servitude of the H-1Bs.”); Wasem, *supra* note 13, at 13 (“GAO has issued reports that recommended more controls to protect workers, to prevent abuses . . .”).

68. See Yale-Loehr, *supra* note 53, at 14 (listing relevant regulations). See also *id.* (“A cause of complaints that has resulted in costly penalties to employers, in the form of back wages and sanctions, is the benching or termination of an H-1B employee prior to the end of the LCA Term . . .”).

69. Wasem, *supra* note 43, at 16 (referring to perspective of “[a]dvocates for temporary foreign workers”); *id.* at 17 (“Some allege that employers prefer foreign workers because they are less demanding in terms of wages and working conditions.”).

70. Goodsell, *supra* note 14, at 172.

71. Bryce W. Ashby, Note, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs is the Solution*, 38 U. MEM. L. REV. 893, 899 (2008).

72. H-2A workers perform “agricultural labor or services of a temporary or seasonal nature.” 8 C.F.R. 214.2(h).

73. *Id.* (describing H-2B workers as persons “coming to perform other temporary services or labor”).

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2A agricultural workers typically work cultivating or harvesting fruits and vegetables. H-2B workers typically work in seasonal industries such as “traveling carnivals,”<sup>74</sup> forestry, hotels, seafood processing, cruise liners, landscaping, construction, and ski resorts.<sup>75</sup> H-2B visas have also been issued to workers in conjunction with national disaster recovery efforts. In the wake of the devastating effects of Hurricane Katrina in 2005, H-2B visa holders helped to rebuild the effected Gulf Coast regions.<sup>76</sup> The numbers vary from year to year but the U.S. grants approximately 100,000 H-2A visas<sup>77</sup> and 66,000 H-2B visas each year.<sup>78</sup>

H-2 visa holders are at a disadvantage compared to H-1B visa holders. Unlike H-1B visas that are initially granted for three years and can be extended for an additional three years, H-2 visas are generally granted for a year or less. While H-2 visas can be extended for a total of three consecutive years “the Department of Labor grants extensions sparingly.”<sup>79</sup> Also unlike H-1B visa holders, H-2 visa holders do not have any opportunity to seek permanent residency or citizenship in the United States and do not have any opportunity to switch employers during their visa terms.

Another important difference between the H-2 and H-1 programs is the H-2 labor market tests.<sup>80</sup> The labor market tests for H-2A and H-2B workers are more extensive than the H-1 test. Most significantly, before an employer may hire an H-2 worker, a U.S. employer first needs to actively try to find a U.S. employee to perform the job through an affirmative recruitment process.<sup>81</sup> If the employer can fill the vacant position with a domestic employee, it cannot take advantage of the H-2 program.<sup>82</sup> In the application, the employer attests both that “unemployed domestic workers are not available and that there will not be an adverse effect on U.S.

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74. Arthur N. Read, *Learning from the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform*, 16 TEMP. POL. & CIV. RTS. L. REV. 423, 433 n.44 (2007).

75. Southern Poverty Law Center, *supra* note 5, at 1; Elmore, *supra* note 1, at 524.

76. See, e.g., *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 488 F. Supp. 2d 565, 566–567 (E.D. La. 2007) (“Plaintiffs are guestworkers recruited from foreign countries following Hurricane Katrina to work in the Defendants’ luxury hotels in the New Orleans area.”).

77. See U.S. DEP’T OF HOMELAND SECURITY, *Yearbook of Immigration Statistics: Temporary Admissions of Nonimmigrants to the United States*, tbl. 3 (2009) (illustrating year-to-year variation). There is no cap on H-2A visas. See Wasem, *supra* note 43, at 8.

78. For 66,000 cap on H-2B visas, see 8 C.F.R. § 214.2(h). For exceptions to the H-2B cap see *Egalitarianism and Exclusion* at 569 n.181 (“Under current law, workers having completed an H-2B work visa may return as ‘H-2R’ workers” without affecting the cap).

79. Elmore, *supra* note 1, at 554 n.180.

80. For an overview of the differences between labor market tests, see Wasem, *supra* note 43, at 14, tbl. 1. The H-2A and H-2B requirements have fluctuated since 2008. This section aims to provide readers with the general contours of the requirements while acknowledging that the regulations may change in the near future.

81. Andorra Bruno, Congressional Research Serv., *Immigration: Policy Considerations Related to Guest Worker Programs-RL32044* 2-3 (2006).

82. *Id.* at 2.

workers from the alien workers' entry into the labor market."<sup>83</sup> An H-2A employer is required to pay the highest of the minimum wage, prevailing hourly wage, and the Adverse Effect Wage Rate (AEWR).<sup>84</sup> The calculation of the AEWR is in flux as President Obama's administration tries to roll back Bush administration changes in this area.<sup>85</sup> Similar to the H-1B program but unlike the H-2A program, an H-2B employer must promise to pay the prevailing wage for the occupation.<sup>86</sup>

Both worker advocates and employers criticize the H-2 labor market tests. Some claim that the labor certification process is "ineffective" in its attempts to protect domestic workers.<sup>87</sup> Among other things, critics note that there is unfair competition because the wages offered to temporary migrant workers are not on par with wages for domestic workers.<sup>88</sup> Employers, especially small businesses, describe the labor certification process in general as so "overly cumbersome" that they cannot quickly respond and "meet their labor needs."<sup>89</sup> In fact, some employers admit that they opt out of the H-2 program entirely and hire undocumented workers because the "process is too expensive, taxing, and time-consuming."<sup>90</sup> Some have advocated for a labor market test, similar to the H-1B test.<sup>91</sup>

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83. Wasem, *supra* note 43, at 1–2. For recent regulatory changes to the H-2A and H-2B programs, currently being challenged in court, see <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21861> and <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21887>. See also Steven Greenhouse, *Labor Secretary Proposes Suspending Farm Rules*, N.Y. TIMES, March 14, 2009, at A11.

84. 20 C.F.R. Department of Labor, *Wages and Foreign Labor Certification*, available at <http://www.dol.gov/compliance/topics/wages-foreign-workers.htm>.

85. 20 C.F.R. Sam Hananel, *US Seeks Tighter Rules on Foreign Workers*, ASSOCIATED PRESS, Sept. 3, 2009 ("The Labor Department briefly suspended the Bush rules earlier this year, but officials were forced to reinstate them after farm groups successfully challenged the decision in federal court.")

86. See U.S. Dep't of Labor, *Foreign Labor Certification Prevailing Wages*, available at <http://www.foreignlaborcert.doleta.gov/wages.cfm>.

87. Bruno, *supra* note 81, at 30 (citing U.S. Department of Labor, Office of Inspector General, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*, Report Number 04-98-004-030321, Mar. 31, 1998). See also Martin, *supra* note 62, at 295 ("Government employment services are ill-suited to second-guess employers who find local workers unqualified").

88. See Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1457 (2008) ("Labor advocates object that the prevailing wage approved by the U.S. Department of Labor frequently bears little relation to actual wages in that sector and region, and is rarely enforced in any event."). See also Denice Velez, *Wages for H-2B workers set lower than the prevailing wage* (Snapshot for Aug. 13, 2008), available at [http://www.epi.org/economic\\_snapshots/entry/webfeatures\\_snapshots\\_20080813/](http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20080813/) ("[E]xamination of seven of the occupations most commonly filled by H-2B workers . . . shows that in almost every case, H-2B certified wages were lower than the prevailing wage reported by the Bureau of Labor Statistics. In 64% of cases, the DOL-certified wage fell below 75% of the mean hourly wage.")

89. Bruno, *supra* note 81, at 3.

90. Merav Lichtenstein, Note, *An Examination of Guest Worker Immigration Reform Policies in the United States*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 697 (2007). See also Patricia Medige, *Perspectives on the Bush Administration's New Immigrant Guestworker Proposal: Immigrant Labor Issues*, 32 DENV. J. INT'L L. & POL'Y 735, 738 (2004).

91. Wasem, *supra* note 43, at 16.

Although H-2 workers have a number of workplace protections, worker advocates criticize them as insufficient.<sup>92</sup> For example, even when the labor law of the worker's country of origin requires foreign employers to pay inbound travel costs, neither the H-2A nor the H-2B program requires the employer to pay these costs up front.<sup>93</sup> Furthermore, because the employers often pay these fees and then deduct them from an H-2 worker's wages, many workers start off their employment "in substantial debt" to their employers.<sup>94</sup> The H-2B program, which often brings in more workers than the H-2A program, has fewer legal protections for migrant workers than the H-2A program.<sup>95</sup> For instance, the H-2A program requires a pay rate that is "typically higher" than the prevailing wage rate for H-2B workers.<sup>96</sup> The H-2A program also goes further than its H-2B counterpart in that it requires the employer to provide employment for at least 3/4 of the amount of time promised in the visa application and to provide certain housing and transportation benefits.<sup>97</sup>

There are formidable barriers to the enforcement of H-2 workplace rights. H-2 workers are often at the bottom of the wage scale and cannot afford an attorney. A limited number of non-profit legal services offices can represent H-2A workers. But those that receive federal funding from the Legal Services Corporation are prohibited from representing H-2B workers, except those who work in forestry.<sup>98</sup> The lack of visa portability, which intensifies the inequality of bargaining power between the employer and the low-skill migrant worker, is another important barrier for H-2 workers. H-2 workers often "fear being blacklisted—refused employment

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92. See, e.g., Medige, *supra* note 90, at 739 ("[W]orkers and worker advocates have longstanding concerns about both the H-2A and H-2B temporary worker programs.").

93. If an H-2A worker completes 50% of the contract period the employer must pay the inbound transportation costs. See 20 C.F.R. § 655.102(b)(5).

94. Elmore, *supra* note 1, at 536; Kati L. Griffith, *Globalizing U.S. Employment Law Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 383, 387-90 (2008) (discussing worker debt and the legal obligations of employers with respect to a worker's transportation costs). See Southern Poverty Law Center, *supra* note 5, at 9 ("The workers, most of whom live in poverty, frequently must obtain high-interest loans to come up with the money to pay the fees. In addition, recruiters sometimes require them to leave collateral, such as the deed to their house or car, to ensure that they fulfill the terms of their individual labor contract.").

95. See generally 20 C.F.R. § 655.102, § 655.103.

96. Medige, *supra* note 90, at 739. See 20 C.F.R. § 655.102(b)(9) (describing H-2A rates of pay as the highest "the adverse effect wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal federal or State minimum wage rate.").

97. For a full list of differences between the programs, see Wasem, *supra* note 43, at 12-14.

98. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 921-923 (2008) (hereinafter referred to as "Internationalization of Public Interest Law"); 45 C.F.R. 1626.11. For a description of the change in regulations that permitted Legal Services Corporation-funded organizations to represent H-2B forestry workers see Legal Services Corporation, "Temporary Forestry Workers Now Eligible for LSC-Funded Legal Services," available at [http://www.lsc.gov/press/updates\\_2008\\_detail\\_T220\\_R0.php](http://www.lsc.gov/press/updates_2008_detail_T220_R0.php).

in future years—or otherwise intimidated if they attempt to assert their rights.”<sup>99</sup> H-2 workers are vulnerable if they dare to make a complaint because their current legal status in the United States and future participation in the program depends on their employer.<sup>100</sup> Moreover, the payment of up-front recruitment fees often makes workers “reluctant to complain and risk losing their jobs.”<sup>101</sup> An H-2B worker who came to the United States in the aftermath of Hurricane Katrina, for instance, alleges that he paid \$20,000 to a labor recruiter before coming to the United States from India.<sup>102</sup> The fears and debts of H-2 workers exacerbate the already existing inadequacies of workplace law enforcement.<sup>103</sup>

### B. *The INA and Undocumented Migrant Workers*

Similar to the INA’s regulation of the temporary visa program, the INA’s regulation of undocumented migrant workers poses challenges for the workplace law regime. The Immigration Reform and Control Act of 1986 (IRCA) amended the INA and marked a fundamental shift in U.S. immigration law away from its primary emphasis on the “the terms and conditions of admission . . . and the subsequent treatment of aliens lawfully in the country”<sup>104</sup> toward a focus on the workplace.<sup>105</sup> As the

99. Medige, *supra* note 90, at 739.

100. See, e.g., Southern Poverty Law Center, *supra* note 5, at 6 (stating that a worker’s “ability to return during any subsequent season depends entirely on an employer’s willingness to submit a request to the U.S. government. In practical terms, it means that an employee is much less likely to complain about workplace safety or wage issues.”).

101. Nicole Gaouette, *Guest workers in U.S. say they are being exploited: They want Congress to reassess the program, which they contend abuses foreign laborers and hurts U.S. workers*, L.A. TIMES, June 12, 2008, at A11.

102. *Id.* See David v. Signal Int’l, LLC, 2008 U.S. Dist. LEXIS 68787, \*\*4-5 (E.D. La. 2008).

103. See U.S. General Accounting Office (GAO), *Fair Labor Standards Act: Better Use of Resources and Consistent Reporting Could Improve Compliance*, GAO/HEHS-08-962T, at 2-22 (2008); Southern Poverty Law Center, *supra* note 5, at 7, 28 (citing Brennan Center for Justice, Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004 (Economic Policy Brief, No. 3, September 2005)). The DOL is charged with investigating worker complaints and enforcing the H-2A regulations, including the H-2A and H-2B contract. See 8 U.S.C. § 1188(g). In recent regulatory changes, the DOL now is charged to enforce provisions of the H-2B work contract. See U.S. Citizenship and Immigration Services, USCIS Finalizes Streamlining Procedures for H-2B Temporary Non-Agricultural Worker Program, *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=332cef590da4e110VgnVCM1000004718190aRCRD&vgnnextchannel=3381c0ed71f85110VgnVCM1000004718190aRCRD>.

104. De Canas v. Bica, 424 U.S. 351, 359 (1976) (describing immigration law before IRCA).

105. *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 231 (2d Cir. 2006) (“Employment is the magnet that attracts aliens here illegally . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”) (quoting H.R. Rep. No. 99-682(1), at 46 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5650).

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Supreme Court has stated, “IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration law.”<sup>106</sup>

Specifically, IRCA requires employers to check employees’ eligibility for employment and contains civil and criminal sanctions for employers who knowingly hire undocumented workers (“employer sanctions”).<sup>107</sup> Every U.S. employer is required to fill out immigration paperwork for its employees. The immigration paperwork, currently the I-9 Employment Eligibility Verification form, requires a prospective employee to provide documentation confirming his or her eligibility for employment and requires the employer to inspect the documentation for its validity.<sup>108</sup> The U.S. employer must also be careful when reviewing an employee’s documents not to discriminate based on national origin.<sup>109</sup> The I-9 form, and not the employer, specifies which types of documents are satisfactory. While the employer must keep the I-9 on file for a specified period of time, the U.S. employer is not required to submit the I-9 or any documentation to the U.S. government unless requested to do so.<sup>110</sup> Generally speaking, therefore, if a document appears on its face to be valid, the U.S. employer does not *know* that the person is undocumented and can hire the prospective employee without violating IRCA.<sup>111</sup> The government can sanction employers when it can establish that an employer knowingly employed an undocumented employee.<sup>112</sup>

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106. Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 147 (2002).

107. 8 U.S.C. § 1324a.

108. For a copy of the form see Dep’t of Homeland Security, USCIS, “Form I-9, Employment Verification,” available at <http://www.uscis.gov/files/form/I-9.pdf>.

109. For instance, employers cannot request additional documentation from prospective employees just because they were born abroad or speak with a foreign accent. 8 U.S.C. § 1324b. With IRCA’s antidiscrimination provision, Congress intended “[t]o address the fear that employers would overreact to the threat of sanctions and discriminate against individuals who sounded or appeared ‘foreign.’” U.S. Dep’t of Agriculture, Office of the Chief Economist, “Labor Laws,” available at <http://www.usda.gov/oce/labor/ina.htm>.

110. *See id.*

111. Document verification is very subjective. *See* Lisa W. Foderaro, *Plenty of Apples, But a Possible Shortage Of Immigrant Pickers*, N.Y. TIMES, Aug. 21, 2007, at B1 (reporting on the following employer statement: “It’s hard to tell who’s legal and who’s not. They all have documents.”). IRCA’s employer sanctions provisions are largely viewed as ineffectual from the point of view of immigration enforcement goals. *See generally*, Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 205-08 (2007). Nonetheless, due to recent high-profile immigration workplace raids and state laws sanctioning employers who hire undocumented workers, it appears that more employers have begun to take notice of both federal and state employer sanctions laws. *See, e.g.*, Julia Preston, *Employers Fight Tough Measures On Immigration*, N.Y. TIMES, July 6, 2008, at A1.

112. Some have argued that IRCA’s employee verification requirements led to “two predictable consequences”: (1) the expansion of a black market in fraudulent documents and (2) some employers passed off the new costs to workers by lowering wages and turning to subcontractors to avoid the new regulation altogether. DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 119–22 (2002).

While IRCA's workplace-based immigration enforcement scheme, viewed comprehensively, largely focuses on employer restrictions, it also specifically targets the actions of undocumented employees to some extent.<sup>113</sup> In 1990, Congress amended IRCA, making it illegal for an employee to knowingly provide his or her employer or prospective employer with fraudulent documents.<sup>114</sup> IRCA did not explicitly make it illegal for an undocumented employee to simply seek or accept employment in the United States.<sup>115</sup> In other words, a purely "off the books" employee does not violate IRCA.

For a number of reasons, IRCA's workplace-based immigration enforcement scheme creates barriers for the effective enforcement of workplace protections. Because IRCA gives employers a prominent role in immigration enforcement,<sup>116</sup> workers are likely to be fearful of speaking out about workplace law violations. Some have argued that IRCA's employer sanctions "contributed to expansion of an 'underground economy' in which employers seek out and hire undocumented workers, expecting them to work for lower wages and working conditions and to remain silent about violations of workplace rights out of fear of losing their job or being reported to immigration authorities."<sup>117</sup> Also, IRCA enforcement through workplace immigration raids further pushes undocumented workers into the shadows.<sup>118</sup> It is unclear what role workplace immigration raids will play during the Obama administration. President Obama, who took office in January, 2009, "has promised immigration enforcement that would focus less on illegal workers and more on the employers who rely on them."<sup>119</sup> During the final years of the Bush administration, workplace immigration raids, such as the meatpacking raid described in the introduction, were a key

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113. See Kati L. Griffith, Comment, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 CORNELL INT'L L.J. 127, 128-29 (2008).

114. 8 U.S.C. § 1324c.

115. *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 231 (2d Cir. 2006) ("Congress made IRCA's new sanctions applicable only to aliens who knowingly or recklessly used false documents to obtain employment . . . It did not otherwise prohibit undocumented aliens from seeking or maintaining employment.").

116. See, e.g., Wishnie, *supra* note 111, at 202 (describing IRCA as "regulatory policy that deputized the private sector to enforce public immigration laws.").

117. Rebecca Smith & Catherine Ruckelhaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEG. & PUB. POL'Y 555, 571 (2007).

118. See, e.g., Leticia Saucedo, *A New 'U': Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 893, 896-98 (2008).

119. *Secretary Seeks Review of Immigration Raid*, N.Y. TIMES, Feb. 26, 2009, at A19. Soon after President Obama's inauguration, immigration authorities engaged in a workplace immigration raid and arrested twenty-eight workers suspected to lack immigration authorization. The Secretary of the Department of Homeland Security, Janet Napolitano, did not know about the raid in advance and has ordered a comprehensive review. *Id.*

aspect of immigration enforcement.<sup>120</sup> While the Obama administration appears less interested in workplace immigration raids and criminal prosecutions against undocumented workers than his predecessor, highly publicized workplace-raids have undoubtedly intensified fears among undocumented workers.<sup>121</sup>

As I will elaborate in the next section, IRCA's workplace-based immigration enforcement scheme also threatens the workplace protections of employees because of its potential effects on federal labor and employment laws. Congress intended, with IRCA, to decrease the magnetic pull of employment opportunities. Therefore, questions emerged after 1986 about IRCA's effect on undocumented workers' labor and employment law protections. IRCA does not explicitly state what effect, if any, it has on the application of labor and employment laws to undocumented workers. Nonetheless IRCA, and its workplace-based immigration enforcement scheme, has undoubtedly had an impact on the labor and employment law regime. In fact, some commentators have noted that IRCA has been "catastrophic for the labor rights of immigrant and U.S. workers."<sup>122</sup> As will be discussed below, while it is widely accepted that undocumented workers share the same labor and employment law *rights* as their documented counterparts, the Supreme Court's interpretation of IRCA has created ambiguity about which labor and employment law *remedies* are available to undocumented workers. Post-IRCA ambiguity about the relationship between federal immigration law and labor and employment law has made it even more unlikely that workplace law violations against undocumented workers will be addressed.

## II. U.S. LABOR AND EMPLOYMENT LAW AND MIGRANT WORKERS

United States' labor and employment statutes provide workplace-based *rights* for employees. These laws, unlike immigration law and most federally funded public assistance programs,<sup>123</sup> apply equally to documented and undocumented migrant workers. After IRCA, however, workers who are known by their employers to be undocumented are not entitled to reinstatement as a *remedy* for an illegal termination. Many U.S.

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120. For a report on another immigration raid in 2008, see Adam Nossiter, *Nearly 600 Were Arrested In Factory Raid, Officials Say*, N.Y. TIMES, Aug. 27, 2008, at A16.

121. See, e.g., Jennifer Gordon, Editorial, *Workers Without Borders*, N.Y. TIMES, Mar. 10, 2009, at A27 ("Raids terrorize immigrants but do not make them go home.").

122. Wishnie, *supra* note 88, at 1459.

123. Documented and undocumented temporary migrant workers are "not eligible for federally funded public assistance, with the exception of Medicaid emergency services." Bruno, *supra* note 81, at 3 n.11. See also Andorra Bruno, Congressional Research Serv., *Immigration: Policy Considerations Related to Guest Worker Programs-RL32044* 3 n.10 (2008).

labor and employment laws require an employer—who illegally fires an employee for engaging in protected activity—to reinstate the illegally fired employee. Under IRCA, however, an employer cannot knowingly hire an undocumented worker and therefore cannot reinstate a known undocumented worker without violating IRCA. Moreover, as will be discussed below, the Supreme Court in its 2002 *Hoffman Plastic Compounds v. NLRB*<sup>124</sup> decision foreclosed an undocumented worker's access to at least one labor law remedy in some circumstances and created confusion about IRCA's effect on other labor and employment law remedies.

#### A. *Labor Law and Migrant Workers: The NLRA*

The National Labor Relations Act of 1935 (NLRA)<sup>125</sup> regulates labor organizations and provides certain collective action and union organizing rights to employees in the private sector regardless of immigration status. In 1984, the U.S. Supreme Court in *Sure-Tan, Inc. v. NLRB* explicitly held that the NLRA protects “employees” even when they do not have proper immigration authorization.<sup>126</sup> NLRA Section 7, which is the heart of the NLRA's worker protections, states that employees “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>127</sup> It also states that employees have the right to “refrain from” these activities and provides certain limitations on union picketing and boycotting activities.<sup>128</sup>

Nonetheless, not all migrant workers benefit from NLRA protection. The NLRA explicitly exempts, for instance, domestic workers and independent contractors from its coverage.<sup>129</sup> Domestic workers are employed in “the domestic service of any family or person at his home.”<sup>130</sup> Therefore migrant domestic workers do not have a federal right to organize a union. Because the test for determining who is an independent contractor

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124. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).

125. 29 U.S.C. §§ 151 *et seq.*

126. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (“Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of ‘employee.’”).

127. 29 U.S.C. § 157. The NLRA may protect employees from adverse employment actions that flow from missing work to attend immigration rallies and protests in some circumstances. *See generally* Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93 (2007).

128. 29 U.S.C. § 157.

129. 29 U.S.C. § 152(3).

130. 29 U.S.C. § 152(3).

is multi-factored and unwieldy it is sometimes difficult to decipher who is an independent contractor and therefore exempt from the NLRA's protections.<sup>131</sup> Some migrant workers, for instance many day laborers, are engaged in work that some contend is misclassified as independent contractor work.<sup>132</sup> Moreover, another important NLRA-exempt migrant worker group is agricultural workers, including H-2A visa holders.<sup>133</sup>

These exceptions notwithstanding, many non-agricultural employees, including many H-1B and H-2B visa holders and undocumented workers, have a legal right to engage in collective action at the workplace.<sup>134</sup> If an employee, labor organization, or employer wants to bring an NLRA action he or she must bring it to the National Labor Relations Board (NLRB), an administrative agency that enforces the NLRA. The NLRA, unlike the federal employment laws I will discuss below, does not provide workers with a private right of action to bring a claim in court. When it finds an NLRA violation the NLRB has "discretion to select and fashion remedies for violations of the NLRA."<sup>135</sup> One of the NLRA's remedies, back pay, is no longer available to many NLRA-covered undocumented workers who experience an NLRA violation.<sup>136</sup> The NLRA's back pay remedy provides employees who experience unlawful terminations for engaging in NLRA-protected activity with the payment of wages they would have received had they not experienced the unlawful terminations. It also requires terminated employees to attempt to mitigate damages through a search for equivalent employment during the interim period when they are waiting for the NLRB to adjudicate their case.

The Supreme Court's 2002 *Hoffman* decision, however, reduced undocumented workers' incentives to take advantage of these rights. It determined that an undocumented employee, who had violated IRCA by using fraudulent documents and had experienced an NLRA violation, did not have access to the NLRA's back pay remedy.<sup>137</sup> The employer had illegally fired this undocumented employee for engaging in NLRA-protected union organizing activity. The Supreme Court concluded that

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131. 29 U.S.C. § 152(3). For criticism of the independent contractor category see Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187 (1999).

132. See, e.g., Robert Knox, *Braintree ruckus points up larger issue: Union protests labor practice*, BOSTON GLOBE, Dec. 7, 2006, at 4.

133. 29 U.S.C. § 152(3).

134. See generally U.S. Gen. Accounting Office, *Collective Bargaining Rights: Information on the Number of Workers with and Without Bargaining Rights*, 20 (2002).

135. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 142 (2002).

136. In *Hoffman* the Court concluded that the worker violated IRCA and the employer did not violate IRCA. There is still an open question, therefore, about whether back pay is foreclosed (1) when an undocumented worker did not violate IRCA and/or (2) when an employer violated IRCA by knowingly hiring/employing the undocumented worker.

137. See *Hoffman Plastic Compounds*, 535 U.S. 137 (2002).

allowing the NLRB to provide the undocumented worker with the NLRA's back pay remedy would contravene IRCA's policy goals. It stated that awarding the back pay remedy "would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."<sup>138</sup> The Court also determined that the removal of the NLRA's back pay remedy would not serve as a detriment to the NLRA's policy goals to protect collective action in the workplace because there were other remedies available to address the NLRA violation.<sup>139</sup> Many, however, believe that effective enforcement of the NLRA requires the award of back pay remedy. Soon after the *Hoffman* decision, for instance, the U.S. Government Accountability Office estimated that the decision negatively affected approximately 5.5 million undocumented workers and stated that "because back pay is one of the major remedies available for a violation, this decision diminished the legal bargaining rights available to these workers under the act [NLRA]."<sup>140</sup>

Since its *Hoffman* decision in 2002, the Supreme Court has not commented on IRCA's applicability to other labor and employment law remedies. This has left lower courts and commentators as well as employers and workers wondering how expansively to read the Supreme Court's interpretation of IRCA's effect on the legal remedies available to undocumented workers in the employment law context. Post-*Hoffman* legal questions demonstrate confusion about Congress' view of the proper interaction between immigration law and labor and employment law. To what extent did Congress intend, with its workplace-based immigration enforcement scheme (IRCA), to affect the remedies available to undocumented employees who suffer labor and employment law violations? For instance, did Congress, with IRCA, intend to limit the remedies available to undocumented migrant workers who experience employment law violations? If so, did Congress intend to do so only when the undocumented employee violates IRCA by using fraudulent documents to obtain employment or, similarly, only when the employer did not violate IRCA? The next section will describe the employment law rights of documented and undocumented migrants as well as *Hoffman's* potential effect on the remedies available for violations of those rights.

### B. *Employment Law and Migrant Workers*

United States' employment law statutes provide protections for documented and undocumented migrants. While there are local and state

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138. *Id.* at 151.

139. *Id.* at 152.

140. U.S. Gen. Accounting Office, *supra* note 134, at 18.

law protections for migrant workers that often go beyond federal protections such as workers' compensation,<sup>141</sup> this section focuses exclusively on federal employment statutes. Moreover, while there are other federal employment law statutes that protect migrant workers such as the Occupational Safety and Health Act (OSHA),<sup>142</sup> this section focuses on three principal workplace statutes affecting migrant workers: (1) the Fair Labor Standards Act (FLSA), which provides wage and hour protections for employees; (2) the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), which provides pre-employment and employment protections for qualifying agricultural employees; and, (3) Title VII of the Civil Rights Act (Title VII), which provides employee protections against, among other things, discrimination based on national origin, race, religion, and sex.

### 1. The Fair Labor Standards Act<sup>143</sup>

The Fair Labor Standards Act (FLSA) of 1938, passed in the midst of the Great Depression, provides child labor restrictions and baseline wage and hour protections for documented and undocumented migrant workers.<sup>144</sup> FLSA established a national hourly minimum wage in 1938, which is currently \$7.25 per hour.<sup>145</sup> It also mandated that employers pay one and one-half times an employee's regular rate, whatever that may be, for hours worked beyond forty each week.<sup>146</sup> If an employer violates FLSA it must pay back the minimum wages and overtime premiums to the worker as well as an equal amount in liquidated damages.<sup>147</sup>

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141. For a comprehensive discussion of Hoffman Plastics and Workers' Compensation Laws, see Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 N.Y.U. REV. L. & SOC. CHANGE 299 (2006). For a discussion of the impact of Hoffman on state labor and employment law remedies, see Griffith, *supra* note 113.

142. 29 U.S.C. §§ 651 *et seq.* Health and safety is an important issue for low-wage migrant workers. See, e.g., Southern Poverty Law Center, *supra* note 5, at 25 ("Guestworkers toil in some of the most dangerous occupations in the United States. Fatality rates for the agricultural and forestry industries, both of which employ large numbers of guestworkers, are more than 10 times the national average."); *id.* 25–28.

143. 29 U.S.C. §§ 201 *et seq.* For comprehensive coverage of FLSA, see FEDERAL LABOR STANDARDS ACT & Supp. (Ellen C. Kearns & Monica Gallagher eds. 2007).

144. See, e.g., Nan Ellis, *Work Is Its Own Reward: Are Workfare Participant Employees Entitled to Protection Under the Fair Labor Standards Act?*, 13 CORNELL J.L. & PUB. POL'Y 1, 25 (2003) ("Congress adopted the FLSA to relieve the effects of the Depression, by protecting the most vulnerable, those unable to negotiate on their own behalf for a living wage, and by preserving competition."); Walter M. Luers, *Workfare Wages Under the Fair Labor Standards Act*, 67 FORDHAM L. REV. 203, 208 (1998) ("The Great Depression spurred congressional efforts to create a national minimum wage."). See also *Castellanos-Contreras v. Decatur Hotels LLC*, 576 F.3d 274, 279 (5th Cir. 2009) (quoting *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) and its statement that "the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant.").

145. 29 U.S.C. § 206.

146. 29 U.S.C. § 207.

147. 29 U.S.C. § 216. See also 29 U.S.C. § 260.

FLSA, which has been described as a “wallflower” because of its obscurity behind the better known Title VII, has been experiencing a renaissance as low-wage migrant worker advocates and private counsel increasingly bring FLSA suits.<sup>148</sup> For undocumented migrant workers, who often work at or near the minimum wage, FLSA provides a form of protection from sub-standard wages.<sup>149</sup> For H-2 visa workers, who often incur great costs in transit to the United States, FLSA may require employers to pay those costs when they cut into the workers’ minimum wages for the first week of employment.<sup>150</sup> FLSA’s overtime protections are also important for migrant workers. Some worker advocates say that employer overtime violations are so rampant that, in practice, there is essentially an “immigrant exception” to FLSA’s overtime law.<sup>151</sup>

Not all migrant workers have FLSA minimum wage *and* overtime rights.<sup>152</sup> Similar to the NLRA, independent contractors are entirely exempt from coverage and agricultural workers and domestic workers are excluded from FLSA’s overtime requirements.<sup>153</sup> FLSA’s multi-factored “economic realities” test<sup>154</sup> for determining who is an employee,<sup>155</sup> and therefore covered by FLSA, and who is an independent contractor, and therefore exempt from FLSA, sometimes leads to employer confusion and/or

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148. See Scott Lemond & Rob Carty, *The Suddenly En Vogue FLSA: After 50 Years as a Wallflower, She’s Finally Ready to Dance*, 44 HOUSTON LAWYER 10, (2006) (“Move over Title VII, n1 the Fair Labor Standards Act (FLSA) is poised to take over as winner of the employment litigation popularity contest.”); Michael Orey, *Wage Wars: Workers—from truck drivers to stockbrokers—are winning huge overtime lawsuits*, BUS. WEEK (Oct. 1, 2007); Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1895 (2007) (“Heightened awareness of degraded working conditions and the creative use of law to drive direct action and media campaigns by worker centers led to the revived enforcement of the Fair Labor Standards Act (FLSA).”).

149. See Pia Orrenius & Madeline Zavodny, *What Are the Consequences of an Amnesty for Undocumented Immigrants?*, 9 GEO. PUB. POL’Y REV. 21, 23 (2004) (“Undocumented immigrants tend to be near the bottom of the U.S. skill distribution and are disproportionately employed in low-wage jobs.”).

150. See *Arriaga v. Florida Pacific Farms L.L.C.*, 305 F.3d 1228, 1242-44 (11th Cir. 2002); Griffith, *supra* note 94, at 409-13. But see *Castellanos-Contreras v. Decatur Hotels LLC*, 2009 U.S. App. LEXIS 4796 (5th Cir. La. Feb. 11, 2009) (basing conclusion largely on Department of Labor’s interpretation issued in December 2008).

151. Email Communication from Daniel Werner, Deputy Director, Southern Poverty Law Center, Immigrant Justice Project, (Aug. 17, 2008) (on file with author).

152. Some H-1B workers may be excluded from FLSA’s overtime requirements. See Susan E. McPherson & Matthew D. Fridy, *Fair Pay Exemptions for you and Your Client*, 66 ALA. LAW. 269, 274 (2005) (citing 29 C.F.R. § 541.400 through 541.402 and stating that “[b]eing highly dependant on the use of a computer to perform one’s work, like an architect or a civil engineer, does not necessarily qualify an employee for this exemption. To qualify, the employee must engage in computer systems analysis, programming or other similar computer-related work.”).

153. 29 U.S.C. § 213.

154. The economic reality test was originally set out in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

155. 29 U.S.C. § 203(e)(1) (“employee” is “any individual employed by an employer”); 29 U.S.C. § 203(d) (“employer” is “any person acting directly or indirectly in the interest of an employer in relation to an employee”).

abuse.<sup>156</sup> In fact, the U.S. government has stated that one of the “most common” violations of FLSA occurs when “contractors hire so-called independent contractors, who in reality should be considered [FLSA-covered] employees.”<sup>157</sup> Moreover, some H-1B workers perform “white collar” jobs that are exempted from FLSA’s overtime law because they are “executive, administrative, or professional” employees as FLSA defines those terms.<sup>158</sup>

FLSA-covered workers have a private right of action to sue the employer in court regardless of immigration status.<sup>159</sup> FLSA plaintiffs can bring representative actions on behalf of themselves and other workers that affirmatively “opt-in” to the lawsuit.<sup>160</sup> If the worker or workers prevail in the lawsuit, the court will require the employer to pay for the worker or workers’ attorneys’ fees.<sup>161</sup> Attorneys’ fees are part of Congress’s broader intent to “encourage private parties to act as ‘private attorneys general’” by bringing FLSA complaints.<sup>162</sup> While the U.S. Department of Labor has authority to enforce FLSA and investigate employee complaints, workers are not required to notify the agency in any way before bringing a claim in federal court. As mentioned above, neither the Supreme Court nor Congress has spoken on whether IRCA forecloses an undocumented worker’s access to FLSA remedies. So far, the lower courts have largely concluded that undocumented workers are eligible for the majority of FLSA’s remedies.<sup>163</sup> If a worker is known to be undocumented, it is unlikely that reinstatement is an available FLSA remedy for an illegal retaliatory termination of employment. This is not an entirely settled area of post-*Hoffman* law, however. At least one court has suggested that reinstatement may be available in some circumstances. In one federal employment law case, for example, a district court concluded that if the

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156. For a broader discussion of misclassification, see L.H. DONAHUE, J.R. LAMARE, & F.B. KOTLER, *THE COST OF WORKER MISCLASSIFICATION IN NEW YORK STATE* (2007), available at <http://digitalcommons.ilr.cornell.edu/reports/9/>; Smith & Ruckelhaus, *supra* note 116; Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999).

157. U.S. Dept. of Labor, “Fact Sheet No. 013: Employment Relationship Under the Fair Labor Standards Act (FLSA),” (Nov. 2007), available at <http://www.dol.gov/esa/whd/regs/compliance/whdfs13.pdf>. See also Pamela Constable, *Advocates Speak Up for Illegal Day Laborers Cheated of Wages*, WASH. POST, July 8, 2008, at A01.

158. See 29 U.S.C. § 213.

159. See, e.g., U.S. Department of Labor, “Fact Sheet No. 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division,” (July 2008), available at <http://www.dol.gov/esa/whd/regs/compliance/whdfs48.pdf>.

160. See 29 U.S.C. § 216(b).

161. See 29 U.S.C. § 216.

162. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 347 n.124 (2005) (citing *Laffey v. Northwest Airlines*, 746 F.2d 4, 11 (D.C. Cir. 1984)).

163. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 509, 510–11 (2004).

employer was allowed to ask the worker to fill out the I-9 employment verification form after an illegal retaliatory termination it would “have the effect not of enhancing compliance with immigration employment laws, but of undermining the enforcement of and compliance with such laws” because it would make undocumented workers more attractive to employers.<sup>164</sup>

## 2. The Migrant and Seasonal Agricultural Worker Protection Act<sup>165</sup>

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) of 1983 is a relevant statute for many documented and undocumented migrants. Some estimate that almost half of agricultural workers in the United States are undocumented migrants.<sup>166</sup> Pursuant to AWPA, a “migrant” worker is a worker who works in agricultural on a temporary or seasonal basis and is required to be away overnight from his or her permanent place of residence.<sup>167</sup> “Seasonal” workers share the same AWPA definition, except that they are not required to be absent overnight from their permanent residences.<sup>168</sup> Similar to its 1963 predecessor,<sup>169</sup> AWPA responded to well-documented worker abuses in the agricultural industry.<sup>170</sup> Courts have often described AWPA as a “remedial statute” that must “be construed broadly to effect its humanitarian purpose.”<sup>171</sup> It creates a wide range of industry-specific protections for employees that go beyond FLSA’s requirement that workers receive minimum wages and overtime premiums. These protections include certain housing, transportation, wage, disclosure, and recordkeeping requirements as well as a requirement that farm labor contractors, who often do the recruiting and transporting of workers, register with the U.S. Department of Labor.<sup>172</sup>

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164. See *EEOC v. City of Joliet*, 239 F.R.D. 490, 492 (N.D. Ill. 2006) (“It is well known and understood that one of the main motivations for the hiring of undocumented workers is the reality that such workers are unlikely to complain if discriminated against, underpaid, overworked or subjected to abusive work environments because they fear deportation. Therefore, safeguarding the rights of such workers to enforce laws such as Title VII will, in effect, strengthen our immigration laws by removing one of the main motivations for hiring undocumented workers in the first place - one of the stated goals of the Immigration Reform and Control Act of 1986 (‘IRCA’).”).

165. 29 U.S.C. §§ 1801 et seq.

166. Philip Martin, *Guestworkers: New Solution to New Problem?* 1 (Pew Hispanic Center, Mar. 21, 2002).

167. 29 U.S.C. § 1802(8)(A).

168. 29 U.S.C. § 1802 (10)(A).

169. *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1168 (11th Cir. 2003) (“The [Farm Labor Contractor Registration Act-FLCRA] was the first major federal effort to improve the conditions for agricultural laborers . . .”). For a provocative expose of the conditions of farm labor before Congress enacted FLCRA, see Edward R. Murrow’s documentary, *Harvest of Shame* (CBS television broadcast 1960).

170. *Morante-Navarro*, 350 F.3d 1163, at 1168–70.

171. *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1505 (11th Cir. 1993).

172. See, e.g., 29 U.S.C. §§ 1811–15, 1821–23, 1831–32, 1841–44.

Unlike FLSA, AWPA has provisions that specifically address each stage of the employment relationship. AWPA's disclosure requirements, for instance, require that AWPA-covered migrant workers receive accurate information about the terms and conditions of employment at the recruitment stage. AWPA's protections acknowledge that there is often a lot at stake during the recruitment stage, especially when a worker is deciding whether to travel great distances for an employment opportunity. Moreover, pursuant to AWPA, an agricultural employer is bound by the "working arrangement" he or she makes with employees and must pay the employees' wages when due. To respond to the sometimes squalid living conditions on farms and unsafe transportation methods, AWPA followed its predecessor and regulates the housing as well as the daily transportation to and from work of AWPA-covered migrant workers.<sup>173</sup>

Somewhat counter intuitively, AWPA does *not* protect H-2A agricultural workers under any circumstances but does protect undocumented migrants and H-2B workers who fall within its definitions.<sup>174</sup> The AWPA definition of "agricultural" is generally broader than the definition of "agricultural" applied in the H-2 visa program.<sup>175</sup> Therefore, AWPA can apply to H-2B workers that are "non-agricultural" according to the H-2B program but are "agricultural" according to AWPA. Forestry workers are an example of workers who are counter intuitively often both AWPA-covered and "non-agricultural" H-2B visa holders.

AWPA-covered workers have a private right of action to bring a claim in court against agricultural employers, agricultural associations, and farm labor contractors regardless of their immigration status.<sup>176</sup> AWPA plaintiffs can bring class actions on behalf of other employees that do not affirmatively opt out of the lawsuit. Prevailing AWPA plaintiffs can receive either statutory damages of \$500 for each AWPA violation or actual damages for each violation.<sup>177</sup> Unlike FLSA, however, even if AWPA plaintiffs prevail in their AWPA claims they do not have the right to recover their attorneys' fees. Similar to FLSA-covered workers, they can also make complaints to the U.S. Department of Labor but are in no way required to do so before pursuing a court action.

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173. *See, e.g.*, 29 U.S.C. §§ 1823, 1841.

174. *See, e.g.*, *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 605 (D. Fla. 2002) (concluding that undocumented workers are AWPA covered); 29 U.S.C. § 1802(8) & (10) (excluding H-2A workers from AWPA coverage).

175. For the definition of agriculture, see 29 U.S.C. § 1802(3).

176. *See, e.g.*, U.S. Department of Labor, "Fact Sheet No. 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division," (July 2008), available at <http://www.dol.gov/esa/whd/regs/compliance/whdfs48.pdf>.

177. 29 U.S.C. § 1854(c).

While there are only a few cases that consider the effect of the Supreme Court's *Hoffman* decision on AWPA remedies, early signs indicate that courts are concluding that AWPA's remedies, besides reinstatement, are still available regardless of immigration status. If undocumented workers experience an AWPA violation they are still likely to be eligible for AWPA's compensatory and statutory damages.<sup>178</sup>

### 3. Title VII of the Civil Rights Act<sup>179</sup>

Title VII of the Civil Rights Act of 1964, which was passed during the heyday of the civil rights movement, forbids specified employers from discriminating against employees based on national origin, race, color, religion, or sex. Title VII forbids employers from taking an adverse employment action against an employee because of his or her membership in one of these protected classes. By definition, migrant workers fall into at least one of Title VII's protected categories because they are from a foreign country. For example, in several recent cases, migrant workers have complained that their employers have discriminated against them based on their national origin through unnecessary "English only" rules and other adverse employment actions.<sup>180</sup> Moreover, in *Chellen v. John Pickle Co.*, a federal court recently concluded, among other things, that H-1B skilled workers from India experienced "a hostile work environment characterized by abusive language, demeaning job assignments, and threats and intimidation based on their national origin."<sup>181</sup>

Title VII also provides migrant workers with protections against sex discrimination. In a recent case, for example, female H-2B workers claimed that their assignment to the H-2B visa program, rather than the H-2A visa program, constituted unlawful sex discrimination. The lead plaintiff claimed "that she was qualified to work in an H-2A position and would have preferred such an assignment because of its preferable benefits. . . [and] that. . . there were men with similar or lesser qualifications that were recruited False [for the H-2A program and that she] was neither offered such a position nor informed that such positions existed."<sup>182</sup> Moreover, in January, 2007, a large Florida vegetable and fruit

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178. See, e.g., Wishnie, *supra* note 163, at 509–11 (stating that AWPA wage and statutory damages are likely to still be available); *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604–05 (S.D. Fla. 2002). See generally *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 131 (W.D.N.Y. 2003).

179. 42 U.S.C. §§ 2000e *et seq.*

180. See, e.g., *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160 (10th Cir. 2007); *Rivera v. NIBCO*, 364 F.3d 1057 (9th Cir. 2004).

181. 446 F. Supp. 2d 1247, 1264 (N.D. Okla. 2006). For another Title VII case involving H-1B workers, see *EEOC v. Technocrest Sys.*, 448 F.3d 1035 (8th Cir. 2006).

182. *Olvera-Morales v. Int'l Labor Mgmt. Corp.*, 2008 U.S. Dist. LEXIS 13094, \*3 (M.D.N.C. 2008).

company, which had been sued for Title VII sexual harassment violations against female agricultural employees, settled the case for \$215,000.<sup>183</sup>

Unlike FLSA and AWP, Title VII-covered workers are required first to make a timely complaint with a federal agency or state agency where applicable before filing a complaint in federal court. The relevant agency is the Equal Employment Opportunity Commission (EEOC). Once the EEOC has a chance to investigate the matter, it decides whether to bring suit in federal court or to issue a “right to sue” letter that grants permission to the complainant to sue in federal court within a specified period of time. Therefore, unlike the NLRA, a Title VII plaintiff does ultimately have a private right of action in federal court. Title VII plaintiffs can bring class action suits on behalf of similarly situated employees. Title VII allows for a wide array of both compensatory and punitive damages for violations. Similar to FLSA, if a Title VII plaintiff prevails, the employer must pay for the plaintiffs’ attorneys’ fees.

While the availability of Title VII’s back pay remedy to undocumented workers is still very much in question, a growing number of courts have concluded that other Title VII remedies, such as compensatory and punitive damages, are available regardless of immigration status.<sup>184</sup> Moreover, the EEOC has pronounced that undocumented workers are still Title-VII protected despite the *Hoffman* decision.<sup>185</sup> Scholars analyzing agency statements and current case law generally agree that “undocumented workers appear still to be eligible for relief . . . including unpaid wages for time actually worked, declaratory and injunctive relief, attorneys fees, and punitive, compensatory, and liquidated damages.”<sup>186</sup> As mentioned above, there is less agreement about the availability of Title VII’s back pay remedy after the Supreme Court’s *Hoffman* decision. The few courts to consider whether back pay is still available to undocumented workers in the Title VII context have arrived at mixed results.<sup>187</sup>

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183. For an article referring to the case, see *Haitian Farmworkers Settle Sexual Harassment Lawsuit Against Major Florida Fruit and Vegetable Wholesaler*, U.S. NEWSWIRE, Jan. 24, 2007, available at [http://findarticles.com/p/articles/mi\\_hb5554/is\\_200701/ai\\_n21887795](http://findarticles.com/p/articles/mi_hb5554/is_200701/ai_n21887795). For reports that sexual harassment is a problem for female agricultural workers, see, e.g., Mary Klaus, *Event focuses on sexual abuse of female migrant workers*, PATRIOT NEWS, Apr. 30, 2008, at B01 (“Monica Ramirez, project director for ‘Esperanza: The Immigrant Women’s Legal Initiative,’ said victims often stay silent because they fear further violence, harm to their families and deportation. She said 90 percent of female farm workers surveyed call sexual harassment on the job a problem.”).

184. See Wishnie, *supra* note 163, at 509-11. See generally Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473 (2005).

185. See EEOC, “EEOC Reaffirms Commitment to Protecting Undocumented Workers From Discrimination,” 6/28/02, available at <http://www.eeoc.gov/press/6-28-02.html>.

186. Wishnie, *supra* note 163.

187. See Christine N. Cimini, *Ask, Don’t Tell: Ethical Issues Surrounding Undocumented Workers’ Status in Employment Litigation*, 61 STAN. L. REV. 355, 384 (2008) (“A couple of courts have questioned the applicability of Hoffman to the Title VII context altogether, while others found that while

#### 4. IRCA Ambiguity and Employment Laws

While a growing number of courts have generally limited the reach of the U.S. Supreme Court's *Hoffman* decision, *Hoffman* undoubtedly affects undocumented workers' incentives to bring lawsuits and enforce their workplace rights.<sup>188</sup> For instance, the U.S. Court of Appeals for the Ninth Circuit reasoned that probing immigration status during litigation may dissuade both undocumented and documented workers from bringing legal actions against their employers.<sup>189</sup> Undocumented workers may fear detention or deportation and documented workers may fear that the immigration status of their friends and family may be called into question or that their own recently-acquired immigration authorization may be jeopardized in the lawsuit.<sup>190</sup> Suggesting that such a probe would damage the efficacy of Title VII's main enforcer, the employee, the Ninth Circuit Court of Appeals stated that "Congress intended to empower individuals to act as private attorneys general in enforcing the provisions of Title VII."<sup>191</sup>

The ambiguity about the full effect of the Supreme Court's *Hoffman* decision allows the fight over the relevance of immigration status to play a role in earlier stages of the litigation, before remedies are awarded. During the discovery phase of litigation, when the parties exchange relevant documents, request answers to interrogatories, and conduct depositions, many employers argue that they have a right to know the immigration status of the plaintiff. The *Hoffman* decision, they contend, made immigration status relevant to the question of which remedies are available and therefore relevant to the litigation. Undocumented worker legal advocates have successfully countered these arguments on a number of occasions. So far "[c]ourts have overwhelmingly decided to prohibit the disclosure of immigration status in the context of employment-related civil litigation, often citing the highly prejudicial impact of the disclosure compared to its relatively small probative value."<sup>192</sup> Nonetheless, the threat of *Hoffman* during these earlier stages of litigation has a profound effect on the process and can limit the assurances that plaintiff attorneys can provide to their clients. It can dissuade workers from making complaints even in the face of some of "the strongest claims for workplace violations."<sup>193</sup>

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*Hoffman* may limit the back-pay remedy, it does not foreclose other remedies available under Title VII."); Ho & Chang, *supra* note 184, at 500-03.

188. Wishnie, *supra* note 88, at 1448 n.14.

189. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004).

190. *Id.* at 1065.

191. *Id.* at 1065-66.

192. Cimini, *supra* note 187, at 382-83 (citing relevant cases).

193. Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 42 (2008) ("Without an effective strategy for answering the

C. *Other U.S. Statutes Protecting Migrant Workers*

There are several federal statutes that are not typically thought of as part of the traditional employment law area but that may apply to some migrant workers and afford them rights. For migrant workers that are victims of labor trafficking, for instance, a federal anti-trafficking statute provides a number of criminal and civil protections. Trafficking is “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”<sup>194</sup> Since the enactment of the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA), victims of labor trafficking have had a private right of action to bring a case against their traffickers in federal court.<sup>195</sup> The immigration status of the trafficking victim is not relevant to the outcome of the criminal or civil proceedings.<sup>196</sup> A trafficking victim who is successful in his or her lawsuit can recover, among other things, pain and suffering damages.<sup>197</sup> To date, the TVPRA has not been used extensively in the labor trafficking area but migrant worker advocates contend that it will have increasing relevance in the upcoming years.<sup>198</sup>

The Alien Tort Claims Act (ATCA) provides aliens, including migrant workers regardless of immigration status, with a right to bring suits in federal court for a tort that is committed in violation of the law of nations or a treaty of the United States.<sup>199</sup> The key limiting factor for these claims, of course, is that the case has to involve a tort that fits this description. According to a legal expert on ATCA, ATCA may protect migrant workers when trafficking, slavery, or severe labor rights violations are involved.<sup>200</sup> A recent federal district court case in California provides an example of a

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status-based questions born of Hoffman, immigrants will continue to opt out of civil litigation, unwilling to assert even the strongest claims for workplace violations.”).

194. 22 U.S.C. § 7102(8)(B).

195. See 18 U.S.C. § 1595.

196. OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Compensation for Trafficked and Exploited Persons in the OSCE Region* 130 (2008). For discussion of the three different ways a trafficking victim can recover, see *id.* at 130–38.

197. For discussion of all remedies, see *id.* at 139.

198. *Id.* at 152 (“Although the private right of action created by the TVPRA is untested, civil attorneys have already brought suit against traffickers using a variety of legal theories and have won substantial judgments.”). If the federal government certifies a labor trafficking victim “as a victim of a severe form of trafficking” the victim can receive legal representation through organizations that receive federal funding. *Id.* at 151–52, 160.

199. 28 U.S.C. § 1350. For a further discussion of ATCA claims see Sarah H. Cleveland, *The Alien Tort Statute: Civil Society and Corporate Responsibility*, 56 RUTGERS L. REV. 971 (2004); Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 (2003).

200. Email communication from Natalie L. Bridgeman (Sept. 16, 2008) (on file with author).

possible claim under ATCA. The migrant worker plaintiffs claimed, among other things, that

defendants fraudulently induced them to come to the United States from India on false promises that they would be provided an education and employment opportunities, but then forced them to work long hours under arduous conditions for pay far below minimum wage and in violation of overtime laws, and sexually abused and physical beat them.<sup>201</sup>

The court stated that the claim “may rest upon any ‘specific, universal and obligatory’ norm recognized by the international community.”<sup>202</sup> It found plaintiffs’ claims that defendants engaged in trafficking, debt bondage, and forced labor were sufficient to survive a motion to dismiss.<sup>203</sup> Due to these limitations, ATCA claims are more common in migrant worker lawsuits alleging severe mistreatment.

While this article focuses on the domestic legal system, migrant workers may also have some recourse in international arenas such as the International Labor Organization, Inter-American Court of Human Rights, and the National Office of Administration of the North American Agreement on Free Trade.<sup>204</sup> These avenues are sometimes limited because of the failure of the United States to sign treaties that may be helpful to migrant workers and because the domestic enforcement of international standards is often difficult. For example, while the United States has signed an International Labor Organization (ILO) Convention on child labor and forced labor and a United Nations Convention on Trafficking it has refused to sign the ILO’s Conventions specifically addressing migrant workers.<sup>205</sup> These avenues are somewhat limited with respect to providing individual relief for migrant workers because international bodies largely do not have an ability to reach specific employers in the United States. Even when international law cannot directly reach employers in the United States, however, international legal challenges often provide political pressure that may help migrant workers more broadly and international laws can serve as a source of “aspirational law” for the future.<sup>206</sup>

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201. Doe I v. Reddy, 2003 U.S. Dist. LEXIS 26120, \*12 (N.D. Cal. 2003).

202. *Id.* at \*32.

203. For limitations on ATCA claims, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (narrowing ATCA claims by disallowing claims “for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATCA] was enacted” in 1789).

204. Griffith, *supra* note 94, at 384–85 n.8-10 (citing relevant scholarship).

205. See OSCE, *supra* note 196, at 128.

206. See generally Philip Harvey, *Aspirational Law*, 52 BUFF. L. REV. 701 (2004).

### III. MIGRANT WORKER ADVOCACY

In the last decade, advocacy on behalf of migrant workers has intensified. Migrant workers and their advocates generally work on three levels to try to improve working conditions in the United States. There are worker groups such as labor unions, worker centers, and community groups that focus on organizing migrant workers through a wide array of strategies. There are non-profit legal groups and attorneys that litigate on behalf of migrant workers in individual complaints as well as representative actions on behalf of groups of migrant workers. Finally, there are policy advocacy groups that focus on legislation and regulations that may have an impact on migrant workers. Acknowledging that these three different tiers of work are not mutually exclusive and advocacy groups often span more than one, below I briefly lay out the main trends in each.

#### A. *Worker Groups*

There are a number of worker groups that organize migrant workers regardless of immigration status and others that focus their organizing on documented migrant workers.<sup>207</sup> As part of their efforts to revitalize the ailing U.S. labor movement,<sup>208</sup> some unions have come to view the mistreatment of low-wage migrant workers as a threat to the workplace rights of all workers<sup>209</sup> and have targeted documented and undocumented immigrants in union organizing campaigns. For instance, in recent efforts to organize the unexportable hotel industry, UNITE HERE “excelled at organizing immigrant workers, who constitute a disproportionate share of hotel employees.”<sup>210</sup> Moreover, in 2005 the Service Employees International Union (SEIU) successfully organized 4,700 janitors in Houston, Texas, by focusing “on two groups [the union] says are pivotal if labor is to grow again: low-wage workers and immigrants.”<sup>211</sup>

There are also many new organizing efforts outside of the labor movement. Recent scholarship has documented the many forms of “alternative worker organizations” that have sprung up in recent years. Many of these organizations serve both documented and undocumented migrant workers. Worker centers, for instance, pursue new forms of

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207. See generally Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 396 (2005).

208. See, e.g., Steven Greenhouse, *Union Claims Texas Victory With Janitors*, N.Y. TIMES, Nov. 28, 2005, at A4 (stating that “the percentage of private-sector workers in unions has dropped to 7.9 percent”).

209. See, e.g., Ruth Milkman, *Introduction*, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 1, 1–2, 10–11 (Ruth Milkman ed. 2000).

210. See, e.g., Harold Meyerson, *Taking On the Hotels*, WASH. POST, Jan. 18, 2006, at A17.

211. Greenhouse, *supra* note 208.

community-labor organizing to respond to the needs of low-wage and immigrant workers.<sup>212</sup> Worker organizations are not uniform in their structures or goals.<sup>213</sup> There are some that target a particular geographical area, an industry, or an ethnic group and others that respond more organically to the needs of the active members or participants. While the role of alternative worker organizations in the broader movement for economic justice is not entirely uncontroversial among worker advocates, many commentators see non-traditional worker organizations as important experiments that can aid efforts to strengthen working class movements.<sup>214</sup>

Neither labor organizations nor the vast majority of alternative worker organizations mentioned above have made H-1B worker organizing a priority.<sup>215</sup> Nonetheless, there are a handful of recent efforts that target documented H-2 migrant workers. The New Orleans Workers' Center for Racial Justice, for instance, recently created the Alliance of Guest Workers for Dignity (the Alliance) to organize and provide services for H-2B workers who are in New Orleans to work on post-Katrina reconstruction efforts.<sup>216</sup> In 2008, the Alliance engaged in a month-long hunger strike "to highlight their allegations that a guest worker program is abusing foreign laborers and shutting Americans out of decent jobs."<sup>217</sup> Moreover, the Farm Labor Organizing Committee (FLOC) has developed a strategy to organize H-2A agricultural guest workers in North Carolina. In 2004 FLOC "won union recognition for roughly 8500 guest workers employed by the North Carolina Growers Association ('NCGA')."<sup>218</sup> The contract "dramatically changes the landscape for the H-2A workers it covers" by, among other things, creating a grievance procedure and giving FLOC power to oversee recruitment in Mexico.<sup>219</sup>

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212. See generally JANICE FINE, *WORKER CENTERS: ORGANIZING NEW COMMUNITIES AT THE EDGE OF THE DREAM* (2006); JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995).

213. *Id.*

214. See generally Hyde, *supra* note 57.

215. *Id.* at 521-22 (describing H-1B advocacy group as focused on policy and stating that "neither the AFL-CIO, nor any of its affiliates, has made efforts to organize H-1B workers.").

216. For a description of the project, see <http://www.nowcrj.org/about-2/alliance-of-guest-workers-for-dignity>.

217. Gaouette, *supra* note 101.

218. Jennifer Hill, *Binational Guestworker Unions: Moving Guestworkers into the House of Labor*, 35 FORDHAM URB. L.J. 307, 309-310 (2008). See also Elisabeth Malkin, *Graft Mars the Recruitment of Mexican Guest Workers*, N.Y. TIMES, May 24, 2007, at A3 ("[FLOC] opened its office in Monterrey two years ago to help the 6,000 Mexican guest workers it represents in a collective bargaining agreement with the North Carolina Growers Association, a group of 650 farmers.").

219. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 576 (2007). See also *id.* ("The UFW agreement with Global Horizons, a labor contractor, was only announced in the spring of 2006, and it is too soon to know how it will work on behalf of the nearly 4000 workers it covers.").

B. *Legal Groups and Lawyers*

Legal groups and lawyers play a significant role as advocates on behalf of migrant workers. Both a change to legal services funding in 1996 and the Supreme Court's *Hoffman* decision, however, affected the way legal groups and lawyers conduct legal advocacy on behalf of migrant workers. These changes fostered separation between advocacy for documented workers and advocacy for workers regardless of immigration status.<sup>220</sup> The legal services appropriations law was changed in 1996 to disallow legal services offices, which receive *any* federal funding, from using *any* of its funds to represent undocumented workers.<sup>221</sup> Since 1996, some federally-funded legal services offices continue to provide legal representation for H-2A agricultural workers and H-2B forestry workers. Meanwhile a host of legal organizations that do not receive federal funding serve both H-2B and other migrant workers regardless of immigration status.<sup>222</sup> Because many groups felt that the Supreme Court's 2002 *Hoffman* decision posed a serious threat to workplace protections for undocumented workers, in recent years they have become increasingly coordinated in their efforts.<sup>223</sup>

Lawyers have also figured prominently in some of the worker organizing efforts described in the section above. In fact there is a growing "literature on ways that law and lawyering can advance (or retard) the process of organizing" among workers.<sup>224</sup> Some unions have turned to legal challenges "both as an organizing strategy and as a matter of philosophical commitment."<sup>225</sup> Moreover, some alternative worker organizations utilize legal cases as an element of their overall strategy.<sup>226</sup> For instance, a recent article noted that, "[b]ecause of the high incidence of legal abuse among immigrant workers, legal services emerged as a significant component of the worker centers' agenda."<sup>227</sup> The partnership

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220. Cummings, *supra* note 98, at 913–24.

221. *Id.* at 914.

222. Legal organizations, such as the Workers' Rights Law Center of New York, the Northwest Workers' Justice Project, and the Legal Aid Society-Employment Law Center of San Francisco, represent migrant workers in litigation against their employers regardless of their immigration status. Other groups, such as the Southern Poverty Law Center's Immigrant Justice Project, were created largely to bring class action litigation on behalf of migrant workers. The National Employment Law Project (NELP), among other things, provides strategic resources for lawyers working on individual and class action cases on behalf of low-wage and migrant workers.

223. See Cummings, *supra* note 98, at 914 (describing post-Hoffman collaborations between law school clinics, worker centers, and other legal groups).

224. Fran Ansley, *Doing Policy from Below: Worker Solidarity and the Prospects for Immigration Reform*, 41 CORNELL INT'L L.J. 101, 110 (2008).

225. See, e.g., Fisk, *supra* note 26, at 59. See generally Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PENN. J. LAB. EMPL. L. 1 (2005).

226. See generally Ashar, *supra* note 148.

227. Cummings, *supra* note 98, at 917.

between lawyers and workers has also given rise to the increased use of employment law as a means to protect new worker organizing efforts. Indeed, Benjamin Sachs has illustrated that, as a response to the declining relevance of the NLRA, “workers and their lawyers are turning to employment statutes like the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act of 1964 as the legal guardians of their efforts to organize and act collectively.”<sup>228</sup>

### C. Legislative Advocacy Groups

There are legislative advocacy groups for low-skilled migrant workers as well as for skilled migrant workers. In part because the issues related to each are so different, advocates for low-skilled migrant workers largely do not work in coordination with advocates for skilled migrant workers. With the national immigration debate looming large over the past few years, legislative advocacy groups such as Farmworker Justice, the National Immigration Law Center, and the Southern Poverty Law Center’s Immigrant Justice Project, have made extensive criticisms and proposals regarding legislation that would affect low-wage migrant workers.<sup>229</sup> While these groups and the large network of their collaborators focus on a wide range of legislative proposals that affect low-wage migrant workers, one of their main foci is advocacy related to the contours of future guest worker programs. Many of these proposals advocate for the existence of paths to permanent residency for guest workers, visa portability, and the payment of transportation costs at the beginning of the employment period. Recently, migrant worker advocates were successful in their efforts to stall new H-2A regulations that were finalized in President Bush’s final month in office.<sup>230</sup> Moreover, as mentioned above, international legal challenges often play a part in broader migrant worker advocacy efforts. For instance, a number of groups brought a complaint pursuant to the labor side agreements of the North American Free Trade Agreement that challenged the H-2A visa program.<sup>231</sup>

The Immigrant Support Network (ISN) has worked on legislative issues on behalf of skilled migrants with H-1B visas.<sup>232</sup> While visa holders

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228. Sachs, *supra* note 29, at 2687.

229. For instance, over thirty groups worked together to submit extensive comments about proposed H-2B regulatory changes. See [http://www.friendsfw.org/h-2B/DOL\\_H-2b\\_2008-07-07\\_Comment.pdf](http://www.friendsfw.org/h-2B/DOL_H-2b_2008-07-07_Comment.pdf). See also Southern Poverty Law Center, *supra* note 5.

230. See Farmworker Justice Web site, [http://www.fwjustice.org/Immigration\\_Labor/h2anews.htm#court](http://www.fwjustice.org/Immigration_Labor/h2anews.htm#court). See also Greenhouse, *supra* note 82.

231. Lisa Guerra, *Modern-Day Servitude: A Look at the H-2A Programs Purposes, Regulations, and Realities*, 29 VT. L. REV. 185, 211 (2004).

232. Hyde, *supra* note 57, at 521.

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originally spearheaded the effort,<sup>233</sup> “[i]t is funded largely by successful Indian entrepreneurs . . . who derive no direct benefit from its success, but are largely motivated by pride in the achievements of their compatriots.”<sup>234</sup> Among other things ISN has advocated for improvements in the process toward permanent residency status and the portability of the visa.<sup>235</sup> ISN has had some success in securing legislative improvements on behalf of H-1B workers.<sup>236</sup>

#### IV. INTERSTICES OF IMMIGRATION LAW AND LABOR AND EMPLOYMENT LAW

This article highlights an aspect of the immigration debate in the United States that is too often overlooked. Much debate focuses on paths to legalization and border security, but far too little attention is paid to the relationship between immigration regulation and the regulation of workplace conditions for employees. For instance, few examine whether, or to what extent, IRCA’s workplace-based immigration enforcement should affect the workplace law rights and remedies of employees or workplace law regulation more broadly. Moreover, little attention is paid to the effect of such things as visa portability restrictions and employer sponsorship of legal residency applications on workplace law enforcement. Despite this absence in the national debate, the above illuminates that U.S. immigration law creates both tensions and ambiguities with respect to labor and employment law enforcement that demand attention.

The way U.S. immigration law regulates temporary worker visa programs as well as how it regulates the employment of undocumented workers may incur a cost on the future viability of the U.S. labor and employment law regime.<sup>237</sup> The regime, initiated during the New Deal’s expansion of federal power in the 1930s and complemented during the civil rights movement in the 1960s, is largely based on the universalist rationale that employees must have the same baseline individual and collective rights nationally in order to avoid creating a sub-class of workers.<sup>238</sup> The

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233. *Id.* at 521–22.

234. Hyde, *supra* note 207, at 396.

235. See generally Hyde, *supra* note 57, at 521–24.

236. *Id.*

237. For an argument that both immigration law enforcement and workplace law enforcement are suffering because of the “legal system’s treatment of illegal workers” see *Developments in the Law—Jobs and Borders: Legal Protections for Illegal Workers*, 118 HARV. L. REV. 2171, 2225, 2246–47 (2005).

238. See generally *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (1945); Wishnie, *supra* note 88, at 1459–61. See also *id.* at 1461 (describing U.S. immigration law as “distorting the labor and employment schemes through which Congress intended to supply basic workplace protections for all workers.”); Rachael S. Simon, *Workers on the March: Work Stoppages, Public Rallies, and the National Labor Relations Act*, 56 CATH. U.L. REV. 1273, 1281 (2007) (“Clearly, when a large segment

Supreme Court, for instance, stated the following before concluding that undocumented workers are NLRA “employees” and therefore enjoy NLRA rights:

If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.<sup>239</sup>

To advance this overarching goal of avoiding a sub-class of workers U.S. labor and employment laws rely on union or worker-initiated complaints more than government-initiated workplace inspections.<sup>240</sup> The promotion of private attorneys general and the protection of collective action are central to workplace law regulation in the United States.<sup>241</sup> Workplace protections, therefore, are undermined when a subset of employees—documented and undocumented migrant workers—are either too fearful to complain or are not sufficiently motivated to bring valid complaints. The intense dependency of H visa workers on their sponsoring employer greatly reduces the incentives for making legitimate workplace law complaints. Moreover, IRCA’s restrictions on the reinstatement and NLRA back pay remedy, as well as ambiguity about the relevance of immigration status to the availability of other labor and employment law remedies, often makes it risky to complain. This reduces incentives for undocumented workers to file workplace law complaints.

I join others who have contended that “Congress must act soon to address in good faith the many tensions and fissures in the labor-immigration amalgam.”<sup>242</sup> While “legal tinkering” may be insufficient, legislative change that resolves tensions between immigration law and labor

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of the workforce is denied basic protections, the rights of all employees are threatened...It is impossible to imagine that the [Hoffman] Court intended to relegate unauthorized workers to an even deeper subclass.”).

239. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 192 (1984). *See also* *Agri Processor Co. v. NLRB*, 379 U.S. App. D.C. 318 (D.C. Cir. 2008).

240. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994) (“We noted that a Title VII plaintiff... is ‘the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’”).

241. *See, e.g., Cunningham-Parmeter, supra* note 193, at 45 (2008) (“From combating sweatshop conditions to investigating labor law violations and enforcing wage laws, many federal agencies rely almost entirely on employee complaints.”).

242. Duff, *supra* note 127, at 150. *See generally id.* (arguing, among other things, that NLRA protects of immigration rallies in some circumstances). *See also* Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1371 (2009) (noting the “disarray” in this area of law and “the need for a coherent framework for evaluating the future rights of unauthorized workers.”).

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and employment law could nonetheless take a step in the right direction.<sup>243</sup> Thus, as the United States deliberates about the militarization of the border and legalization opportunities for undocumented migrants, the impact that immigration law has on the labor and employment law regime should not be overlooked. The regime's intent to protect collective action among employees is threatened every day that undocumented workers have less adequate recourse for labor law violations than their documented counterparts. The regime's intent to create a baseline of standards in the workplace is threatened every day that documented migrant workers are not paid their lawfully earned wages but are afraid that a complaint might jeopardize their ability to remain in the United States or to return to the United States as a guest worker in the future. It is threatened every day that undocumented migrant workers are paid less than the federal minimum wage but are afraid to make a FLSA complaint, are living in tattered and unsanitary trailers but are afraid to make an AWPA complaint, and are experiencing workplace discrimination based on their membership in a protected class but are afraid to make a Title VII complaint. Admittedly, not all workers will complain even when they experience severe workplace abuse. However, the current atmosphere of ambiguity and disincentives to complain or engage in collective activity effectively create the conditions for a sub-class of workers that threaten the living and working standards of domestic and migrant workers alike.

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243. *Id.* at 151 (referring to Jennifer Gordon's transnational strategy for regulating migrant workers).

