LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS' RIGHTS

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INTRODUCTION: IMMIGRANT WORKERS IN THE U.S. ECONOMY

Between twenty-eight and thirty million immigrants live in the United States.[1] While immigrants make up less than eleven percent of the total population, they make up fourteen percent of the nation's labor force and twenty percent of the low-wage labor force.[2] Though war and poverty in many immigrants' home countries make coming to the United States the only avenue to a better life, restrictive immigration laws mean that only a fraction of immigrants are able to legally enter and remain in the United States.

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1. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THE FOREIGN-BORN POPULATION IN THE UNITED STATES 1 (2000).

2. URBAN INST., BRIEF NO. 4, A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE 1 (2003), *available at* http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf.

Researchers have estimated that there are 9.3 million undocumented immigrants living in the United States;[3] among them are an estimated 5.3 million undocumented workers.[4]

One need only open the local papers to understand the risks that these workers face in their attempts to come to the United States and make a better life for themselves. On September 28, 2003, four migrants were killed when the vehicle in which they were traveling crashed while being pursued by U.S. Border Patrol.[5] Data provided by Latin American consulates in Arizona and area medical examiners' offices suggests that at least 181 people may have died in the Tucson sector alone over the past year.[6] Border Patrol, which only tracks deaths discovered by its agents or reported by other law enforcement agencies, reported that 346 people died along the 2000-mile U.S. border with Mexico over the 2002–03 fiscal year[7] and that over 1500 people have died trying to enter the United States since 1998.[8] Immigrants die of heat stroke, drowning, and thirst, and as the victims of human smugglers.[9] In 2002, eight migrants were murdered over eight months in Arizona.[10] Law enforcement officials in the region believe that the victims may have been killed by human traffickers when they could not afford to pay for their entry to the United States.[11]

Immigrants' troubles do not end once they settle in the United States and obtain work. Immigrants, both documented and undocumented, work long hours at the lowest-paid and most dangerous jobs in the U.S. economy. The manufacturing sector employs nearly 1.2 million undocumented workers, the services sector employs 1.3 million, and one million to 1.4 million undocumented

3. JEFFREY S. PASSEL, RANDY CAPPS & MICHAEL FIX, UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (Jan. 12, 2004), *available at* http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf. Mexicans comprise approximately 57 percent of that group, people from other Latin Americans countries comprise 23 percent, Asians comprise approximately 10 percent and 10 percent come from all other parts of the world. *Id.* at 1.

4. B. LINDSAY LOWELL & ROBERT SURO, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.—MEXICO MIGRATION TALKS 7 (2002), *available at* http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf.

5. Resource Center of the Americas, *Border Deaths Hit Record High*, *at* http://www.americas.org/news/nir/20031003_border_deaths_hit_record_high.asp (last modified Apr. 6, 2004).

6. *Id.*

7. BORDER WORKING GROUP, IMMIGRATION REFORM AND THE U.S.-MEXICO BORDER: CAN IT PUT AN END TO THE MIGRANT DEATHS? 1 (Feb. 2004), *available at* http://www.rtfcam.org/border/prespkt.pdf.

8. Linda Kane, *Rescuing the Hopeless*, CUSTOMS & BORDER PROTECTION TODAY ¶ 3 (May 2003), *at* http://www.cbp.gov/xp/CustomsToday/2003/May/hopeless.xml.

9. *Id.*

10. Zulema Flores & Manuel Villegas, *Eight Migrants Murdered in Similar Way Over Eight Months in Arizona*, FRONTERA NORTESUR, *at* http://www.nmsu.edu/~frontera/nov02/immi.html (Nov. 2002).

11. Another theory is that the immigrants may have been kidnapped and later killed when friends or family failed to pay ransom. *Id.*

workers labor in the fields.[12] As of 1998, eighty-one percent of U.S. farmworkers were foreign born.[13] Over 600,000 more work in construction and 700,000 work in restaurants.[14] In states with high percentages of immigrants, three out of every four tailors, cooks, and textile workers are immigrants.[15] Immigrants are also overrepresented as taxicab drivers, domestic workers, waiters, parking lot attendants, and sewing machine operators.[16]

Many of these industries are known for dangerous working conditions. In 2001, farm workers accounted for less than one percent of the workforce, but represented six percent of the occupational deaths.[17] In that year, there were forty-nine farm fatalities in the State of California alone.[18] Construction, manufacturing, and transportation have even higher injury and illness rates than agriculture.[19] Because of the overrepresentation of immigrants in dangerous jobs, work-related injuries and deaths of Latino workers are extremely high, and increasing. A study by the National Academy of Sciences demonstrated that foreign-born Latino men are nearly 2.5 times more likely to be killed on the job than the average American worker.[20] Between 1999 and 2000, while the number of occupational fatalities in the nation as a whole declined, there was a five percent increase in the number of fatal injuries to foreign born workers, and a twelve percent increase in the number of Latino workers killed on the job even though Latino employment increased by only six percent.[21] At the same time, immigrant workers are particularly likely to lack health insurance: as of 2002, 43.3% of noncitizens were uninsured.[22]

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12. LOWELL & SURO, *supra* note 4 at 7–8.

13. U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997–98, at 5 (2000), *available at* http://www.dol.gov/asp/programs/agworker/report_8.pdf. Nearly all of these individuals (seventy-seven percent of all farmworkers) are from Mexico. *Id.* at 5.

14. LOWELL & SURO, *supra* note 4 at 7.

15. THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION 215 (James P. Smith & Barry Edmonston, eds., 1997), National Academy Press (1997), *available at* http://www.nap.edu/books/0309063566/html/index.html.

16. *Id.* at 215.

17. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2002, at Table 2, *at* http://stats.bls.gov/news.release/cfoi.t02.htm (last modified Sep. 17, 2003).

18. Andy Furillo, *Farm Death Sparks Manslaughter Charge*, SACRAMENTO BEE, Dec. 18, 2001, http://www.sacbee.com/content/news/v-print/story/1344170p-1413729c.html (last visited Apr. 6, 2004).

19. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKPLACE INJURIES AND ILLNESSES IN 2002 2 (Dec. 18, 2003), *available at* http://www.bls.gov/news.release/pdf/osh.pdf.

20. Nurith C. Aizenman, *Harsh Reward for Hard Labor,* WASH. POST, Dec. 29, 2002, at C1.

21. Office of Minority Health, U.S. Dep't of Health and Human Servs. , *Protecting the Safety and Health of Immigrant Workers, at* http://www.cdc.gov/omh/Populations/HL/HHP/IWorkers.htm (last updated Apr. 6, 2004).

22. News Release, Center on Budget and Policy Priorities, Number Of Americans Without Health Insurance Rose In 2002, at 3 (Oct. 8, 2003), *available at* http://www.cbpp.org/9-30-03health.pdf.

The industries in which immigrants are overrepresented are also known for frequent violations of hour, wage, and overtime payment laws. Department of Labor ("DOL") surveys have shown that in 2000, 100% of all poultry processing plants were noncompliant with federal wage and hour laws;[23] in 2001 almost half of all garment-manufacturing businesses in New York City failed to comply with Fair Labor Standards Act ("FLSA") overtime provisions;[24] and in 1999 agricultural employers engaged in cucumber, lettuce, and onion harvesting had unacceptably low levels of compliance with FLSA and other worker protections.[25]

Even without wage and overtime violations, these occupations are among the lowest-paid in the nation. In almost all of these industries, more than half of workers are paid only poverty-level wages.[26] As a result, in 2000, the average weekly earnings of male full time immigrant workers with high school degrees fell short of those of American workers with equivalent education by $132 per week.[27]

A. Federal Law

The federal legal climate has become increasingly hostile towards immigrants in recent decades. In 1986, Congress passed the Immigration Reform and Control Act ("IRCA"), which amended the Immigration and Nationality Act ("INA") in an attempt to restrict unauthorized immigration to the United States by barring employers from hiring undocumented workers.[28] The law also provides some protections against discrimination for documented immigrant workers.[29] Of course, the law does not provide any protection for undocumented

23. U.S. DEP'T OF LABOR, FY 2000 POULTRY PROCESSING COMPLIANCE REPORT 267 (2000).

24. U.S. Dep't of Labor, *2001 New York City Garment Compliance Survey*, http://www.dol.gov/Opa/Media/Press/Opa/NewYork_Survey.htm (Mar. 2002).

25. U.S. DEP'T OF LABOR, COMPLIANCE HIGHLIGHTS 1, 3 (Nov. 1999).

26. *See* AFL-CIO, *Who Are Low-Wage Workers?*, *at* http://www.aflcio.org/yourjobeconomy/minimumwage/whoarelowwage.cfm (last visited Apr. 6, 2004).

27. ASIAN PACIFIC AMERICAN LABOR ALLIANCE, AFL-CIO, THE WAGE GAP BY RACE, SEX, EDUCATION AND PLACE OF BIRTH: 2001 (2002), *available at* http://www.napawf.org/newadds/AAPI_Wage_Gap.pdf.

28. *See* Immigration and Nationality Act § 274A, Pub. L. No. 99-603, 100 Stat. 3360 (codified as amended at 8 U.S.C. § 1324a (2000)).

29. The law bars employers with four or more employees from engaging in employment discrimination on the basis of national origin or citizenship status, as long as the employee falls into certain categories of lawful immigrant status and meets requirements regarding application for naturalization. 8 U.S.C. § 1324b (2000). "Examples of citizenship status discrimination include employers who hire only U.S. citizens or U.S. citizens and green card holders, employers who refuse to hire asylees or refugees because their employment authorization documents contain expiration dates, and employers who prefer to employ unauthorized workers or temporary visa holders rather than U.S. citizens and other workers with employment authorization." Office of the Chief Economist, U.S. Dep't. of Agric., *IRCA Antidiscrimination Provisions*, *at* http://www.usda.gov/agency/oce/oce/labor-affairs/ircadisc.htm (last revised July 2, 2001).

workers, since its primary purpose was to prevent employers from hiring undocumented immigrants.[30]

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). As discussed below, these laws increased state and local law enforcement officials' authority to enforce criminal immigration laws. Along with the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), also passed in 1996, AEDPA and IIRIRA also promoted increased sharing of immigration information between state and federal governments.

At the same time, however, progress was being made towards legalization of undocumented workers—an important move that would allow undocumented workers, at long last, to take part in the civic life of the country. In 2000, labor leaders adopted a pro-legalization resolution that captured the enthusiasm and energy of many immigrant workers.[31] Just before September 11, President George W. Bush and Mexican President Vicente Fox seemed close to agreement on a legalization program that would have enabled hundreds of thousands of immigrant workers to legalize, with Bush publicly extolling immigrants as "innocent, hard-working people."[32]

After September 11, however, these hopes died as immigrants came to be seen as security threats. The federal government began concentrating on harsh "anti-terrorism" measures that doubled as anti-immigration measures. Congress quickly passed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" ("USA PATRIOT Act").[33] The media reported that immigration enforcement would be stepped up, and directed toward an ever lengthening list of likely suspects: immigrant students, immigrants who had overstayed their visas, and immigrants of Middle Eastern and South Asian origin.

Two recent Supreme Court decisions, *Alexander v. Sandoval*,[34] finding that individuals have no private right of action to bring disparate-impact claims directly under Title VI of the Civil Rights Act of 1964, and *Hoffman Plastic Compounds v. NLRB*, finding that the National Labor Relations Act ("NLRA") does not entitle undocumented workers to backpay when they are illegally fired

30. *See*, Office of the Chief Economist, U.S. Dep't. of Agric., *IRCA Antidiscrimination Provisions, at* http://www.usda.gov/agency/oce/oce/labor-affairs/ircadisc.htm (last revised July 2, 2001).

31. *See* AFL-CIO, *Executive Council Action: Immigration*, http://www.aflcio.org/aboutaflcio/ecouncil/ec0731a2001.cfm (July 31, 2001).

32. Bill Sammon, *Bush Urges Legalizing Aliens*, WASH. TIMES, Sept. 7, 2001, *available at* http://are.berkeley.edu/APMP/pubs/agworkvisa/bushurges090701.html.

33. Pub. L. No. 107-56, 115 Stat. 272 (to be codified at scattered sections of 8, 12, 15, 18, 21, 22, 28, 31, 42, 47, 49, 50 U.S.C.).

34. 532 U.S. 275, 285–86 (2001) (discussing Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (2000)).

after taking part in union organizing campaigns,[35] have further contributed to the perception that immigrant workers have no enforceable rights under federal law.

B. Maximizing State Law Protections in an Anti-Immigrant Climate

As has occurred each time anti-immigrant sentiment has dominated the federal policy scene, maximization of immigrant protections requires that states step into the breach. States retain considerable latitude to act in areas that are as yet subject only to state regulation, and to offer benefits and protections beyond what the federal government has made available. At the state level, authorities often have greater appreciation of immigrant workers' contributions to the local economy. They often have closer experience with the kinds of abuses immigrants suffer, and a better understanding of the duty of agencies and police authorities to protect all local residents.

In this article, we address five areas in which states can take important steps to assist immigrant workers: equal employment rights and remedies for undocumented workers, language access to government benefits and services, confidentiality provisions that protect immigrant workers' access to public services, access to workers' compensation programs, and driver's licensing provisions'. We provide examples of some of the state and local laws currently in force that protect the most vulnerable of immigrant workers: the undocumented and those that do not speak English well enough to navigate state and federal bureaucracies. We also highlight model bills that have not yet made their way into law, and profile selected campaigns for increased labor protections. This paper is intended as a guide to model legislation that states and localities can pass to protect immigrant workers.

I.
ENFORCING THE LABOR RIGHTS OF ALL WORKERS POST-*HOFFMAN*

A. Federal Context

Given the high concentration of immigrant workers in dangerous, low-paid occupations with few benefits and frequent labor law violations, it is clear that these workers need the protection of labor laws as much or more than any other workers. There are a number of federal laws that are of potential benefit to workers. To protect their health and safety, the Occupational Health and Safety Act ("OSHA") authorizes the Secretary of Labor to set mandatory health and safety standards for employers.[36] Workers are also protected by a number of more specific laws, such as the Mine Safety and Health Act ("MSHA")[37] and the

35. 535 U.S. 137, 149 (2002).
36. 29 U.S.C. § 655 (2000).
37. 30 U.S.C. §§ 801–961 (2000).

Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[38]

To prevent employers from underpaying their employees, FLSA requires employers to pay at least minimum wages and to pay overtime wages for time worked in excess of forty hours per week, as well as restricting child labor and imposing record-keeping requirements on employers.[39] AWPA requires employers to pay migrant workers their wages when due.[40] To increase workers' ability to improve their working conditions, the National Labor Relations Act ("NLRA") protects employees' rights to unionize and organize.[41] Additionally, a side agreement to the North American Free Trade Agreement ("NAFTA"), the North American Agreement on Labor Cooperation ("NAALC"), obligates the United States, Mexico, and Canada to ensure that their labor laws provide high labor standards and to effectively enforce these standards.[42]

Workers are also protected by antidiscrimination laws, such as the Americans with Disabilities Act ("ADA")[43] and the Age Discrimination in Employment Act ("ADEA").[44] Of particular importance to immigrant workers is Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of national origin, as well as race, color, sex or religion.[45] Under Equal Employment Opportunity Commission ("EEOC") guidelines, national origin discrimination includes discrimination on the basis of the fact that "an individual has the . . . linguistic characteristics of a national origin group,"[46] such that "speak-English-only" workplace rules create a presumption of a Title VII violation.[47] The Supreme Court has also interpreted Title VI restrictions on national origin discrimination to cover exclusionary language policies,[48] and various other courts have applied this interpretation to the Title VII context.[49] The EEOC has also interpreted Title VII to bar employers from imposing citizenship requirements where the requirements

38. 29 U.S.C. §§ 1801–1872 (2000).

39. *Id.* §§ 206–207, 211–212.

40. *Id.* § 1822.

41. *Id.* §§ 151–169.

42. Lance Compa & Rebecca Smith, United Farm Workers, *Background on Complaint under North American Agreement on Labor Cooperation (NAALC)*, *at* http://www.ufw.org/NAALCbg.htm (last visited Apr. 6, 2004).

43. 42 U.S.C. §§ 12112, 12202 (2000). The ADA prohibits discrimination against qualified employees with disabilities working in the private sector, and in state and local governments.

44. 29 U.S.C. § 623 (2000). The ADEA protects individuals who are 40 years of age or older from employment discrimination.

45. 42 U.S.C. § 2000e-2 (2000).

46. Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.1 (2003).

47. *Id.* § 1606.7.

48. Lau v. Nichols, 414 U.S. 565, 568 (1974).

49. *See, e.g.*, Fragrante v. City & County of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989) (noting that "accent and national origin are obviously inextricably intertwined in many cases").

"have the purpose or effect of discriminating against an individual on the basis of national origin."[50]

*Uncertainty of Remedies Post-*Hoffman

Unfortunately, the degree to which undocumented workers will be able to rely on the protection of any of these laws has been called into doubt by *Hoffman*.[51] In *Hoffman*, the Supreme Court held that the National Labor Relations Board ("NLRB") could not award backpay to an undocumented worker as a remedy for the employer's violations of NLRA.[52]

The case involved a worker named José Castro who was employed in a factory in California. Mr. Castro was fired for his organizing activities, in clear violation of NLRA.[53] The NLRB ordered the employer to cease and desist from further violations of NLRA, post a notice to its employees explaining the remedial order, reinstate Castro, and provide him with backpay for the time he was out of work because of the illegal discharge.[54] During an NLRB hearing, it was revealed that Castro had used false documents to establish work authorization and that he was actually undocumented.[55] The Supreme Court concluded that backpay must be denied to undocumented workers, because the remedy would conflict with the Congressional policy of barring employers from hiring undocumented immigrants, as expressed in the IRCA.[56]

The decision is highly problematic not only in terms of its consequences for individuals who will be denied backpay as a result of the ruling, but also in terms of the incentive structure it creates for employers. As the dissenters in *Hoffman* argued, the purpose of awarding backpay is not only to compensate the victims of employers who violate the law, but also to deter employers from breaking the laws at the outset.[57] In fact, it is the only motivation employers have to refrain from violating the laws at least once.[58] "[T]he backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the

50. 29 C.F.R. § 1606.5 (2003).

51. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

52. *Id.* at 149.

53. *Id.* at 140.

54. *Id.* at 140–41.

55. *Id.* at 141.

56. *Id.* at 140.

57. *Id.* at 153–54 (Breyer, J., dissenting) ("[B]ackpay awards serve critically important remedial purposes. Those purposes involve more than victim compensation; they also include deterrence, *i.e.*, discouraging employers from violating the Nation's labor laws.") (citation omitted).

58. *Id.* at 154 (Breyer, J., dissenting) ("Without the possibility of the deterrence that backpay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity.") (citation omitted).

labor laws will not pay."[59] Following *Hoffman*, employers have little incentive to respect workers' rights under NLRA if their workers are undocumented.

This decision has also raised concern about whether courts will extend its application to deny undocumented workers the protection of other federal laws, such as the laws, discussed above, protecting workers from wage and hour violations, imposing safety regulations, and barring employment discrimination.[60] Prior to the *Hoffman* decision, a number of lower federal courts had awarded backpay to undocumented immigrant workers for Title VII violations[61] as well as for wage and overtime violations under FLSA.[62] Other courts, however, had adopted the approach of basing workers' access to employment protections on their immigration status. The Fourth Circuit Court of Appeals had held that an undocumented job applicant was not covered by Title VII, because he was not eligible to be employed in the United States;[63] the same court had held that a Mexican national applying for a job through the H-2A guestworker program was not protected by ADEA.[64]

While the Supreme Court has not spoken on whether undocumented workers are eligible for backpay under the federal antidiscrimination laws, it is possible that courts following *Hoffman* will conclude that they are not. However, the EEOC announced after *Hoffman* that it would continue enforcing all antidiscrimination statutes, though also stating that the agency would have to consider the effect that immigration status may have on the remedies available for statutory violations.[65] Shortly after this, the EEOC settled a Title VII action for sexual harassment and discrimination on behalf of a group of immigrant workers, some of whom were undocumented, making it clear that undocumented workers continue to be eligible for at least some types of monetary remedies following *Hoffman*.[66] It seems likely that, following the lead of the EEOC, most federal courts will continue to hold that workers are eligible for compensatory and punitive remedies under antidiscrimination laws regardless of immigration status.

Other federal agencies have also expressed an intention to continue upholding labor laws to the fullest extent permitted by *Hoffman*. The NLRB General Counsel, in a guidance memorandum issued after the *Hoffman* decision,

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59. *Id.*

60. *See supra* notes 36–50 and accompanying text.

61. *See, e.g.*, EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989); Rios v. Local 638, 860 F.2d 1168, 1173 (2d Cir. 1988).

62. *See* Patel v. Quality Inn S., 846 F.2d 700 (11th Cir. 1988).

63. Egbuna v. Time Life, 153 F.3d 184 (4th Cir. 1998).

64. Reyes-Gaona v. N.C. Growers Ass'n, 250 F.3d 861 (4th Cir. 2001).

65. Press Release, EEOC, EEOC Reaffirms Commitment to Protecting Undocumented Workers From Discrimination (June 28, 2002), *available at* http://www.eeoc.gov/press/6-28-02.html.

66. Press Release, EEOC, EEOC And Decoster Farms Settle Complaint For $1,525,000 (Sept. 30, 2002), *available at* http://www.eeoc.gov/press/9-30-02-b.html.

stated that immigration status may become relevant in determining remedies, but that undocumented workers are still considered employees under NLRA and therefore retain protections against unfair labor practices.[67] The memorandum asserts that immigration status is not at issue in determining an employer's liability, even though it may affect the availability of remedies for the employee.[68] The DOL, which enforces FLSA, AWPA, OSHA, and MHSA,[69] announced that the agency will continue to enforce those laws without regard to whether an employee is documented or undocumented.[70]

Of less concern is the effect of *Hoffman* on undocumented workers' rights to recover "backpay" for work actually performed under FLSA. "Backpay" under FLSA is different from backpay under NLRA and the antidiscrimination laws. Under the other laws, backpay is payment of wages that the worker would have earned if not for the unlawful termination or other discrimination. Under FLSA, "backpay" is payment of wages the worker actually earned but was not paid.[71] Following the Supreme Court's decision in *Hoffman*, federal courts have held that *Hoffman* is not relevant to backpay under FLSA, and have made rulings favoring undocumented plaintiffs.[72]

Concerns About Discovery of Workers' Immigration Status

Even if labor laws will be enforced against employers regardless of their employees' immigration status, the *Hoffman* decision creates a second problem: if immigration status is relevant either to the underlying merits of the claim or to the remedies available once a claim is proven, immigration status arguably becomes a factor which courts should consider in adjudicating claims of labor law violations. At least one decision since *Hoffman* has suggested that *Hoffman* has made the issue of immigration status relevant to a worker's standing to sue for relief under the ADA:

> If Hoffman Plastics does deny undocumented workers the relief sought by plaintiff, then he would lack standing. . . . [I]f plaintiff were to

67. Memorandum from Arthur F. Rosenfeld, NLRB General Counsel, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds,Inc.* (Jul. 19, 2002), *available at* http://www.nlrb.gov/nlrb/shared_files/gcmemo/gcmemo/gc02-06.asp?useShared=.

68. *Id.*

69. *See supra* notes 36–41 and accompanying text.

70. DOL, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of* Hoffman Plastics *Decision on Laws Enforced by the Wage and Hour Division*, http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm (last modified Apr. 7, 2004).

71. There is one form of backpay under the FLSA that resembles backpay under the NLRA and the antidiscrimination laws. This form of backpay appears in the antiretaliation provision of the FLSA and is payment of wages that the worker would have earned if not for his or her unlawful termination by the employer in retaliation for having initiated a complaint under the FLSA. 29 U.S.C. § 215(a)(3) (2000).

72. *See* Flores v. Albertson's, Inc., No. CV0100515AHM(SHX), 2002 WL 1163623, at *5–6 (C.D. Cal. Apr. 9, 2002); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002).

> admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether Hoffman Plastics applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.[73]

The Court went on to observe in a footnote: "If we do ultimately reach this issue, it could result in a judicial finding that plaintiff is illegally residing in the United States and therefore is subject to deportation."[74]

Determination that immigration status is relevant to remedies or even standing to sue would mean that undocumented workers could no longer invoke protective orders to keep their immigration status out of the proceedings. Such a possibility would have a severe chilling effect on workers seeking to enforce their rights.

B. State Enforcement of Workers' Rights

Of the cases litigated thus far, none has squarely addressed the issue of the continuing availability of backpay under state law. There is a strong argument that states are free to make their own policy choices under state laws regarding the types of protections and remedies they will make available to undocumented workers. States can continue to award backpay to compensate workers and deter employers from violating labor laws, and can provide protections against language discrimination by employers. Strategies to ensure that backpay will be made available should focus on both legislative action and state agency enforcement.

State Legislative Action

The California legislature has become the first in the country to adopt an affirmative state law regarding immigrant workers' rights post-*Hoffman*.[75] The law amends the Civil, Government, Health and Safety, and Labor Codes.[76] The law establishes that:

> For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to

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73. Lopez v. Superflex, Ltd., No. 01 Civ. 10010 (NRB), 2002 U.S. Dist. LEXIS 15538, at *7–8, (S.D.N.Y. Aug. 21, 2002).

74. *Id.* at *8 n.4.

75. S.B. 1818, 2001–02 Sess. (Cal. 2002) (codified at CAL. CIV. CODE § 3339 (West Supp. 2003); CAL. GOV'T CODE § 7285 (West Supp. 2003); CAL. HEALTH & SAFETY CODE §§ 24000–26200 (West Supp. 2003); CAL. LAB. CODE § 1171.5 (West 2003)), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_bill_20020929_chaptered.pdf.

76. *Id.*

> enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.[77]

It also affirms that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."[78]

Another approach to protecting immigrant workers from discrimination, that a number of states have taken, is to supplement federal antidiscrimination statutes with state laws barring employers from implementing language policies that have a discriminatory impact on non-English-speaking employees. California, for example, became the only state in the nation to protect employees from "English only" rules in the workplace, following an amendment to the California Fair Employment and Housing Act that prohibits employers from requiring employees to speak only in English without a valid business necessity.[79]

The bill was enacted after ten years of intense work to promote it, spearheaded by the California American Civil Liberties Union ("ACLU") and the Employment Law Center's Language Rights Project, as well as a strong coalition including Mexican American Legal Defense and Education Fund, National Council of La Raza, the California Immigrant Welfare Collaborative, Chinese for Affirmative Action, and others. After passage of the law, the California ACLU Language Rights Project implemented a statewide "Know Your Rights" campaign to educate workers and employers about the new law.[80]

Another important type of state law requires employers to provide employees with materials explaining other workplace rights, such as wage and hour requirements, in their own languages. For example, the Connecticut Act to Prohibit the Employment Exploitation of Immigrant Labor requires the Commissioner of Labor to produce outreach materials to immigrant workers, in their languages, that explain their workplace rights. The Act is intended to "prevent illegal advantage being taken of such laborers by reason of their lack of information about their rights, credulity or lack of proficiency in the English

77. CAL. CIV. CODE § 3339(b) (West Supp. 2003).

78. *Id.* § 3339(a).

79. CAL. GOV'T. CODE § 7285(a) (West Supp. 2003). The amendment also requires employers to provide employees with notice of any restrictive language policies and of consequences for violation of the policies. *Id.*

80. ACLU of N. Cal., *ACLU Issues: Language and Immigrants' Rights*, *at* http://www.aclunc.org/language/ (last visited Apr. 7, 2004); *see also* ACLU LANGUAGE RIGHTS PROJECT, GUIDELINES AND QUESTIONS FOR CALIFORNIA EMPLOYERS CONSIDERING THE USE OF WORKPLACE "SPEAK-ENGLISH-ONLY" RULES, *available at* http://www.aclunc.org/language/guidelines.pdf (last visited Apr. 7, 2004).

language."[81] This limited English proficiency ("LEP") program is funded by penalties levied on employers for violations of the Act.[82]

The Act was a response to the efforts of a coalition of immigrants' rights and labor organizations, including the New England Council of Carpenters, the Latino and Puerto Rican Affairs Commission, NELP, SEIU Local 32 B-J, the Connecticut Department of Labor, and Waterbury Good Jobs Now. The coalition came together after a series of successful actions against employers of undocumented immigrant workers, with the goal of changing state law to educate immigrant workers about their rights under state law and building a base for future campaigns.

Other states have enacted laws providing bilingual notices of rights to non-English speakers. Nebraska's law states that if an employer actively recruits any non-English-speaking persons and if more than ten percent of the employees speak the same non-English language, the employer must provide a bilingual employee to explain and respond to questions regarding the terms, conditions, and daily responsibilities of employment; and to serve as a referral agent to community services for the non-English-speaking employees.[83] Iowa's law is similar to the Nebraska law.[84]

Even though they do not directly provide any substantive rights regarding working conditions, laws such as these can foster compliance with labor laws by reminding employers of their obligations towards their employees and expressing the state's commitment to protecting the rights of immigrant workers.

Finally, state laws prohibiting national origin discrimination should also provide protection against language-based discrimination. The state of Kansas provides a private right of action for enforcement of its national origin discrimination law.[85] Minnesota law bars national origin discrimination, but does not specify whether the law provides a private right of action.[86]

State Agency Enforcement

A useful action that advocates can urge on the state level is for state agencies to develop pro-worker policies for enforcing labor and employment laws as well as providing benefits. Such policies would reaffirm a commitment to performance of duties without regard to workers' immigration status. Shortly after the *Hoffman* decision, the California Department of Industrial Relations posted a statement on its website clarifying that it will "[i]nvestigate retaliation

81. 2001 Conn. Public Act No. 01-147 § 1(b), http://www.nelp.org/iwp/reform/state/lphrappctlep112503.cfm (last visited Apr. 7, 2004).

82. *Id.* § 2.

83. NEB. REV. STAT. § 48-2209 (2002).

84. IOWA CODE §§ 91E.2–91E.3 (1991). The law also requires that return transportation to the place of recruitment be provided to the worker under certain circumstances. *Id.*

85. KAN. STAT. ANN. § 44-1001 (2000).

86. MINN. STAT. ANN. § 363A.02 (West. 1991 & Supp. 2003).

complaints and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about wages or workplace safety and health, without regard to the worker's immigration status."[87]

Model Policies

State agencies responsible for enforcing antidiscrimination laws should adopt the following policy:

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

1) The [Agency Name] will:
   a. Investigate complaints of violations of the employment anti-discrimination laws and file court actions to seek and collect backpay, compensatory and punitive damages, and all other appropriate remedies, including equitable relief. This shall be done without regard to the worker's immigration status, unless explicitly prohibited by federal law.
   b. Investigate retaliation complaints and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about unlawful discrimination, without regard to the worker's immigration status,[88] unless explicitly prohibited by federal law.
2) The [Agency Name] will not ask a complainant or witness for their social security number (SSN) or other information that might lead to disclosing an individual's immigration status, will not ask workers about their immigration status and will not maintain information regarding workers' immigration status in their files.
3) During the course of court proceedings, the [Agency Name] will oppose efforts of any party to discover a complainant's or witnesses' immigration status by seeking a protective order or other similar relief.
4) In the rare occasion that [Agency Name] must know the complainant's immigration status, it will keep that status confidential, and will have a policy of nondisclosure to third parties (including to other state or federal agencies), unless otherwise required by federal law.
5) If a party raises the issue of an employee's immigration status in the course of proceedings, the party must show that the evidence is more

87. Cal. Dep't of Indus. Relations, *All California Workers Are Entitled to Workplace Protection*, *at* http://www.dir.ca.gov/QAundoc.html (last modified Apr. 7, 2004).

88. This language is adopted from the California Department of Industrial Relations' statement on its website. Cal. Dep't of Indus. Relations, *All California workers are entitled to workplace protection*, *at* http://www.dir.ca.gov/QAundoc.html (last modified Apr. 7, 2004).

probative than prejudicial, and that it obtained such evidence in compliance with 8 C.F.R. § 274a.2(b)(1)(vii).

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

7) [Agency Name] will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.[89]

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

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

1) The [Agency Name] will:

a. Investigate complaints of violations of the wage and hour laws and file court actions to seek and collect unpaid wages and all other remedies authorized under state law without regard to the worker's immigration status, unless explicitly prohibited by federal law.

b. Investigate retaliation complaints and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about unpaid wages, without regard to the worker's immigration status unless explicitly prohibited by federal law.[90]

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

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

1) The [Agency Name] will:

a. Investigate complaints of violations of the occupational safety and health laws and file court actions to enforce the law without regard to the worker's immigration status unless explicitly prohibited by federal law.

b. Investigate retaliation complaints [if state law includes an anti-retaliation provision] and file court actions to collect backpay owed to any worker who was the victim of retaliation for having complained about unpaid wages without regard to the worker's immigration status unless explicitly prohibited by federal law.[91]

89. ACLU Immigrants' Rights Project, *Model City Policy to Protect Client Confidentiality*, 1997 (on file with authors) [hereinafter *Model City Policy*].

90. *Id.*

91. *Id.*

II.
LANGUAGE ACCESS TO STATE SERVICES AND BENEFITS

Every day, thousands of immigrant workers turn to state and federally funded agencies seeking enforcement of labor laws and access to critical benefits such as job training, unemployment insurance, and workers' compensation. Every day, immigrant workers find the agencies are ill-equipped to assist them in their language.

Lack of services in their native languages deters workers from applying for unemployment compensation. Statistics demonstrate that nearly two-thirds of people who do not apply for unemployment compensation fail to do so because they do not believe they would qualify.[92] A simple outreach program can go a long way toward increasing access.[93] Providing access to benefits is not necessarily costly. In 2001, California's Department of Social Services spent a total of $648,312 to staff an internal team of thirteen employees to translate documents into Spanish, Chinese, Cambodian, Russian, and Vietnamese, and an average of approximately $22,000 per year in contracts with outside vendors for translations into other languages. This is a negligible cost for an eighteen billion dollar budget.[94] Nevertheless, in most states agency measures to reach LEP individuals have been patchwork at best.

New York's unemployment insurance system typifies the problems that are characteristic around the country. In New York, all regular walk-in unemployment offices were closed in 1997, leaving most immigrant workers to file their unemployment claims through an automated telephone system or through a website available only in English and Spanish.[95] There are two walk-in centers in New York City staffed with people who speak Chinese languages.[96] Moreover, people who do not speak English or Spanish are told to bring their own interpreters.

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92. Stephen Wandner & Andrew Stettner, *Why Are Many Jobless Workers Not Applying for Benefits?*, 123 MONTHLY LAB. REV. 21, 30 Table 10 (June 2000), *available at* http://www.bls.gov/opub/mlr/2000/06/art2full.pdf.

93. Washington State has a large Spanish-speaking farm worker population that is subject to winter layoffs. In winter 1999–2000 the state conducted a simple outreach program by means of a Spanish-language flier, short radio advertisements, and advertisements and articles in Spanish-language newspapers. Unemployment insurance claims among Spanish speakers rose by 17.7% from the fourth quarter of 1999 to the fourth quarter of 2000. Telephone Interview with Rosie Macs, Deputy Assistant Commissioner, Unemployment Claims Telecenter Operations, Washington State Employment Security Department (Oct. 2002).

94. E-mail from Donya Fernandez, Staff Attorney, Employment Law Center, to Rebecca Smith, Immigrant Worker Project Coordinator, NELP (May 18, 2001) (on file with authors) (citing audit data provided at briefing on Dymally-Alatorre Act by California State Auditor).

95. *See* N.Y. State Dep't of Labor, *How to File an Unemployment Insurance Claim*, http://www.labor.state.ny.us/working_ny/unemployment_insurance/claimant/intrntfl.htm (last visited Apr. 7, 2004).

96. *See* ANNETTE BERNHARDT & KATE RUBIN, RECESSION AND 911: ECONOMIC HARDSHIP AND THE FAILURE OF THE SAFETY NET FOR UNEMPLOYED WORKERS IN NEW YORK CITY 17 (2003), *available at* http://www.brennancenter.org/programs/downloads/Recession_9_11_Report.pdf.

New York is hardly unique. Several state unemployment agencies simply provide no forms or translated brochures to any immigrants in any language.[97] At least two states, Connecticut and Illinois, explicitly (and illegally) require that those immigrants who need interpreters at public hearings on their cases must provide their own.[98] In twenty-eight states, more than half of unemployment insurance claims are filed through a telephone system,[99] which makes it even more complicated for LEP workers to negotiate the system.

As discussed below, federal law provides few useful avenues for increasing language access. However, some states and cities have provided language access to their services and benefits. The next section of the article reviews state and local legislation expanding language access, as well as the role immigrants' rights and labor organizations have played in bringing such legislation into existence.

A. Failure of Federal Law to Ensure Language Access to Services and Benefits

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding, including many state agencies, from discriminating on the basis of race, color, or national origin[100] and authorizes federal agencies that distribute funds to issue rules and regulations needed to uphold Title VI's antidiscrimination provisions.[101] The Supreme Court has interpreted Title VI's ban on national origin discrimination to include exclusionary language policies.[102]

Unfortunately, Title VI has never been fully enforced with respect to agencies that receive federal funds. In August 2000, a ray of hope emerged: President Bill Clinton issued Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," calling on federal agencies to develop guidances for compliance with Title VI.[103] The Executive Order gave the Department of Justice ("DOJ") responsibility for providing LEP guidance to other federal agencies and ensuring consistency among the agencies' guidance statements, and the DOJ issued a guidance document intended as a model for other agencies.[104] The DOJ guidance reminded agencies receiving federal funding that they "have an obligation to reduce language barriers that can

97. Wayne Vroman, *Low Benefit Recipiency in State Unemployment Insurance Programs* (June 2001) (unpublished manuscript, on file with authors).

98. CONN. AGENCIES REGS. § 31-237g-23 (1999); ILL. ADM. CODE tit. 56 § 2720.210 (1994).

99. U.S. Dep't of Labor, *Initial Claims Filing Methods CY 2002* (2004), *at* http://www.ows.doleta.gov/unemploy/initclaims.asp (last visited Apr. 7, 2004).

100. 42 U.S.C. § 2000d (2000).

101. 42 U.S.C. § 2000d-1 (2000).

102. Lau v. Nichols, 414 U.S. 565, 568 (1974).

103. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000), *available at* http://www.usdoj.gov/crt/cor/Pubs/eolep.pdf.

104. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002), *available at* http://www.usdoj.gov/crt/cor/lep/DOJFinLEPFRJun182002.pdf.

preclude meaningful access by LEP persons to important government services."[105]

Unfortunately, when the DOL issued its final guidance in June 2002,[106] the guidance retreated in some significant aspects from an interim guidance statement issued in January 2001,[107] in that it weakened a number of provisions regarding interpretation services and hiring of bilingual employees, and fell short of the DOJ guidance in its requirements for written LEP language access plans.[108]

In 2001, the Supreme Court dealt another blow to immigrant workers seeking to enforce Title VI in *Alexander v. Sandoval*.[109] Sandoval sought to challenge the Alabama Department of Public Safety's decision to administer driver's license tests only in English, arguing that the policy violated Title VI by discriminating against non-English speakers.[110] The Court held that individuals do not have a private right of action to enforce disparate-impact regulations promulgated by federal agencies under Title VI.[111] Rather, they must wait for the government to take up the cause of enforcing the right to be free from the discriminatory impact of "English-only" state administration of benefits and services.[112]

B. State Laws and Policies to Ensure LEP Access to Work-Related Programs and Benefits

States' approaches to expanding language access have taken two primary forms: laws or local ordinances imposing specific language-related requirements such as hiring of interpreters or translation of documents, and laws banning national origin discrimination, which can be used to challenge exclusionary language policies.

State and Local Laws Requiring Translation and Interpretation Services

The California Dymally-Alatorre Bilingual Services Act of 1973, as

105. *Id.* at 41,457.

106. Policy Guidance to Federal Financial Assistance Recipients Regarding the Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 32,290 (May 29, 2003), available at http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-13125.pdf.

107. Policy Guidance on the Prohibition Against National Origin Discrimination as it Affects Persons With Limited English Proficiency, 66 Fed. Reg. 4,595 (Jan. 17, 2001).

108. Letter from Rebecca Smith, Coordinator, Immigrant Workers' Rights Project, NELP, Tyler Moran, National Immigration Law Center, and Margie McHugh, New York Immigration Coalition, to Annabelle T. Lockhart, Director, Civil Rights Center, U.S. DOL, *at* http://www.nelp.org/docUploads/DOL%20LEP%20comments%20final%20063003%2Epdf (June 30, 2003).

109. 532 U.S. 275 (2001).

110. *Id.* at 279.

111. *Id.* at 293.

112. *Id.* at 279.

amended in 2002,[113] is the country's most comprehensive language access law. The law requires every state agency involved in providing information and services that has contact with a "substantial number of non-English-speaking people" to employ a sufficient number of qualified bilingual individuals in public contact positions to ensure adequate service provision to non-English speaking members of the public,[114] as well as to translate written materials into any non-English language spoken by a substantial number of the agency's constituents.[115] It also requires every state agency and state department to survey the population it serves to determine the language needs of its constituent population and the degree to which the agency or department is meeting those needs,[116] and to establish effective bilingual services programs, including a procedure for accepting and resolving complaints.[117] The agency or department's survey and plan to provide services to non-English-speaking people must be updated every two years.[118]

San Francisco has a local version of California's state language access law.[119] The local ordinance requires city departments to offer bilingual services and materials if a substantial or concentrated portion of the public utilizing their services does not speak English effectively because it is not their primary language.[120] In addition, it requires the Immigrant Rights Commission to coordinate a "language bank" for departments in need of assistance finding translators.[121]

The city of Oakland "Equal Access to Services" ordinance requires city departments to "provide the same level of service to members of the substantial number of limited-English-speaking [persons] as they provide English speakers."[122] Departments must hire, over a period of two years, a sufficient number of bilingual employees to provide services to persons speaking non-English languages used by at least 10,000 LEP individuals in the area,[123] and

113. S.B. 987, 2001–02 Sess. (Cal. 2002) (codified as amended at CAL. GOV'T. CODE §§ 7294, 7295.4, 7296.2, 7297, 7299, 7299.1, 7299.4–7299.6), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0951-1000/sb_987_bill_20020830_enrolled.pdf. A "substantial number of non-English-speaking people" is defined in CAL. GOV'T. CODE §§ 7296.2, 7296.4 (WESTLAW 2004 through Ch. 19 & Res. Ch. 1 of 2004 Reg. Sess.).

114. *Id.* §§ 7292, 7296.4.

115. *Id.* §§ 7295.2, 7295.4.

116. *Id.* §§ 7299.4, 7295.4.

117. *Id.*

118. *Id.*

119. SAN FRANCISCO, CAL., ADMIN. CODE §§ 89.1, 89.2, 89.4–89.14 (1993), *available at* http://www.las-elc.org/easord1.doc; *Id.* § 89.3, *available at* http://www.las-elc.org/easord2.doc.

120. *Id.* §§ 89.1, 89.2, 89.4–89.14.

121. *Id.* § 89.11.

122. Oakland, Cal., Municipal Code Chap. 2.30.030 (Supp. Jan. 2004), *available at* http://bpc.iserver.net/codes/oakland.

123. *Id.* § 2.30.100. The Code defines "bilingual employee" as a "city employee who is proficient in the English language and a language other than English that is spoken by not less than ten thousand (10,000) limited-English-speaking-persons who are Oakland residents." *Id.* §

maintain recorded telephone messages in each of these languages.[124] Agencies must submit a compliance plan to the City Council on an annual basis.[125]

California is not the only state where improvements are being made in language access. Maryland recently enacted a language access law that obligates most state agencies[126] to provide services to LEP individuals, and requires all vital documents offered by state agencies to be translated into any language spoken by three percent of the overall population within a geographic service area.[127] The law also requires all other state entities to regularly review their functions to determine the need to create further access for LEP individuals.[128] Massachusetts unemployment compensation law provides that all notices and materials be available in English, Spanish, Chinese, Haitian Creole, Italian, Portuguese, Vietnamese, Laotian, Khmer, Russian, and any other language that is the primary language of at least 10,000 or 0.5% of all residents of the commonwealth.[129] Florida law requires state agencies to provide bilingual educational and instructional materials related to unemployment insurance and associated services in counties where five percent or more of the households are classified as a single-language minority.[130]The New York City Council recently passed a language rights bill, Introduction No. 38-A, that affords access to all city services to LEP individuals.[131] It obligates agencies to determine the primary language of LEP individuals and to ensure that they are offered interpreters and translated documents.[132]

A number of states and localities require, either as a matter of law or policy, the provision of interpreters in administrative hearings. These include Arkansas, the District of Columbia, Indiana, Maine, Minnesota, New York, Oregon, Texas, and Washington.[133] Texas law requires bilingual services for Spanish-speaking

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2.30.020.

124. *Id.* § 2.30.080.

125. *Id.* § 2.30.100.

126. The list of covered state agencies, which includes the state Department of Labor, Licensing, and Agriculture; Department of Agriculture; and Workers' Compensation Commission, is at S. 265 § 10-1103(C), 2002 Sen., Reg. Sess. (Md. 2002), *available at* http://mlis.state.md.us/2002rs/bills/sb/sb0265e.rtf.

127. *Id.* § 10-1103(A), (B)(2).

128. *Id.* § 10-1104.

129. MASS. GEN. LAWS ANN. ch. 151A, § 62A(d)(iii) (West Supp. 2003).

130. FLA. STAT. ANN. § 443.151 (West 2002 & Supp. 2003).

131. N.Y. City Council, Proposed Intro. No. 0038-2002A (Feb. 6, 2002), http://www.council.nyc.ny.us/textfiles/Int%200038-2002A.htm (last visited Apr. 7, 2004).

132. *Id.*

133. ARK. CODE ANN. § 25-15-101 (Michie 2002); D.C. CODE ANN. § 31-2702 (2001); IND. CODE ANN. § 4-21.5-3-16; MINN. STAT. ANN. § 15.441; N.Y. COMP. CODES R. & REGS. tit. 12, § 461.4 (2000); OR. REV. STAT. § 45.275 (2002); TEX. LAB. CODE ANN. § 301.064 (Vernon 1996); WASH. REV. CODE ANN. § 2.43.030 (West 2003); *see also* ME. DEP'T OF LABOR, HOW TO CLAIM UNEMPLOYMENT BENEFITS, *at* http://www.state.me.us/labor/uibennys/questions_&_answers.htm (last visited Apr. 7, 2004).

claimants only, though other translators "may" be provided.[134]

State Laws Against National Origin Discrimination

Though workers may not be able to bring suit directly under Title VI against an agency that discriminates, a number of states have enacted state laws barring national origin discrimination. Such laws can be used by advocates to undercut the ill effects of *Alexander v. Sandoval*,[135] particularly when the state laws provide a private right of action. Connecticut specifically provides for an independent, private right of action against a state agency that engages in discriminatory practices, including discrimination based on national origin.[136] A number of additional states—Minnesota, Missouri, North Dakota, and Virginia—have antidiscrimination laws that cover national origin discrimination by state agencies, but do not specify whether or not private enforcement is possible.[137]

Highlighted Campaigns: San Francisco and New York City

The experience of the advocates who fought for San Francisco's language access ordinance provides useful guidance for advocates working to implement similar legislation in other regions. LEP communities themselves identified problem agencies through their requests for assistance to the Employment Law Center's language hot-line and to Chinese for Affirmative Action. Immigrants in the communities lent their personal stories to the effort and spoke out at hearings and dealings with the press.

The greatest challenge for advocates was overcoming the cost of providing translation services. They employed several strategies, including educating agencies about the use and costs of paid translators and about the difficulties in using volunteer translation. The city's purchasing department entered into discussions about negotiating lower rates for the city on a volume basis.[138] After intensive efforts by advocates over the span of two years, the ordinance was passed by the San Francisco Board of Supervisors on June 4, 2001. Once it passed, Chinese for Affirmative Action hired a staff member to oversee implementation of the new ordinance.

In New York City, language barriers to accessing state services is a serious problem, particularly because September 11 and the economic recession have increased the numbers of unemployed immigrants in need of benefits. A group of advocates and community groups, including the Legal Aid Society, the New

134. TEX. LAB. CODE ANN. § 301.064 (Vernon 1996).

135. 532 U.S. 275 (2001).

136. CONN. GEN. STAT. ANN. §§ 46a-71–76, 46a-99 (West 1995 & Supp. 2003).

137. VA. CONST. art. I, § 11; MINN. STAT. ANN. § 363A.02 (West. Supp. 2004); MO. REV. STAT. § 213.070(3) (2000); N.D. CENT. CODE 14-02.4-15.

138. Telephone Interview with Donya Fernandez, Staff Attorney, Employment Law Center (Apr. 2002).

York Immigration Coalition, NELP, YKASEK, Roza Promotions, NY 911, Korean Community Services, UNITE and others have begun meeting to develop strategies to increase language access. Advocates from the Legal Aid Society and the New York Immigration Coalition have already initiated negotiations with representatives from the New York Department of Labor to address this issue.[139]

III.
ENSURING ACCESS TO PUBLIC SERVICES WITHOUT FEAR OF DEPORTATION

> Immigrants have come to New York and written their own American success stories by working hard . . . playing by the rules . . . and weaving themselves into the permanent fabric of city life. They are the lifeblood of this City. Their contributions to our history are beyond measure. And they have always been—and will always be—welcome here . . . . At its core, Executive Order 41 is a clear and unequivocal invitation to all law-abiding New Yorkers to come forward without fear or apprehension and avail themselves of the services that keep us all healthy, safe, and prosperous. This new executive order is good for our immigrant residents, which means it is good for all New Yorkers.[140]

Because immigrants are likely to work in dangerous occupations and to lack job-based insurance for themselves or their families, it is important that they and their families have access to Medicaid, Medicare, the State Children's Health Insurance Program ("SCHIP"), and Social Security disability benefits, if possible. Because their earnings are often low, they may be in need of benefits such as Temporary Assistance to Needy Families ("TANF"), and Food Stamps. Though administered through state agencies, all of these programs are federally funded and subject to federal law, including requirements that agencies distributing certain benefits collect immigration information and share that information with federal authorities. This information-sharing is reciprocal: Immigration and Customs Enforcement ("ICE") is also required to provide information on individuals' immigration status to state agencies upon request.[141] This type of information-sharing can deter not only undocumented immigrants, who may not be able to apply for benefits without risking deportation, but also documented immigrants, since immigration status is sometimes based on highly

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139. A recent report by the Brennan Center for Justice identifies some of the problems faced by New Yorkers seeking to recover benefits to which they are entitled. ANNETTE BERNHARDT & KATE RUBIN, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, RECESSION AND 9/11: ECONOMIC HARDSHIP AND THE FAILURE OF THE SAFETY NET FOR UNEMPLOYED WORKERS IN NEW YORK CITY (2003).

140. Remarks of Michael Bloomberg, Mayor of New York City, Mayor's Office of Immigrant Affairs, Mayor Michael R. Bloomberg Signs Executive Order 41 Regarding City Services for Immigrants, *at* http://www.nyc.gov/html/imm/html/news/exe_order_41_remarks.shtml (Sep. 17, 2003).

141. IIRIRA § 642(b)(2), 8 U.S.C. § 1373(c) (2000).

personal matters such as being the victim of domestic violence.

Another social service that is becoming increasingly inaccessible to immigrants is law enforcement. Like everyone else, immigrants need the protection of law enforcement and wish to contribute to the safety and well-being of their communities by reporting crimes that they witness. When immigrants are afraid to call the police, or go to court, they cannot benefit from the protections of law enforcement.

Experience shows that many immigrants will not access essential social services if doing so could result in sharing of confidential immigration information with immigration officials or other federal agencies. This section discusses state and local strategies to encourage immigrant access to social services and law enforcement.

A. Ensuring Access to Social Services and Public Benefits

Federal Law Regarding Collection and Reporting of Immigration-Related Information

Recognizing that unnecessarily intrusive inquiries regarding immigration status and social security numbers ("SSNs") can deter immigrants from accessing services, the U.S. Department of Agriculture and the U.S. Department of Health and Human Services issued a policy guidance document detailing the circumstances under which it is permissible or obligatory for states to inquire into immigration status, citizenship, and SSNs.[142] The guidance clarifies that states are required to establish the citizenship and immigration status of applicants for Medicaid (except emergency Medicaid), 'SCHIP, TANF, and the Food Stamp program.[143]

However, the guidance reiterates that only the applicant's immigration status is relevant: states may not require an applicant to provide information about the citizenship or immigration status of any nonapplicant family or household member, and may not deny an eligible applicant benefits because a nonapplicant family or household member has not shared her citizenship or immigration status.[144] Internal provisions of the Medicaid, SCHIP and Food Stamp laws bar states from denying benefits to an applicant due to a household member's failure to provide a SSN.[145] The guidance also reminds states of their obligation to comply with the Privacy Act.[146] Under the Privacy Act, unless

142. Letter from Olivia Golden, Assistant Secretary, Administration for Children and Families, et al., to State Health and Welfare Officials [hereinafter Golden Letter], http://www.hhs.gov/ocr/immigration/triagency.html (revised Sept. 21, 2000).

143. *Id.*

144. *Id.*

145. *Id.*

146. Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896 (codified in notes to 5 U.S.C. § 522a (2000)); *see also* Golden Letter, *supra* note 142

disclosure of a SSN is required by law, states are prohibited from denying a right, benefit or privilege provided by the law because of an individual's refusal to provide an SSN.[147]

Moreover, the guidance points out that even asking nonapplicants to disclose immigration information without making clear that they do not have to provide the information raises concerns under Title VI, if the effect is to deter otherwise eligible applicants who are protected under Title VI against discrimination in applying for benefits.[148]

Federal laws also impose some reporting obligations on states. IIRIRA bans federal, state, and local government agencies and officials from enacting any policies to prohibit or restrict maintenance of immigration status information or exchange of such information with the Immigration and Naturalization Service ("INS") or any other government entity.[149] Notably, however, the law does not require agencies to collect immigration information to begin with.[150]

PRWORA also includes provisions that prohibit states from restricting the exchange of information with the INS regarding immigration status.[151] Specifically, state agencies are required to report to the INS persons "known to be not lawfully present in the United States."[152] The Social Security Administration ("SSA"), the Department of Health and Human Services, the DOL, and the Department of Housing and Urban Development clarified PRWORA's reporting requirements in a joint notice in the Federal Register in 2000.[153] The notice explains that PRWORA established reporting requirements to the following federal programs: TANF, the Welfare-to-Work program, Supplemental Security Income ("SSI"), the Public and Assisted Housing Program provided under the United States Housing Act of 1937, and the Section 6 and Section 8 housing assistance programs.[154]

According to the notice, the reporting requirements only apply when the applicant's immigration status is a formal finding of fact or conclusion of law made by the agency as part of a formal determination that is subject to

147. Privacy Act § 7. However, a state may request voluntary disclosure. *Id.* § 7(b). The state must inform the individual of whether the disclosure is mandatory or voluntary, by what statutory authority the information is requested, and for what purpose the information will be used. *Id.*

148. Golden Letter, *supra* note 142.

149. IIRIRA § 642(b)(2), 8 U.S.C. § 1373 (2000).

150. *See id.*

151. PRWORA § 434, 8 U.S.C. § 1644 (2000).

152. *Id.*

153. Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" Is Not Lawfully Present in the United States, 65 Fed. Reg. 58,301 (Sept. 28, 2000) [hereinafter Responsibility of Certain Entities], *available at* http://www.hudclips.org/sub_nonhud/cgi/pdf/24894.pdf; *see also New Rule Explains Limits of INS Reporting Requirements Under the 1996 Welfare Law,* 14 IMMIGRANTS' RTS. UPDATE 10 (Oct. 19, 2000), *available at* http://www.nilc.org/immspbs/vr/verifreptg004.htm.

154. Responsibility of Certain Entities, *supra* note 153.

administrative review, and that is supported by a determination by the INS or the Executive Office for Immigration Review.[155] The notice also stresses that "[d]eterminations of status for purposes of the Immigration and Nationality Act are the responsibility of the Department of Justice, not of any other agency."[156]

The importance of safeguarding information relating to immigration status calls for state laws protecting the confidentiality of all applicants to the maximum extent permitted by federal law. The complexity of developing confidentiality policies for state administered benefits is further compounded by the fact that many states have now consolidated the application forms for Medicaid, SCHIP, Food Stamps, TANF, and other benefits.[157] The first step in increasing immigrant access to social services and protecting confidentiality is to understand what information is required or can permissibly be sought by various state agencies. Second, advocates must discern how this information is recorded, maintained, and shared with other agencies, particularly with immigration officials.

The guidance issued by the Department of Health and Human Services and the Department of Agriculture contains a number of suggestions for states. They recommend that states restructure application forms to allow designation of nonapplicant household members early in the process, thus eliminating the need to collect immigration information or SSNs for those individuals. Further, states should delete general requests for immigration information and SSNs, replacing them with inquiries directed specifically towards applicants, in only those contexts where the information is required. They also recommend that states address the fears of immigrants by providing information on the uses and confidentiality of immigration information and SSNs (such as the explanation that SSNs will only be used to verify income and will not be reported to the U.S. Citizenship and Immigration Services ("UCSIS"), when that is the case). Finally, they recommend that states ensure that applicants understand that their applications will not be delayed or denied for failure to provide information on nonapplicant household members' immigration status or SSNs, and provide training in this area for intake caseworkers and other staff.[158]

State and Local Responses: Confidentiality Laws for Social Services and Benefits

A number of states and localities have already adopted confidentiality regulations. San Francisco, California; Takoma Park, Maryland; and Austin, Texas have had ordinances protecting confidential immigration status information for a number of years.[159] The Takoma Park ordinance states that city

155. *Id.*
156. *Id.* at 58, 302.
157. Golden Letter, *supra* note 142.
158. *Id.*
159. SAN FRANCISCO, CAL., ADMIN. CODE § 12H (1993), *available at*

employees may not inquire into immigration status or discriminate in the enforcement of rights or granting of benefits on the basis of immigration status unless federal or state law requires them to do so.[160] The Austin City Council Resolution declares that "it shall be the policy of the City of Austin that it will not discriminate or deny city services to anyone on the basis of a person's immigration status."[161] The San Francisco ordinance, which dates back the furthest, bars city employees from requesting or disseminating information on immigration status, including questions relating to immigration status on any applications or interview forms, or conditioning provision of services or benefits on immigration status.[162] Exceptions are made where federal or state statutes or regulations, city or county public assistance criteria, or court decisions mandate such inquiries.[163]

More recently, ordinances prohibiting city employees from making inquiries into immigration status except under limited circumstances have been enacted in Portland, Maine; Minneapolis, Minnesota; and Seattle, Washington.[164] Enactment of provisions such as these often requires the sustained efforts of immigrants' rights advocates, labor groups, and community organizations, as well as the cooperation of local government. The history of confidentiality regulations in New York City provides insight into the process underlying enactment of these laws.

Highlighted Campaign: New York City

Since 1989, New York City workers followed Executive Order 124, which prohibited city officers and employees from "transmit[ting] information respecting any alien to federal immigration authorities" unless they were required to do so by law, written permission has been obtained from the indivi-

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http://www.nelp.org/docUploads/SF%20City%20of%20Refuge%20Ordinance%2Epdf; Takoma Park, Md., Resolution No. 2002-82 (Oct. 28, 2002), *available at* http://207.176.67.2/clerk/ordinances/other/ord198563.pdf; Austin, Tex., City Council Res. Item 33, Reg. Sess., http://www.ci.austin.tx.us/minutes/mincy97/mn013097.htm (Jan. 30, 1997).

160. Takoma Park, Md., Resolution No. 2002-82 ("No agent, officer, or employee of the City of Takoma Park, in the performance of official duties, shall make any inquiry about citizenship or residency status of any person seeking to enforce rights or obtain benefits, or discriminate in the enforcement of rights or the granting of benefits on such bases, unless Federal or Maryland law so requires for the determination of eligibility of benefits. The City of Takoma Park administers no program which requires such inquiry.").

161. Austin, Tex., City Council Res. Item 33, http://www.ci.austin.tx.us/minutes/mincy97/mn013097.htm (last visited Apr. 8, 2004).

162. SAN FRANCISCO, CAL., ADMIN. CODE § 12H.2(c)–(d).

163. *Id.*

164. PORTLAND, ME., CODE OF ORDINANCES § 2-21 (2003), *available at* http://www.ci.portland.me.us/Chapter002.pdf; Minneapolis, Minn., Ordinance 2003-Or-092 (July 11, 2003), *available at* http://www.ci.minneapolis.mn.us/council/2003-meetings/20030711/20030711-proceedings.pdf; Seattle, Wash., Ordinance 121063 (Jan. 27, 2003), *available at* http://www.nelp.org/docUploads/Seattle%20City%20Council%20Ordinance%2Epdf.

dual, or criminal activity was suspected.[165] Seeking to continue enforcement of Executive Order 124 after IIRIRA and PRWORA increased states' duty to share immigration information,[166] the Giuliani administration challenged the IIRIRA and PRWORA provisions as violative of the Tenth Amendment and the Guarantee Clause.[167]

The City lost its facial challenge in both the district court[168] and the Second Circuit Court of Appeals[169] in 1999. However, the decisions did not clearly invalidate Executive Order 124, and the Second Circuit implied that a broader confidentiality policy that was "more integral to the operation of City government" might present a stronger Tenth Amendment argument.[170] Nevertheless, the status of Executive Order 124 was uncertain after the lawsuits, and advocates including the Legal Aid Society, the New York Immigration Coalition, NELP, the Arab American Family Support Center, the Council of Pakistan Organization, Asian Americans for Equality, SEIU 32B-J, and UNITE sought to ensure that confidential information would continue to be protected.

On December 4, 2002, New York City Council Member Hiram Monserrate, along with over twenty-five other sponsors, proposed Introduction No. 326. If enacted, this bill would have prohibited disclosure of confidential information to anyone except another city officer or employee acting in the scope of her official duties.[171] The bill was designed to "survive a constitutional challenge" by implementing the type of "generalized confidentiality policy necessary to the performance of legitimate municipal functions" suggested by the Second Circuit.[172]

This bill gained overwhelming support in the City Council. Before it was passed, however, Mayor Michael Bloomberg rescinded Executive Order 124 and replaced it with Executive Order 34, which provided few limitations on the ability of city workers other than police to make enquiries about immigration status and no prohibitions on sharing of information.[173] This was met with outcry from community, advocacy and labor groups who ultimately entered into discussions with the Mayor's office about how to improve the confidentiality policy.

On September 17, 2003, Mayor Bloomberg replaced Executive Order 34

165. 43 R.C.N.Y. § 3-02 (2001) (codifying Exec. Order No. 124 (1989)).

166. *See supra* notes 149–52 and accompanying text.

167. City of New York v. United States, 179 F.3d 29, 37 (2d Cir. 1999).

168. City of New York v. United States, 971 F. Supp. 789 (S.D.N.Y. 1997).

169. *City of New York*, 179 F.3d 29.

170. *Id.* at 37.

171. N.Y. City Council, Intro. No. 0326-2002, http://www.council.nyc.ny.us/textfiles/Int%200326-2002.htm (Dec. 4, 2002).

172. N.Y. City Council, Comm. Rep. for Intro. No. 0236-2002, http://www.council.nyc.ny.us/attachments/57019.htm (May 5, 2003).

173. N.Y. City Exec. Order No. 34 (May 13, 2003), *available at* http://www.nelp.org/docUploads/Executive%20Order%20No34%20May%2013%202003%2Epdf.

with Executive Order 41, which created a citywide confidentiality policy protecting immigrants from arbitrary or unnecessary collection and reporting of immigration status information when seeking city services or interacting with police.[174] For the first time ever, New York City has a policy that places restrictions both on asking about and sharing information regarding immigration status.[175]

Executive Order 41 contains "don't ask" provisions that prohibit city workers from asking about immigration status unless it is necessary to provide services or they are required by law to do so.[176] Executive Order 41 also contains "don't tell" provisions that prohibit city workers, including the police, from sharing or disclosing confidential information they have obtained, with certain exceptions.[177] Confidential information includes any information relating to immigration status, sexual orientation, status as a victim of domestic violence or sexual assault, status as a crime witness, receipt of public assistance, and income tax records.[178] The signing of this Executive Order was a major step in the years-long campaign to ensure that all New Yorkers would be able to access city services without fear of having their immigration status revealed.

B. Ensuring Access to Law Enforcement

Many police departments have spent years nurturing the trust of immigrant communities. Adopting policies that enable local police to act as de facto INS agents seriously erodes relations between communities and police. Additionally, immigration laws are extremely complex and constantly changing. Proper understanding and enforcement of these laws requires intensive training.

Immigration enforcement by local police officers harms both undocumented as well as documented immigrants. It harms undocumented workers by increasing the threat of deportation, further weakening their bargaining power relative to exploitive employers. It harms documented workers by exposing them to increased harassment by police who are unfamiliar with immigration laws or who make assumptions about a person's citizenship on the basis of their skin color or accent. This was clearly demonstrated in "Operation Restoration," an experimental attempt at collaboration between local police and Border Patrol that took place in Chandler, Arizona. An investigation into Operation Restor-

174. N.Y. City Exec. Order. No. 41 (Sept. 17, 2003), *available at* http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf.

175. Remarks of Michael Bloomberg, Mayor of New York City, Mayor's Office of Immigrant Affairs, Mayor Michael R. Bloomberg Signs Executive Order 41 Regarding City Services for Immigrants, *at* http://www.nyc.gov/html/imm/html/news/exe_order_41_remarks.shtml (Sept. 17, 2003).

176. N.Y. City Exec. Order No. 41 § 4.

177. Immigration information may be disclosed if disclosure is required by law or under certain conditions relating to criminal investigations. *Id.* § 2(b), (e); *see also infra* note 234 and accompanying text.

178. N.Y. City Exec. Order No. 41 § 1.

ation by the Arizona State Attorney General's office concluded "'without a doubt that residents of Chandler, Arizona were stopped, detained, and interrogated by officers . . . purely because of the color of their skin'"[179] and that the roundups "greatly harmed the trust relationship between the Chandler Police and many of the city's residents."[180] In 1999, the Chandler City Council unanimously approved a $400,000 settlement of a lawsuit stemming from the police role in the roundups.[181]

Federal Law Regarding Local Enforcement of Immigration Law

Immigration laws have traditionally been enforced by the former INS, which is now reorganized within the Department of Homeland Security (DHS) into USCIS, ICE, and the Customs and Border Protection ("CBP").[182] In 1996, however, AEDPA amended the INA to authorize state and local police to enforce the criminal provisions of federal immigration laws.[183]

More recently, the DOJ has succeeded in obtaining the assistance of state and local law enforcement in the enforcement of not only criminal, but also civil[184] immigration laws.[185] Enforcement of civil immigration laws is of potentially far greater concern to immigrant workers, since a substantial proportion of immigrant workers are undocumented but only a small percent have violated criminal immigration laws.[186]

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179. *See* Charles Kamasaki, Senior Vice President, National Council of La Raza, Statement on Terrorism, Immigration, and Civil Rights before the U.S. Commission on Civil Rights, http://www.usccr.gov/pubs/tragedy/imm1012/kamasaki.htm (Oct. 12, 2001).

180. Karen Brandon, *U.S. Weighs Local Role on Immigration*, CHI. TRIB., Apr. 14, 2002, § 1, at 10.

181. Press Release, American Immigration Lawyers Association, DOJ Opinion on State and Local Police Enforcing Immigration Laws Bodes Ill for Law Enforcement Communities, http://www.aila.org/contentViewer.aspx?bc=9,594,626 (Apr. 9, 2002) (posted on AILA InfoNet at Doc. No. 02040937).

182. In this article, the former INS will be referred to as the INS in discussions of legislation or policy implemented at the time when it was still called the INS, and as USCIS, ICE, or CBP in discussions of more recent legislation and policy.

183. AEDPA, Pub. L. No. 104-132, 110 Stat. 1276 (codified at INA, 8 U.S.C. § 1252c(a) (2000)). The INA now states that

> "[T]o the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction . . . ."

8 U.S.C. § 1252c(a) (2000).

184. Criminal immigration violations are those which are dealt with in criminal proceedings and for which some type of criminal punishment can be imposed. Examples include document fraud and illegal re-entry after deportation. Civil immigration violations are those which are dealt with through administrative, noncriminal proceedings and are not subject to criminal punishment. Examples include overstaying a visa or living in the United States without documentation.

185. Patrick J. McDonnell, *Police Want No Part in Enforcing Immigration Law*, L.A. TIMES, Apr. 5, 2002, at B1.

186. In the year 2000, 16,495 individuals were referred to U.S. attorneys for suspected

Historically, the position of many state Attorneys General[187] and of the DOJ was that state and local police lack any inherent general authority to make arrests for civil infractions of the immigration laws,[188] following the principle that civil immigration enforcement can only occur under circumstances expressly provided for by Congress.[189] Congress has not granted broad power to the states to enforce civil immigration violations, as compared with their power to enforce criminal immigration violations. The source of any state power to enforce civil immigration infractions lies in the AEDPA amendments to the INA. Sections 103(a)(8) and 237(g) of the INA now grant state and local authorities some very limited power to enforce the civil provisions of the immigration laws, but only under specifically delineated circumstances and always under the direction and supervision of the DOJ.[190]

The authority of state and local law enforcement to exercise federal immigration power under Section 103(a)(8) of the INA is proscribed by "contingency agreements" between the Commissioner of the INS and state or local law enforcement officials.[191] Contingency agreements do not authorize the state or local officers to perform civil immigration functions until the Attorney General declares that a "mass influx of aliens" is imminent or occurring, and specifically authorizes such performance.[192] Such contingency agreements authorize state and local officials to exercise immigration authority under specific conditions within geographically defined boundaries.[193] The agreements prohibit state and local officers from performing any functions of the INS pursuant to this rule without undergoing trainings in immigration law, immigration

violations of criminal immigration laws and 15,613 individuals were prosecuted for criminal immigration violations. JOHN SCALIA & MARIKA F. X. LITRAS, BUREAU OF JUSTICE STATISTICS, IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1 (Aug. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/iofcjs00.pdf. Seven percent of these individuals were U.S. citizens charged with offenses such as human trafficking. *Id.* In contrast, there are an estimated 9.3 million immigrants living in the United States in violation of civil immigration laws. PASSEL, CAPPS & FIX, *supra* note 3.

187. Kan. Att'y Gen. Op. No. 78-149 (1978), 1978 WL 33443 (taking the position that state law only granted local police power of arrest for violations of state laws and local ordinances, such that a local law enforcement officer in Kansas did not "have the power of arrest for violation of Federal immigration laws"); Nev. Att'y Gen. Op. No. 83-16 (1983) (noting that local authority to enforce federal immigration law was not well settled, suggesting that arrest power should be "cautiously exercised" in this context, and advising officers not to detain or arrest a person solely because he may be a "deportable alien").

188. Assistance by State and Local Police in Apprehending Illegal Aliens, Mem. Op. for the U.S. Att'y for the S.D. Cal. (Feb. 5, 1996), 1996 WL 33101191 (O.L.C.).

189. *See generally* Migration Policy Inst., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Immigration Law* (arguing against broad inherent authority of state and local officers to exercise federal immigration authority), *available at* http://www.migrationpolicy.org/files/authority.pdf (last visited Apr. 8, 2004).

190. INA § 103(a)(8), 8 U.S.C. § 1103 (2002); INA § 287(g), 8 U.S.C. § 1357(g) (2002).

191. 28 C.F.R. § 65.83(d) (2002).

192. *Id.* § 65.84(d)(1).

193. *Id.* § 65.83(d)(1)–(4).

law enforcement fundamentals and procedures, civil rights law, and sensitivity and cultural awareness issues.[194] Rules implementing Section 103(a)(8) went into effect on July 24, 2002.[195]

Section 287(g) of the INA provides for written agreements between the Attorney General and a state authorizing state and local officials to "perform a function of an immigration officer."[196] The section goes on to outline the requirements that must be met for state and local officers to enforce immigration laws.[197] These include written certification of training in immigration law, as well as a written agreement with the Attorney General regarding the specific duties to be performed by the local officers and the duration of local officers' authority to perform these duties.[198]

The claim that state and local law enforcement officers have the inherent authority to enforce federal immigration laws wholly contradicts the long standing principle that immigration matters are a federal concern. By providing specific circumstances for state and local exercise of federal immigration powers in Sections 103(a)(8) and 287(g) of the INA, Congress legislated with the presumption that state and local law enforcement officers may exercise immigration powers only within the scope of limited circumstances defined by the statute. Acceptance of the argument that state and local law enforcement officials possess inherent authority to enforce immigration matters would render sections of the INA detailing the conditions for state and local enforcement of immigration laws meaningless.

Nevertheless, in 2002, leaks to the press revealed that the federal DOJ had concluded that state and local police have the inherent authority to enforce civil violations of the immigration law[199] by arresting and detaining persons who are in violation of civil immigration laws and whose names have been placed in the National Crime Information Center ("NCIC").[200]

Since then, as discussed below, some states have cooperated in enforcement, but many others have resisted. To further strengthen the federal government's case for local enforcement, U.S. Representative Charles Norwood, Republican of Georgia, introduced the Clear Law Enforcement for Criminal Alien Removal

194. *Id.* § 65.84(a)(3)(vii).

195. Powers of the Attorney General to Authorize State or Local Law Enforcement Officers to Exercise Federal Immigration Enforcement Authority During a Mass Influx of Aliens, 67 Fed. Reg. 48,354 (July 24, 2002).

196. INA § 287(g), 8 U.S.C. § 1357(g) (2002).

197. *Id.* § 1357(g)(2).

198. *Id.* § 1357(g)(2)–(5).

199. Eric Schmitt, *Ruling Clears Way to Use State Police in Immigration Duty*, N.Y. TIMES, Apr. 4, 2002, at A19.

200. Letter from Alberto Gonzales, Counsel to the President of the United States, to the Migration Policy Institute (June 24, 2002), *available at* http://www.migrationpolicy.org/files/whitehouse.pdf. The NCIC is a national database maintained by the Federal Bureau of Investigations and used by federal, state, and local law enforcement officers to identify those labeled as "high-risk aliens." *Id.*

Act ("CLEAR Act") in July 2003.[201] Senator Jeff Sessions, Republican of Alabama, introduced the Senate version of the bill, the Homeland Security Enhancement Act.[202] These bills would effectively require state and local police to enforce civil immigration laws by denying certain types of federal funding to states that failed to comply.[203] The fate of these bills is uncertain, since they are both still in committee.

State and Local Responses: Confidentiality Provisions Regarding Law Enforcement Activities

A few states have cooperated with federal officials in enforcing immigration law. Florida became the first state to enter into an agreement with the federal government to deputize local police officers as INS agents. Pursuant to this agreement, on July 9, 2002, thirty-five state law enforcement officers began training to enforce civil as well as criminal immigration laws.[204] In October 2003, Alabama became the second state to join this enforcement program, after twenty-one state troopers completed the federal training program.[205] However, many states and localities have resisted federal pressure to enforce civil immigration laws. The next section discusses various state and local approaches to limiting involvement in enforcement of immigration laws.

Law Enforcement Officials' Policies and Statements

Local police, sheriffs, and other law enforcement officials, who are presumably in the best position to know how their resources should be utilized and whether they can make useful contributions to their communities by attempting to enforce immigration laws, have spoken out strongly against federal efforts to secure their cooperation. The New York Attorney General's office maintains that state and local officers have no power to make warrantless arrests on suspicion of civil infractions of the INA.[206] Officials in Des Moines, Iowa; El Paso, Texas; Santa Cruz County, Arizona; Lenexa, Kansas; Los Angeles County, California; Newark, California; South Tucson, Arizona; and Yuma County, Arizona, among many others, have made statements opposing the CLEAR

201. CLEAR Act, H.R. 2671, 108th Cong. § 102 (2003). Further information about the CLEAR Act is available from the National Immigration Forum, at http://www.immigrationforum.org/currentissues/clear.htm (last updated Apr. 8, 2004).

202. Homeland Security Enhancement Act of 2003, S. 1906 108th Cong. § 102 (2003).

203. CLEAR Act, H.R. 2671; Homeland Security Enhancement Act of 2003, S. 1906.

204. Mireidy Fernandez, *FDLE Cross-Training 35 Police Officers to Also Serve as INS Agents*, NAPLES DAILY NEWS, Jul. 23, 2002, http://web.naplesnews.com/02/07/naples/d795586a.htm (last updated Apr. 8, 2004).

205. See *Alabama Troopers Now Enforcing Federal Immigration Laws*, MSNBC NEWS, *at* http://www.msnbc.com/local/wpmi/D-8486EB56-EA82-4E5E-A1B7-6C643C0E2E43.asp (Oct. 3, 2003).

206. N.Y. Att'y Gen. Informal Op. No. 2000-1 (2000).

Act.[207] State police associations, such as the California Police Chiefs Association, the El Paso Municipal Police Officers' Association, the Miami-Dade Chiefs Association and the Florida Police Benevolent Association, have made similar statements.[208] Representatives of many more local police departments have criticized the idea of participating in the enforcement of federal immigration laws. These include the police departments in Boston, Massachusetts; Kansas City, Kansas; Portland, Maine; St. Paul, Minnesota; South Tucson, Arizona; Des Moines, Iowa; Pawtucket, Rhode Island; and Washington, D.C. Police Departments, among many others.[209]

A number of police departments have instituted policies regarding immigration law enforcement. For example, under the procedural rules of the San Diego Police Department, police may not look for violations of immigration law and may not report undocumented persons to immigration officials when they are material witnesses of crime, have family disturbances or minor traffic offenses or seek medical treatment.[210] San Diego Police spokesman David Cohen explained the rationale behind this policy, saying, "We've spent decades establishing trust . . . with our very diverse immigrant communities. If there is an immigration emergency tied to criminal activity, of course we'll assist. But if it is simply an immigration violation . . . we will not be involved."[211] The Chandler [Arizona] Police Department has adopted a policy that prohibits arrest when the only violation is infraction of an immigration law; the policy further prohibits police from notifying the INS of undocumented persons when those persons are material witnesses of crime, are seeking medical treatment, or are involved in family disturbances, minor traffic offenses, or minor misdemeanors.[212] Other departments instituting such policies include the police or sheriff's departments of the District of Columbia[213] and Philadelphia,

207. NAT'L IMMIGRATION FORUM, THE CLEAR ACT AND HOMELAND SECURITY ENHANCEMENT ACT: DANGEROUS PUBLIC POLICY ACCORDING TO POLICE, GOVERNMENTS, OPINION LEADERS, AND COMMUNITIES (Jan. 26, 2004), *available at* http://www.immigrationforum.org/CurrentIssues/articles/CLEARHSEAQuotes.pdf.

208. NAT'L IMMIGRATION FORUM, ORGANIZATIONS OPPOSED TO LOCAL ENFORCEMENT OF IMMIGRATION LAWS (Jan. 26, 2004), *available at* http://www.immigrationforum.org/currentissues/articles/OppositiontoSLenforcement.pdf.

209. *Id.*

210. NAT'L IMMIGRATION LAW CTR., ANNOTATED CHART OF LAWS, RESOLUTIONS, AND POLICIES INSTITUTED ACROSS THE U.S. AGAINST STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAWS 2 (Jan. 27, 2004), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/Local_Law_Enforement_Chart_FINAL.pdf.

211. Kris Axtman, *Police Can Now Be Drafted to Enforce Immigration Law*, CHRISTIAN SCI. MONITOR, Aug. 19, 2002, at 2.

212. *See* Chandler Police Dep't, Gen. Order E-17 (Mar. 1, 1999), *available at* http://www.chandlerpd.com/gos/E17forgn.pdf.

213. Statement Reaffirming MPD Policy Prohibiting Police Inquiries Into the Citizenship, Immigration or Residency Status of Individuals, D.C. Metropolitan Police Department, http://mpdc.dc.gov/news/stmts/2003/07/072803.shtm (July 28, 2003).

Pennsylvania.[214] In some instances, police department policies have been incorporated into local legislation.[215]

Limitations on Use of Local Resources to Enforce Immigration Law

One approach to restricting involvement in immigration law enforcement has been to bar use of state or local law enforcement resources for immigration-related activities. For example, in May 2003, the Alaska State Legislature passed a nearly unanimous resolution opposing provisions of the USA PATRIOT Act that the Legislature believed would violate rights and liberties guaranteed under the state and federal constitutions and prohibiting the use of state resources or institutions for the enforcement of federal immigration laws.[216] Oregon state law also prohibits the use of state and local law enforcement funds or personnel to detect or apprehend individuals simply because they are in the country in violation of federal immigration laws.[217] The law of Marion County, Oregon also provides that county law enforcement entities will not use resources or personnel to "detect [or] apprehend persons solely for violations of immigration laws,"[218] and the city of Salem has adopted policies mirroring those of Marion County.[219] The Albuquerque Code of Resolutions provides that "no municipal resources shall be used to identify individuals' immigration status or apprehend persons on the sole basis of immigration status, unless otherwise required by law to do so."[220] The San Francisco Administrative Code prohibits the use of any city funds or resources to assist in enforcement of federal immigration law, with the exception of instances in which federal or state statutes, regulations or court decisions require the city or county to provide such assistance.[221]

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214. Philadelphia Police Dep't Memorandum, Departmental Policy Regarding Immigrants (May 17, 2001), *available at* http://www.friendsfw.org/Immigrant/Police/Phila_Police_Memo_01-06.pdf.

215. Seattle, Wash., Ordinance 121063 (Jan. 27, 2003), *available at* http://www.nelp.org/docUploads/Seattle%20City%20Council%20Ordinance%2Epdf (describing a Seattle Police Department Directive stating that "Seattle Police officers may not request specific documents for the sole purpose of determining a person's civil immigration status, and may not initiate police action based solely on a person's civil immigration status . . . .").

216. H.J. Res. 22, 23d Leg., 1st Sess. (Alaska 2003), *available at* http://www.legis.state.ak.us/pdf/23/Bills/HJR022C.PDF. For a list of local resolutions passed in opposition to the USA PATRIOT Act, see the website of the American Civil Liberties Union at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11256&c=206 (last visited Apr. 8, 2004).

217. OR. REV. STAT. § 181.850 (2001).

218. Role of Marion County in Relation to the Immigration and Naturalization Service, Marion County, Or., Admin. Policy, http://www.nelp.org/iwp/reform/state/appendixmarion.cfm (last visited Mar. 8, 2004).

219. Role of City of Salem in Relation to the Immigration and Naturalization Service, Salem, Or., Administrative Policy (1997), http://www.nelp.org/iwp/reform/state/appendixsalem.cfm (last visited Mar. 8, 2004).

220. ALBUQUERQUE, N.M., CODE OF RES. § 3-1-11(b)(5) (2001).

221. SAN FRANCISCO, CAL., ADMINISTRATIVE CODE § 12H.2 (1993).

Limitations on Inquiry Into Immigration Status

New York City's Executive Order 41 contains "don't ask" provisions that specifically prohibit police and other law enforcement officers from asking about the immigration status of crime victims, witnesses, or other persons seeking assistance from the police and states that police officers shall not inquire about a person's immigration status, unless police are investigating illegal activity other than undocumented status.[222] In 2003, several other cities adopted similar ordinances prohibiting police from making inquiries into immigration status except under limited circumstances: Portland, Maine; Minneapolis, Minnesota; and Seattle, Washington.[223] The Seattle ordinance provides that no city officer or employee should inquire into the immigration status of any individual or apprehend individuals for violation of immigration laws.[224]

Antiprofiling Provisions

The San Francisco Administrative Code prohibits any city officer or employee from stopping, questioning, arresting, or detaining an individual solely because of her national origin or immigration status,[225] and prohibits officials from discriminating among individuals on the basis of their ability to speak English or their perceived or actual national origin in deciding whether to report an individual to the INS.[226]

Symbolic Statements

The city councils in San Francisco, California; Cambridge, Massachusetts; and Austin, Texas have passed local resolutions declaring the cities to be a "City of Refuge," a "Safety Zone," and a "Sanctuary City," respectively.[227] Additionally, various entities, from police departments to city and county councils have come out in opposition to the CLEAR Act and its potential impact on the local level. Resolutions opposing parts of the USA PATRIOT Act and the

222. N.Y. City Exec. Order No. 41 (Sept. 17, 2003), *available at* http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf.

223. PORTLAND, ME., CODE OF ORDINANCES § 2-21 (2003), *available at* http://www.ci.portland.me.us/Chapter002.pdf; Minneapolis, Minn., Ordinance 2003-Or-092 (2003), *available at* http://www.ci.minneapolis.mn.us/council/2003-meetings/20030711/20030711-proceedings.pdf; Seattle, Wash., Ordinance 121063 (2003), *available at* http://www.nelp.org/docUploads/Seattle%20City%20Council%20Ordinance%2Epdf.

224. Seattle, Wash., Ordinance 121063.

225. SAN FRANCISCO, CAL., ADMIN. CODE § 12H.2-1 (1993).

226. *Id.*

227. *See* Cambridge, Mass., City Council Res., http://www.hispanicvista.com/html/070102nn.htm (June 17, 2002); San Francisco, Cal., Board of Supervisors Res. 389-02 (June 3, 2002) (reaffirming San Francisco's status as a "City and County of Refuge" and an "I.N.S. Raid-Free Zone"), *available at* http://www.sfgov.org/site/uploadedfiles/bdsupvrs/resolutions02/r0389-02.pdf; Austin, Tex., City Council Res. Item 33, Reg. Sess. (declaring the City of Austin to be a "Safety Zone"), http://www.ci.austin.tx.us/minutes/mincy97/mn013097.htm (Jan. 30, 1997)."

CLEAR Act have been passed in 208 communities in thirty-five states.[228] There have also been three statewide resolutions passed, in Hawaii, Alaska, and Vermont.[229] Many of these do not grant new rights or benefits to local citizens, but rather call on the federal government to recognize the importance of civil liberties and privacy rights, criticize the PATRIOT Act, and express opposition to racial profiling.[230] While such resolutions do not offer the level of detail or accountability of a law or administrative regulation, they can be effective organizing tools to raise awareness of the need for public agencies and elected officials to affirm their commitment to increased immigrant access to social services.

Investigation of the Immigration Status of Individuals Arrested on Criminal Charges

Many of the laws and policies discussed above contain an important exception to the general confidentiality principles: they permit investigation into the immigration status of anyone arrested on criminal charges. For example, Portland, Maine's ordinance permits city officers to investigate the immigration status of any individual whom the officer has reasonable suspicion to believe has committed a felony.[231] Oregon's law allows police to check the immigration status of suspects arrested for criminal offenses.[232] The San Francisco Administrative Code allows investigation into and reporting of immigration status where a person is in custody after being booked for alleged commission of a felony,[233] and New York City's Executive Order 41 allows inquiry into immigration status where:

> (i) [T]he individual to whom such information pertains is suspected by such officer or employee or such officer's or employee's agency of engaging in illegal activity, other than mere status as an undocumented alien or (ii) the dissemination of such information is necessary to apprehend a person suspected of engaging in illegal activity, other than mere status as an undocumented alien or (iii) such disclosure is necessary in furtherance of an investigation of potential terrorist activity.[234]

In New York City, it is unclear which types of investigations of illegal activity

228. *See* ACLU, *List of Communities that have Passed Resolutions, at* http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207 (last visited Apr. 8, 2004).

229. *Id.*

230. *See, e.g.*, Minneapolis, Minn., City Council Res. 2003R-109, http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12291&c=207 (Apr. 4, 2003).

231. PORTLAND, ME., CODE OF ORDINANCES § 2-21 (2003), *available at* http://www.ci.portland.me.us/Chapter002.pdf.

232. OR. REV. STAT. § 181.850 (2001).

233. SAN FRANCISCO, CAL., ADMIN. CODE § 12H.2-1 (1993).

234. N.Y. City Exec. Order No. 41 § 2(e) (Sept. 17, 2003), *available at* http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf.

will subject people to questions about immigration status. Advocates are negotiating with the City and the Police Department to interpret the exceptions as narrowly as possible.

Model Confidentiality Provisions

Many of the state and local ordinances discussed above do not provide specific guidelines such as those suggested by the Department of Health and Human Services and the Department of Agriculture.[235] Advocates should work to ensure passage of detailed state and local confidentiality laws covering both social service agencies and law enforcement. The following are provisions that should be included in state and local laws:

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

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

a. Where immigration status information is a condition of receipt of the service or benefit, the agency, officer, or employee shall make only those inquiries necessary to determine whether an applicant or recipient is an immigrant qualified for such service or benefit. Because not all undocumented immigrants are eligible for services and benefits, it is not necessary to ask whether a person is lawfully present in this country, but only whether he or she has the requisite status for benefits or services.

b. This section shall apply to any application, questionnaire, interview sheet, or other form used in relation to benefits or services provided by the City."[236]

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

"No agency, officer, or employee shall record information regarding the immigration status of an applicant for or recipient of any service or benefit unless required by federal or state law. Where federal or state law requires the recording of immigration status information, only that information specifically required shall be recorded."[237]

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

No city personnel "shall request information about or disseminate information regarding the immigration status of any individual except as

235. *See supra* notes 142–58 and accompanying text.

236. *Model City Policy*, *supra* note 89.

237. *Id.*

required by federal or state statute or regulation."[238]

Comprehensive model language should also include a clear prohibition on the use of state and local resources for immigration enforcement.

IV.
ENSURING ACCESS TO WORKERS' COMPENSATION BENEFITS

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

Workers' compensation programs vary from state to state. The programs are typically financed through payroll taxes. Workers' compensation generally covers an injured worker's medical costs, and provides some portion of wage replacement for periods that a worker is unable to perform his or her job duties. Workers' compensation benefits generally include payment for job retraining, in the form of vocational rehabilitation benefits paid during retraining. Finally, the benefits provide some compensation for work-related disabilities and fatalities.

Entitlement to workers' compensation benefits turns on the definition of "worker" or "employee" under applicable state statutes. Many states' workers' compensation laws include "aliens" in the definition of covered employees.[239] A number of states also explicitly provide for workers' compensation benefits for "lawfully or unlawfully employed" employees. They are: Arizona, California, Colorado, Florida, Montana, North Carolina, South Carolina, Utah, and Virginia.[240] There is only one state, Wyoming, which has a statute

238. *Id.*

239. ARIZ. REV. STAT. § 23-901(5)(b) (West Supp. 2003); CAL. LAB. CODE § 3351(a) (2003); FLA. STAT. ANN. ch. 440.02(15)(a) (West Supp. 2004); 820 ILL. COMP. STAT. ANN. 305/1-b (West 1993); KY. REV. STAT. ANN. § 342.0011(21) (Michie 1997); MICH. COMP. LAWS § 418.161(l) (2001); MINN. STAT. ANN. § 176.011 subd. 9(1) (West 1993); MISS. CODE ANN. § 71-3-27 (1999); MONT. CODE ANN. § 39-71-118(1)(a) (2003); NEB. REV. STAT. §§ 48-115(2), 48-144 (1998); NEV. REV. STAT. § 616A.105 (2003); N.M. STAT. ANN. § 52-3-3 (Michie 2003); N.C. GEN. STAT. 97-2(2) (Supp. 2003); N.D. CENT. CODE § 65-01-02(16)(a)(2) (2000); OHIO REV. CODE ANN. 4123.01(A)(1)(b) (West 2001); S.C. CODE ANN. § 42-1-130 (Law. Co-op. Supp. 2003); TEX. LAB. CODE § 406.092(a) (1996); UTAH CODE ANN. § 34A-2-104(1)(b) (2001); VA. CODE ANN. 65.2-101 (Michie 2001).

240. ARIZ. REV. STAT. ANN. § 23-901(6)(b) (West Supp. 2003); CAL. LAB. CODE § 3351(a) (Deering, LEXIS through 2003–04 Reg., 1st Extra. And 2nd Extra. Sess.); COLO. REV. STAT. ANN.

specifically limiting coverage to documented aliens.[241]

Workers' compensation laws in most states have special provisions for nonresident alien dependents.[242] Some state statutes include nonresident alien dependents on equal terms with other dependents, some completely exclude them from benefits, some provide for reduced benefits or for commutation of benefits to a lump sum on a reduced basis, and many restrict the classes of beneficiaries.[243] A number of these laws have been repealed, in some cases because they have been found unconstitutional. For example, a Kansas court held that a statute that limited workers' compensation for nonresident alien dependents' death benefits to $750 when all other dependents, including resident alien dependents, were entitled to compensation benefits of up to $200,000, was unconstitutional.[244] The Florida Supreme Court found that a similar limit on compensation for alien dependents who were not residents of the United States or Canada violated the state and U.S. Constitutions.[245]

A. The Effect of Hoffman *on Availability of Remedies*

Prior to *Hoffman*, state courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas held that undocumented workers were covered under state workers' compensation laws.[246] However, some courts had already begun to restrict

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§ 8-40-202(VI)(b) (LEXIS through 2003 Supp.); FLA. STAT. ch. 440.02(15)(a) (Matthew Bender, LEXIS through 2003 legislation); MONT. CODE ANN. § 39-71-118(1)(a) (LEXIS through 2003 Sess.); N.C. GEN. STAT. § 97-2(2) (Matthew Bender, LEXIS through 2003 Reg. Sess.); S.C. CODE ANN. § 42-1-130 (LEXIS through 2003 Sess.); UTAH CODE ANN. § 34A-2-104(1)(b)(ii) (Matthew Bender, LEXIS through 2003 2nd Spec. Sess.); VA. CODE ANN. § 65.2-101 (Matthew Bender, LEXIS through 2003 Sess.).

241. WYO. STAT. § 27-14-102(a)(vii) (WESTLAW through 2002 Reg. Sess.).

242. Tracy A. Bateman, *Validity, Construction, and Application of Workers' Compensation Provisions Relating to Nonresident Alien Dependents*, 28 A.L.R. 5th 547 (1995).

243. *Id.*; *see also, e.g.*, 820 ILL. COMP. STAT. 305/7(i) (WESTLAW through 2003 Reg. Sess.) (limiting the categories of dependents who can receive compensation and providing that when the dependents of a deceased employee do not reside in the United States, Canada, or Mexico, the amount of compensation is reduced to fifty percent of the usual amount unless otherwise mandated by treaty).

244. Jurado v. Popejoy Constr. Co., 853 P.2d 669 (Kan. 1993).

245. De Ayala v. Fla. Farm Bureau Cas. Ins. Co., 543 So.2d 204 (Fla. 1989).

246. *See* Champion Auto Body v. Indus. Claim Appeals Office, 950 P.2d 671 (Colo. Ct. App. 1997); Dowling v. Slotnik, 712 A.2d 396, 405 (Conn. 1998); Gene's Harvesting v. Rodriguez, 421 So.2d 701, 701 (Fla. Dist. Ct. App. 1982); Dynasty Sample Co. v. Beltran, 479 S.E.2d 773 (Ga. 1996); Arriaga v. M.A. Patout & Son, 671 So.2d 1138, 1139 (La. Ct. App. 1996); Gayton v. Gage

undocumented workers' access to workers' compensation. The Nevada Supreme Court found that undocumented workers are not entitled to vocational rehabilitation benefits.[247] State law established a hierarchy of benefits to be offered to an injured worker, which mandates that insurers must first attempt to return the employee to the prior job, then attempt to return the employee to the prior job with modifications to accommodate the injury or limitations of the worker, and finally to provide training or education to assist the employee in entering another vocation.[248] The court emphasized that the IRCA[249] limited the remedies available to undocumented workers, arguing that "because of the federal government's plenary power in the area of alienage, any legislation created by Congress—such as the IRCA—preempts Nevada's workers' compensation laws as those laws have an effect on aliens in this state."[250] The court pointed out that returning the employee to the prior job would require circumvention of the IRCA provision banning employers from hiring employees that they know are undocumented.[251] Since the IRCA would not bar a documented immigrant worker from returning to the former job, the court reasoned that providing training and education to assist undocumented workers in entering a new vocation would place them in a privileged position relative to documented workers.[252] Additionally, providing vocational rehabilitation benefits without attempting to return undocumented workers to their previous occupations would provide undocumented workers with automatic access to the most expensive rehabilitation option.[253]

Since *Hoffman*, two state courts have found that immigration status can affect the availability of recovery to an injured worker. In neither of these cases did the court engage in a meaningful discussion of the prime cause of the workers' inability to work: the injury, rather than the use of false documents to obtain a job in the first place. In a Pennsylvania case, a worker was rendered unconscious after he was struck with a steel beam in the head, neck and back.[254] He sustained serious injuries to his back and neck, and was ill for many months before being terminated by his employer.[255] Apparently after the injury, the

laws apply to aliens but do not "expressly authorize vocational rehabilitation benefits for an 'illegal worker'" who is unable to return to his position due to his immigration status rather than his medical condition); *cf.* Iowa Erosion Control v. Sanchez, 599 N.W.2d 711, 715 (Iowa 1999) ("The employer has furnished no authority to support its view that, on grounds of policy or morality, [decedent worker's surviving mother's] immigration status has any bearing on her entitlement to benefits.").

247. Tarango v. State Ind. Ins. Sys., 25 P.3d 175 (Nev. 2001).

248. *Id.* at 179–80.

249. *See supra* note 28 and accompanying text.

250. *Tarango,* 25 P.3d at 179.

251. *Id.* at 178.

252. *Id.* at 181.

253. *Id.*

254. Reinforced Earth Co. v. Workers' Comp. Appeals Bd., 810 A.2d 99, 101 (Pa. 2002).

255. *Id.* at 101.

employer verified with the INS that the employee was unlawfully in the United States. The Pennsylvania Supreme Court held that undocumented workers are not ineligible for workers' compensation,[256] but that immigration status would modify the test an employer would have to satisfy when seeking to suspend an undocumented worker's total disability benefits.[257] Because Pennsylvania law equates disability with the loss of earning power attributable to the work-related injury, Pennsylvania courts have developed a test for employers seeking to discontinue benefits that incorporates both medical and economic elements of disability. The test requires the employer to produce evidence of a referral to an open job in the occupational category for which the claimant has been given medical clearance.[258] The court held that the employer should be excused from the requirement to show job availability, because "Claimant's loss of earning power is caused by his immigration status, not his work-related injury" and therefore "there would be no point in requiring [the employer] to show . . . that jobs were referred to or are available to Claimant."[259]

In a second case, *Sanchez v. Eagle Alloy, Inc.*, the Michigan Court of Appeals held that wage loss compensation could be suspended for an undocumented worker from the date that the employer "discovered" that the worker did not have authorization to be employed, under a specific state law that allows suspension of wage loss benefits if a worker commits a "crime" that prevents him or her from working or obtaining work.[260]

In contrast, despite the *Hoffman* ruling, other courts have continued to extend benefits to undocumented workers. The Arizona Court of Appeals held that an undocumented worker could receive compensation after suffering a work-related injury, reasoning that disqualifying undocumented workers from workers' compensation benefits would create an incentive for businesses to hire undocumented individuals, "knowing that [they] would not be responsible for their injuries."[261] In Minnesota, a worker injured his back lifting heavy boxes in

256. *Id.* at 105–06.

257. *Id.* at 107–09.

258. *Id.* at 107.

259. *Id.* at 108.

260. 658 N.W.2d 510 (Mich. Ct. App. 2003). On November 5, 2003, Representative Steve Tobocman introduced legislation to remedy the effect of the *Eagle Alloy* decision. The proposed legislation would amend the existing workers' compensation statute to provide that: "As used in this subsection, 'commission of a crime' does not include an alien's working without employment authorization or an alien's use of false documents to obtain employment or to seek work." H.B. 5256, 92nd Leg., 1st Reg. Sess. (Mich. 2003) (emphasis altered from original). If enacted, this legislation would prevent a court from coming to the conclusion that an undocumented worker is ineligible for wage replacement benefits under workers' compensation simply because of his or her immigration status. This is a unique type of fix, specific to the Michigan's provision limiting availability of wage replacement benefits for people who are unable to work because of "commission of a crime."

261. Tiger Transmissions v. Ind. Comm'n of Ariz., No. 1 CA-IC 02-0100 (Ariz. Ct. App. May 29, 2003).

his work, and needed surgery and therapy as a result.[262] The employer argued that he was not entitled to wage loss benefits because of his undocumented status. The Minnesota Supreme Court disagreed, holding that the IRCA was not intended to preclude the authority of states to award workers' compensation benefits to undocumented workers: "The IRCA is not aimed at impairing existing state labor protections."[263]

B. State and Local Responses: Ensuring Access to Workers' Compensation

Highlighted Campaigns: New York and Washington

In October 2001, injured and concerned workers leading the National Mobilization Against Sweatshops' "It's About TIME!" Campaign for Workers' Health and Safety exposed to the world New York State's violations of workers' human rights by filing a complaint based on the labor rights agreement of NAFTA.[264] A delegation went to Mexico City to initiate the NAFTA complaint against the United States and the New York State Workers' Compensation Board.

The NAFTA complaint charges that the New York State Workers' Compensation Board violates workers' rights by allowing endless delays to injured workers' cases, forcing injured workers into poverty and deteriorating health, and permitting insurance companies to profit from millions of dollars of unpaid benefits.[265] Additionally, the complaint accuses New York State of failing to protect the health and safety of all working people. Under NAALC, the labor side agreement to NAFTA, the Mexican government must review the complaint and make recommendations for its resolution.

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

Legislative Reform

Advocates may find that local businesses can be allies in pushing for

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262. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003).

263. *Correa*, 664 N.W.2d at 329.

264. Bureau of Int'l Labor Affairs, U.S. DOL, *Petition on Labor Law Matters Arising in the United States Submitted to the National Administrative Office (NAO) of Mexico under the North American Agreement on Labor Cooperation (NAALC)*, http://www.dol.gov/ilab/media/reports/nao/mxsub2001-1.htm (Oct. 24, 2001).

265. *Id.*

legislative reform, as demonstrated by the history of workers' compensation legislation in Virginia. After the Supreme Court of Virginia held in 1999 that an undocumented immigrant was not entitled to workers' compensation benefits,[266] employers quickly realized that workers who could not recover under workers' compensation would turn instead to tort suits against their employers. Finding the prospect of funding workers' compensation premiums much more appealing than the idea of paying out tort damages, employers called on the legislature to extend coverage to undocumented immigrants. The legislature passed a law extending workers' compensation to cover "[e]very person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed . . . ."[267] Though the governor vetoed the inclusive legislation, the bill had enough support in the legislature to override the veto. Virginia has thus become a the model state in its coverage of immigrant workers under its workers' compensation system.

Reform may also come in the form of state agency action. For example, the Director of the Washington State Department of Labor and Industries issued a statement asserting that undocumented immigrants continue to be entitled to both time loss and wage replacement after the *Hoffman* decision:

> The 1972 law that revamped Washington's workers' compensation system is explicit: All workers must have coverage. Both employers and workers contribute to the insurance fund. The Department of Labor and Industries is responsible for . . . providing workers with medical care and wage replacement when an injury or an occupational disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.[268]

Model State Policies

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

1) The [Agency Name] is responsible for providing workers with medical care and wage replacement when an injury or an occupational disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.[269]
2) The [Agency Name] will provide medical expenses, wage replacement and all other benefits and remedies authorized under state law to all

266. Granados v. Windson Dev. Corp., 509 S.E.2d 290 (Va. 1999).

267. VA. CODE ANN. § 65.2-101 (West, WESTLAW 2003).

268. Statement by Gary Moore, Director of the State of Washington Department of Labor and Industries (May 21, 2002), *available at* http://www.nelp.org/iwp/reform/state/appendixwadol.cfm.

269. This model provision is based on Statement by Gary Moore, *supra* note 268.

workers regardless of immigration status unless explicitly prohibited by federal law.

3) The [Agency Name] will not ask injured workers or their witnesses for their social security number (SSN) or other information that might lead to disclosing an individual's immigration status, and will not ask injured workers or their witnesses about their immigration status and will not maintain information regarding immigration status in their files.
4) Worker's immigration status is not relevant to determining eligibility for medical expenses or wage replacement.[270]
5) During the course of court proceedings, the [Agency Name] will oppose efforts of any party to discover an injured worker's or witnesses' immigration status by seeking a protective order or other similar relief.
6) In the rare occasion that [Agency Name] must know the injured worker's or witnesses' immigration status, it will keep that status confidential, and will have a policy of nondisclosure to third parties (including to other state or federal agencies), unless otherwise required by federal law.
7) If a party raises the issue of an injured worker's or witnesses' immigration status in the course of proceedings, the party must show that the evidence is more probative than prejudicial, and that it obtained such evidence in compliance to 8 C.F.R. § 274a.2(b)(1)(vii).
8) [Agency Name] will train its staff (including intake officers, investigators, attorneys, and other relevant staff) on this policy and will work closely with community-based organizations to conduct this training.
9) [Agency Name] will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.[271]

V.
ENSURING ACCESS TO DRIVER'S LICENSES

There are an estimated 9.3 million undocumented immigrants in the United States, [272] most of whom have to drive, whether or not they can get a driver's license. Like everyone else, immigrant workers must get to work, bring their children to school, shop, and go to the doctor. They may work at night or early in the morning, when public transportation is unavailable, or in areas that are poorly served by public transit. Or they may work in occupational sectors, such as construction or agriculture, where driving is an essential part of the job. Like their U.S. citizen counterparts, they use their driver's licenses to cash their paychecks when the day is done.

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270. However, immigration status may be relevant to an employer's obligation to provide vocational rehabilitation. *See* Tarango v. State Indus. Ins. Sys., 25 P.3d 175 (Nev. 2001).

271. *Model City Policy*, *supra* note 89.

272. PASSEL, *supra* note 3.

Prior to September 11, 2001, many states were considering legislation to make driver's licenses more accessible to their residents. At least fifteen states were considering changes to their driver's license laws to remove lawful presence requirements or allow applicants who lacked SSNs to use other identity documents to get a driver's license.[273] Many states accepted the Individual Taxpayer Identification Number ("ITIN") as proof of identification or had legislation allowing individuals without SSNs to obtain driver's licenses.[274] Unfortunately, September 11, 2001 triggered a reversal of efforts to broaden access to driver's licenses. Following early reports of the tragedy claiming that several of the terrorists had U.S. state-issued driver's licenses that allowed them to rent cars, board airplanes, and blend into society more easily, there has been mounting pressure on state driver's licensing agencies to institute stringent documentation requirements and to institute costly verification procedures with the SSA and ICE. Erroneous ideas about the utility of driver's licenses in terrorist attacks have spawned an avalanche of regressive driver's licensing proposals.

These responses are misguided. There is no evidence that restricting access to driver's licenses will reduce the risk of terrorist attacks, or that the identification documents that immigrants may wish to use in place of SSN documents when obtaining licenses—primarily the IRS-issued ITIN or Mexican Matricula Consular—are any more easily forged or obtained on false pretexts than a SSN.[275] The reliability of these forms of identification is demonstrated by

273. Nat'l Immigration Law Ctr., *Immigrant Driver's License Proposals and Campaigns: Surprising Progress Since 9/11*, http://www.nilc.org/immspbs/DLs/DL002.htm (May 14, 2002).

274. *See, e.g.*, UTAH CODE ANN. § 53-3-205 (2003); N.C. GEN. STAT. § 20-7(b1) (2000); *see also A Report by the Commissioner of the Department of Motor Vehicles to the Chairman of the Transportation Committee of the Virginia Senate, and the Chairman of the Transportation Committee of the Virginia House of Delegates*, 4–5 (Va. 2002); Coalition for a Safer Tennessee, *What is Public Chapter 158?*, http://www.tndriverslicense.org/background.htm (last visited Apr. 14, 2004).

275. Apart from the requirement that U.S. citizenship or lawful immigrant status must be demonstrated in order to obtain a Social Security card, the documentation required to obtain a Social Security card, and an ITIN are remarkably similar. In order to obtain a SSN, a person must show the SSA two forms of identification that show age and identity, such as: a birth certificate, hospital record of birth, religious records showing age made before the individual was three months old, a passport, or adoption records, to show age; and photo identification including driver's license, employee identification card, passport, marriage or divorce records, military records, adoption records (if not used to establish age), a health insurance card, a life insurance policy, or school identification card to prove identity. Citizenship or immigration status must also be proven. SSA, APPLICATION FOR A SOCIAL SECURITY CARD (Oct. 2003), *available at* http://www.ssa.gov/online/ss-5.pdf. In order to obtain an ITIN, a person must show the Internal Revenue Service an original valid passport or a notarized copy of a passport, or at least two of the following documents that when combined prove both identity and foreign status: national identification card showing photo, name, current address, date of birth, and expiration date; civil birth certificate; medical records (dependents only); school records (dependents and/or students only); foreign voter's registration card; foreign driver's license; foreign military identification card; U.S. military identification card; U.S. driver's license; USCIS photo identification; U.S. state identification card; or visa. Nearly half of these documents are issued by American governmental

the fact that they are accepted by over eight hundred police departments and at least sixty-six major banking institutions.[276] The U.S. Department of Treasury recently adopted regulations pursuant to the USA PATRIOT Act that allow banks to continue to use identification such as the ITIN and the Matricula Consular to identify bank customers.[277] Additionally, it is not necessary to possess a U.S. driver's license to board an airplane. Furthermore, sophisticated terrorists with substantial financial resources are likely to have the ability to obtain driver's licenses and other documents when they find them necessary.

The real effect of restrictive policies is to disadvantage both immigrants, documented and undocumented, and U.S. citizens. Many immigrants in the legalization process do not yet have documentation from ICE. License restrictions have started to give rise to harassment and even arrest of immigrant drivers when state agency workers mistakenly believe they have presented forged documents.[278]

All applicants for driver's licenses are disadvantaged by verification requirements because they introduce delays in the licensing process. The Director of the California Department of Motor Vehicles has complained that the system for verifying SSNs is so antiquated that it cannot check for maiden names, nicknames, or simple misspellings when looking up SSNs, causing up to 800,000 people per year to be told that their names do not match the SSN they provided.[279] The UCSIS database has also been criticized for being slow, inaccurate, and out of date. A pilot project in Virginia found that in about eleven percent of cases, Department of Motor Vehicle personnel could not determine

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agencies. INTERNAL REVENUE SERV., APPLICATION FOR AN IRS INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (Dec. 17, 2003), *available at* http://www.irs.gov/pub/irs-pdf/fw7.pdf. To obtain the Mexican Matricula Consular, an individual must prove citizenship by showing a certified birth certificate, a military service card, a Mexican passport, a previously issued Matricula ID, a certificate of Mexican nationality, or a letter of naturalization; and must prove identity by showing a current driver's license, a state ID card, a resident alien card, voter registration, or a school certificate issued by the Department of Education. Consulate of Mexico at Seattle, *Consular Identification*, *at* http://www.sre.gob.mx/seattle/ing_ser_matriculas.htm (last visited Apr. 14, 2004).

276. Secretaria de Relaciones Extranjeros, *La SRE Ha Emitido 740 Mil Matriculas Consulares a Mexicanos en el Extranjero, at* http://www.sre.gob.mx/comunicados/comunicados/2002/octu/b-220.htm (Oct. 13, 2002).

277. Customer Identification Programs for Financial Institutions, 68 Fed. Reg. 55,335 (Sept. 25, 2003) (to be codified at 31 C.F.R. pt. 103), *available at* http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-24226.pdf; *see also* Customer Identification Programs for Banks, Savings Associations, and Credit Unions, 67 Fed. Reg. 48,290 (Jul. 23, 2002) (setting out the proposed regulation that was adopted, without changes, as the final version).

278. Bob Braun, *Treated Like a Criminal, and No One's Sorry,* STAR LEDGER (Newark), Aug. 14, 2002, at 15; Lourdes Medrano Leslie, *Action Against State Office: Latino to File Complaint Over Driver's License,* STAR TRIB. (Minneapolis), Aug. 12, 2002, at B1; Yilu Zhao, *A Nervous State Looks to Limit Licenses,* N.Y. TIMES, Apr. 6, 2003, at 14CN.

279. Sharon Bernstein, *Tried to Renew Your Driver's License Lately?,* L.A. TIMES, Aug. 19, 2003, *available at* 2003 WL 2428434.

immigration status, and that in some cases, verification took several days to several weeks to complete.[280]

Additionally, taxpayers must cover the costs of verifying legal status and updating licenses to match visas, which can be quite high. According to the California Department of Motor Vehicles, the Department spends approximately $3.4 million each year to conduct immigrant verification checks.[281] The Commonwealth of Virginia estimated that it would cost over $5.5 million annually to verify applicants' immigration status, and that training costs alone would be $200,000.[282] A state budget estimate for a restrictive driver's license bill in Washington State concluded that it would cost nearly one million dollars over the next five years to make immigrants' driver's licenses expire with their visas, with $200,000 budgeted just for reprogramming computers to handle licenses with variable renewal dates.[283] The state of Texas calculated that the two-year net impact of reprogramming computers and of producing new driver's license cards would be nearly $350,000.[284] North Carolina calculated that the state would spend $94,000 per year to renew immigrant driver's licenses more frequently.[285]

State citizens also suffer the loss of revenue brought in by license fees when large numbers of people are denied licenses. States use license fees to supplement state general funds, and to help pay for emergency medical services, driver training and motorcycle safety programs, and construction and maintenance of public roads.[286] North Carolina estimated that lost license fees would reduce revenues to the state by as much as $475,000 annually if restrictive measures were adopted.[287] Tennessee estimated a loss in revenue of over $150,000 per year if individuals without SSNs were required to obtain documentation from ICE in order to qualify for a driver's license.[288]

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280. COMMONWEATLH OF VA. DEP'T OF MOTOR VEHICLES, REPORT TO THE CHAIRMAN OF THE TRANSPORTATION COMMITTEE OF THE VA. SENATE, ET AL 33 (2002) [hereinafter VA. TRANSPORTATION REPORT].

281. Senate Floor Analysis of S.B. 60, 2003–04 Sess. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/bill/sen/sb_0051-0100/sb_60_cfa_20030903_094028_sen_floor.html (Sep. 3, 2003).

282. VA. TRANSPORTATION REPORT, *supra* note 280, at 38.

283. WASH. DEP'T OF LICENSING, 5081 S.B., INDIVIDUAL STATE AGENCY FISCAL NOTE (2003) (on file with authors).

284. LEGISLATIVE BUDGET BD., 78TH LEG., REG. SESS., FISCAL NOTE 1 (Tex. 2003) (on file with authors).

285. GEN. ASSEMB., 2003–04 SESS., LEGISLATIVE FISCAL NOTE 1 (N.C. 2003) [hereinafter FISCAL NOTE], *available at* http://www.ncleg.net/html2003/bills/FiscalInfo/Senate/SFN0263.pdf.

286. NAT'L CONFERENCE OF STATE LEGISLATURES, PROVISIONS GOVERNING THE DISPOSITION OF STATE MOTOR-VEHICLE AND MOTOR-CARRIER RECEIPTS (Jan. 1, 2001), *available at* http://www.fhwa.dot.gov/ohim/hwytaxes/2001/pdf/pt12.pdf.

287. See FISCAL NOTE, *supra* note 285.

288. FISCAL NOTE, SB 1188 - HB 1790, TENNESSEE LEGISLATURE (Mar. 24, 2003), *available at* http://www.legislature.state.tn.us/bills/currentga/Fiscal/SB1188.pdf.

Conversely, states that are expanding access expect to reap substantial revenues as a result.

A. Federal Law Regarding Driver's Licenses

On the federal level, the emphasis has been on restricting access to licenses. U.S. Senator Richard J. Durbin, Democrat of Illinois, introduced the Driver's License Fraud Prevention Act of 2002 to set national standards for state-issued driver's licenses.[289] His measure would authorize the Secretary of Transportation to promulgate regulations setting minimum standards for identification requirements in licensing. The Secretary is given the option of authorizing states to exchange information with the federal government in order to verify the authenticity of identification documents used by applicants.[290] The bill would also require the Secretary of Transportation to conduct a study of the potential use of biometric identifiers[291] for unique identification of individuals.[292] The goal is that such standardization would facilitate sharing of driver's license information and driving-related conviction records between the states.[293] The bill has not yet been reintroduced this session of Congress.

U.S. Representative Jeff Flake, Republican of Arizona, introduced a bill, the Visa and License Integrity Act of 2003, that would bar federal agencies from accepting state-issued driver's licenses for identification purposes if the licensing state has not enacted regulations requiring identification issued to individuals with nonimmigrant visas to expire at the end of the individual's authorized period of stay in the United States (or after five years if the expiration date of the visa is indefinite or is modified).[294] While the bill is not an absolute mandate to the states, it offers strong incentives to comply because if the bill passes, it will punish all residents of noncompliant states who will be unable to use their licenses as proof of identity.

An additional restrictive proposal, the Drivers' License Integrity Act of 2003, was put forth by U.S. Representative Eric Cantor, Republican of Virginia. The Cantor bill would provide that driver's licenses cannot be issued to nonimmigrant aliens if they do not provide a valid nonimmigrant visa, and provides that licenses must expire when the visa expires.[295]

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289. S. 3107, 107th Cong. (2002), *available at* http://www.aamva.org/Documents/legS3107DLFraudAsIntroduced.pdf.

290. *Id.* § 102 (amending 49 U.S.C. ch. 303 of the U.S.C. to add a new § 30306, "Minimum identification requirements").

291. "Biometric identifiers" include fingerprints, structure of the iris or retina, and facial patterns. Elec. Privacy Info. Ctr., *Biometric Identifiers*, *at* http://www.epic.org/privacy/biometrics/ (last updated Feb. 5, 2003).

292. S. 3107 § 202.

293. *Id.* § 102 (amending 49 U.S.C. ch. 303 to add § 30310(b), "Interstate agreements: Purpose").

294. H.R. 655, 108th Cong. (2003).

295. H.R. 1121, 108th Cong. (2003).

B. State and Local Responses: Legislation Affecting Access to Driver's Licenses

Since none of the federal bills discussed above have been signed into law, states are still free to establish their own procedures for verifying identity in order to issue driver's licenses.[296] The state response following September 11 has been somewhat similar to the federal response: many state legislatures rushed to draft restrictive legislation, buying into the assumption that restricting access to driver's licenses would increase national safety. The story is a complex one, however: surprisingly few of the restrictive bills have actually been signed into law, and some laws expanding access have been passed. Both restrictive laws and laws increasing access, and the advocacy surrounding their implementation, are discussed in this section.

Highlighted Campaign: California

The history of state legislation governing licensing in California provides an illustrative example of the difficulties advocates face in preserving immigrant workers' access to driver's licenses. Before reform efforts began, California was a state with one of the most restrictive driver's licensing laws. In 2002, the state legislature passed a bill expanding immigrants' access to driver's licenses. The bill, AB 60, would have allowed persons who have applications for lawful immigration status pending to get a driver's license, and allowed use of an ITIN as an identifier for driver's licenses.[297] Immigrants' rights groups waged a hard-fought campaign supporting the bill. Latino activists and other community leaders pressured the governor for his signature by engaging in letter-writing campaigns, days-long vigils, and demonstrations in Southern California and Sacramento.[298] Unfortunately, Governor Gray Davis vetoed the bill, citing security concerns:

> [T]he tragedy of September 11 made it abundantly clear that the driver's license is more than just a license to drive; it is one of the primary documents we use to identify ourselves . . . . Unfortunately, a

296. States also do not have to fear losing federal child support funding if they eliminate SSN requirements. Although the Social Security Act requires states to record the SSN of every applicant for a driver's license, 42 U.S.C. § 666(a)(13) (2000), the Department of Health and Human Services ("DHHS") has interpreted this requirement to apply only to individuals who actually possess a SSN. Office of Child Support Enforcement, DHHS, *Inclusion of Social Security Numbers on License Applications and Other Documents, PIQ-99-05*, http://www.acf.hhs.gov/programs/cse/pol/PIQ/piq-9905.htm (July 14, 1999). David Gray Ross, Commissioner of the Office of Child Support Enforcement, has stated that the law "does not require that an individual have a SSN as a condition of receiving a license." *Id.* Therefore, states need not require all individuals to have a SSN in order to get a license.

297. Minerva Canto & Hanh Kim Quach, *Migrant Driver's Licenses Urged*, ORANGE COUNTY REG. (Cal.), Aug. 10, 2002, *available at* 2002 WL 5456851.

298. *Id.*

driver's license was in the hands of terrorists who attacked America on that fateful day.[299]

Assemblyman Gil Cedillo, the author of the vetoed bill, had refused to include a provision in the bill that would have required immigrants' licenses to identify the license holder as an illegal immigrant.[300]

Assemblyman Cedillo reintroduced the bill in the 2003 legislative session and it was signed in the waning days of the Davis administration as SB 60.[301] Although the bill was nearly identical to expansive bills passed in other states in recent years, it created an immediate firestorm of protest from anti-immigration activists.[302] Following negative public response to the law, Assemblyman Cedillo went before the Legislature and led the drive to repeal the law and replace it with a compromise version that would include more security measures.[303] In early December 2003, Governor Arnold Schwarzenegger signed the repeal of the bill.[304]

New Restrictive Laws

By July 2002, forty-six bills had been introduced in various states in the 2001–02 legislative session that would have restricted immigrants' access to driver's licenses.[305] As of November 2002, nine states—Colorado, Florida, Indiana, Kentucky, Louisiana, Minnesota, New Jersey, Ohio, and Virginia—had enacted restrictive laws.[306] In the 2002–03 legislative session, sixty-five restrictive bills were introduced.[307] By the end of 2003, three additional states—

299. John Fund, *Cruz Control: Is Schwarzenegger Anti-Immigrant? Is Bustamante?*, OPINION J. (Sept. 3, 2003) (quoting Governor Davis), *at* http://www.opinionjournal.com/diary/?id=110003960; *see also* Nancy Vogel & Dan Morain, *No Licenses for Illegal Immigrants: Davis Vetoes Measure Despite Vows of Support, Citing National Security, as He Faces Deadline for Legislation in His First Term*, L.A. TIMES, Oct. 1, 2002, at 1.

300. Canto & Hanh Kim Quach, *supra* note 297.

301. Cal. Immigrant Welfare Collaborative, *In the Last Days of His Administration, Governor Davis Signs Key Bills Affecting Immigrants in California*, 7 CAL. UPDATE 5, ¶ 1 (Oct. 21, 2003), *available at* http://www.nilc.org/ciwc/nwsltr/CAUPD5-03.pdf.

302. Jeff Denham, Cal. State Sen., *Driver License Law Repealed*, *at* http://republican.sen.ca.gov/opeds/12/oped2028.asp (Dec. 11, 2003).

303. *Id.*

304. *Id.*

305. Nat'l Immigration Law Ctr., *Most State Proposals to Restrict Drivers' Licenses for Immigrants Have Been Unsuccessful* (July 15, 2002) [hereinafter *State Proposals Unsuccessful*], *available at* http://www.nilc.org/immspbs/DLs/DL003.htm.

306. *Id.* (stating that restrictive laws were passed in Colorado, Florida, Kentucky, New Jersey, Ohio, and Virginia); Nat'l Immigration Law Ctr., *Driver's Licenses For Immigrants: Broad Diversity Characterizes States' Requirements*, 16 IMMIGRANT'S RIGHTS UPDATE (Nov. 22, 2002) [hereinafter *Broad Diversity*] (stating that restrictive laws were passed in Indiana, Louisiana, and Minnesota), *available at* http://www.nilc.org/immspbs/DLs/DL005.htm.

307. Nat'l Immigration Law Ctr., *Over 117 Driver's License Bills Introduced In State Legislatures; 17 Have Become Law*, 17 IMMIGRANT'S RIGHTS UPDATE (July 15, 2003) [hereinafter *Over 117 Bills Introduced*], *available at* http://www.nilc.org/immspbs/DLs/DL009.htm.

Nevada, Tennessee, and West Virginia—had signed restrictions into law.[308] In addition, Connecticut, Indiana, Iowa, Minnesota, Pennsylvania, and Tennessee enacted restrictive policies by administrative rule, though nearly all of these regulations were later withdrawn.[309]

These restrictive measures have taken a variety of forms. The most common are limits on the types of identification that can be presented as proof of identity, lawful presence requirements, restrictions on the duration of the license so that it will expire with the individual's visa, rules that licenses must be marked to identify the license holder as an immigrant, fingerprinting, and reporting or verification requirements. Examples of each type of restriction follow below.

Several states have passed rules regarding acceptable forms of identification to obtain a driver's license. Legislation passed in New Jersey grants authority to the state Department of Motor Vehicles to refuse to issue a license when reasonable doubt exists as to the authenticity of the documents submitted in the licensing process.[310] Nevada passed legislation eliminating arrival or departure records, alien registration receipt cards, and letters of authorization as acceptable proof of identity for licensing, although the law also adds permanent resident cards and temporary resident cards as acceptable proof of identity.[311] Tennessee law now prohibits use of consular identification cards as proof of identity for a driver's license.[312]

Another restrictive measure is the lawful presence requirement. A lawful presence requirement means that the state requires proof of some sort of valid immigration status. Lawful presence requirements vary from state to state. For example, New York State's Department of Motor Vehicles requires anyone applying for a driver's license to provide either a valid Social Security card, or specified immigration documents and a letter from the Social Security Administration stating that the applicant is not eligible for a Social Security number.[313] Colorado codified a preexisting rule requiring proof of lawful presence for a license.[314] Kentucky now requires people who are not citizens or

308. *Id.*; NAT'L IMMIGRATION LAW CTR., 2003 DRIVER'S LICENSE PROPOSALS (2004) [hereinafter 2003 PROPOSALS] (stating that Tennessee passed a restrictive law), *at* http://www.nilc.org/immspbs/DLs/2003_DL_proposals_12-03.pdf.

309. Nat'l Immigration Law Ctr., *Immigrant Driver's License Restrictions Challenged in Some States*, 16 IMMIGRANT'S RIGHTS UPDATE (Oct. 21, 2002) [hereinafter *License Restrictions Challenged*], *available at* http://www.nilc.org/immspbs/DLs/DL004.htm.

310. NAT'L IMMIGRATION LAW CTR., 2001-2002 STATE DRIVER'S LICENSE PROPOSALS 5 (2002) [hereinafter 2001–02 PROPOSALS], *available at* http://www.nilc.org/immspbs/DLs/2001-02_State_DL_Proposals_10.02.PDF.

311. 2003 PROPOSALS, *supra* note 308, at 7.

312. *Id.* at 10.

313. *See* New York State Department of Motor Vehicles, Proofs of Identity and Date of Birth Required to Apply for a Driver License, a Learner Permit or a Non-driver Photo ID Card, *at* http://www.nydmv.state.ny.us/idlicense.htm (last visited Apr. 26, 2004).

314. 2001–02 PROPOSALS, *supra* note 310, at 1.

lawful permanent residents to go to an office of the Transportation Cabinet and demonstrate proof of lawful presence.[315] Indiana, Louisiana, Minnesota, and Ohio also recently imposed lawful presence requirements.[316] A similar type of restriction is the residency requirement. Virginia's new law uses residency requirements to deny immigrants access to licenses: the law provides that only Virginia residents may be issued driver's licenses, and that an immigrant visa does not establish state residency.[317]

Other states have placed time limits on licenses such that they expire contemporaneously with visas. Kentucky passed legislation mandating that a driver's license must expire with the individual's visa or in four years, whichever comes first.[318] New Jersey, Nevada, Virginia, and West Virginia now require driver's licenses to expire with visas.[319]

Some states mark driver's licenses to show immigration status. In Iowa, the Department of Transportation issued a policy requiring that noncitizens' licenses be stamped with the legend, "Nonrenewable–Documentation Required."[320] The policy was withdrawn in September 2002 after pressure from advocates and threat of litigation.[321] As of January 2004, however, Minnesota, Mississippi, and Ohio had policies of placing distinguishing features on noncitizens' driver's licenses.[322]

States have also adopted reporting and verification requirements. Colorado's new legislation provides that an individual who presents identification documents that are not secure and verifiable will be reported to the border and transportation security directorate of the Department of Homeland Security.[323] New Jersey law grants a newly created Motor Vehicle Commission authority to confer with federal immigration officials to verify the identity of license applicants and their eligibility for licenses.[324]

Many of the new restrictive measures face legal, fiscal, practical, and political obstacles. Connecticut's Attorney General issued an opinion that a regulation eliminating employment authorization documents as a form of identification would violate the U.S. and Connecticut Constitutions; the regulation was subsequently withdrawn.[325] A proposal in Indiana to require

315. *Id.* at 3.

316. *Broad Diversity*, *supra* note 306.

317. 2001–02 PROPOSALS, *supra* note 310, at 8.

318. *Id.* at 3. Certain categories of immigrants, such as asylees, are exempt from this restriction. *Id.*

319. *Id.* at 5 (summarizing New Jersey law); 2003 PROPOSALS, *supra* note 308, at 7, 11.

320. *License Restrictions Challenged*, *supra* note 309.

321. *See id.*

322. NAT'L IMMIGRATION LAW CTR., OVERVIEW OF DRIVERS' LICENSE REQUIREMENTS 2 (2004) [hereinafter OVERVIEW OF LICENSE REQUIREMENTS], *available at* http://www.nilc.org/immspbs/DLs/OVERVIEW_OF_STATES_1-4-04.pdf.

323. 2003 PROPOSALS, *supra* note 308, at 2.

324. *Id.* at 8.

325. *License Restrictions Challenged*, *supra* note 309.

proof of lawful residence and four documents to establish identity was challenged in court.[326] In Minnesota, after a legislative proposal failed, the Commissioner of Public Safety attempted to pass restrictive policies through emergency rulemaking procedures.[327] The new rules required lawful presence in order for an immigrant to obtain a drivers' license, and required full frontal pictures with the individual's head uncovered, even if that individual opposes photographing on religious grounds.[328] The Minnesota Court of Appeals declared the rules invalid because the Department of Public Safety had failed to justify its departure from normal rule-making procedures.[329]

New Laws Expanding Access to Licenses

As of July 2002, fifteen bills had been introduced in the 2001–02 legislative session that would have expanded immigrants' access to driver's licenses.[330] As of July 2002, two states—New Mexico and South Carolina—had enacted expansive proposals.[331] In the 2002–03 legislative session, thirty-seven expansive bills were introduced,[332] with the result that four additional states—Georgia, Hawaii, Kansas, and Louisiana—passed expansive legislation.[333] These laws have all increased access to licenses primarily by adding to the types of documents that will be accepted as proof of identity in the licensing process.

States have, for example, expanded the range of acceptable identification for obtaining driver's licenses. Georgia legislation now provides that an individual who does not have a SSN may be issued a license if she presents certification from the SSA stating that she is not eligible for a SSN, but only if she also establishes lawful presence.[334] Hawaii similarly extended availability of licenses to individuals who are not eligible for SSNs.[335] Kansas passed legislation to allow individuals to use an ITIN in place of a SSN for licensing.[336] Kentucky passed legislation that restricts access to licenses in a number of ways, but does allow applicants to submit an ITIN, denial letter from the SSA, or notarized affidavit swearing that the person does not have a SSN or refuses to supply it for religious reasons, in place of a SSN.[337] New Mexico passed

326. *Id.*

327. Jewish Cmty. Action v. Comm'r of Pub. Safety, 657 N.W.2d 604, 606–07 (Minn. Ct. App. 2003).

328. *Id.* at 606.

329. *Id.*

330. *State Proposals Unsuccessful*, *supra* note 305. It is not evident from the National Immigration Law Center's report how many of the bills were introduced prior to September 11, 2001, and how many were introduced afterwards.

331. *Id.*

332. *Over 117 Bills Introduced*, *supra* note 307.

333. *Id.*

334. 2003 PROPOSALS, *supra* note 308, at 3.

335. *Id.* at 4.

336. *Id.* at 5.

337. 2001–02 PROPOSALS, *supra* note 310, at 3.

legislation allowing driver's licenses to be issued to individuals without SSNs.[338]

Louisiana passed legislation to set up a special system allowing individuals who are employed in the agricultural industry to obtain a license that is good for one year.[339] Rather than providing a SSN, applicants are only required to provide an ITIN and proof of residency in the state.[340] Kentucky's new law allows noncitizens to drive for up to one year on a license issued by their country of domicile.

Summary: Present Day Requirements

Of course, the recent changes in law tell only half the story; states already varied significantly in their licensing requirements prior to 2001. As a result, some of the states that have recently passed restrictive laws still have other features of their licensing scheme that make licenses relatively accessible to immigrant drivers. For example, Tennessee passed legislation in 2003 prohibiting use of consular identification cards as proof of identification for a driver's license,[341] but it is also among a small number of states with no lawful presence requirement,[342] and requires a SSN for a driver's license only if an individual has actually been assigned a SSN or is eligible for one.[343] West Virginia enacted legislation to require driver's licenses to expire once a person is no longer legally authorized to be in the United States,[344] but is also one of the few states that accept ITINs as an alternative to SSNs.[345]

Advocates should carefully investigate the features of their state's licensing scheme.[346] As of January 4, 2004, only South Dakota and the District of Columbia absolutely required a SSN for a driver's license, with no exceptions.[347] Only Oregon and Vermont did not require a SSN at all for a driver's license.[348] All the other states require a SSN but make exceptions in cases in which individuals are not eligible for SSNs or in other specific circumstances, such as when a person has a religious objection to providing a SSN.[349] Fifteen states accept the ITIN, Matricula Consular, or other foreign identification cards

338. 2003 PROPOSALS, *supra* note 308, at 8.

339. *Id.* at 5.

340. *Id.*

341. *Id.* at 10.

342. OVERVIEW OF LICENSE REQUIREMENTS, *supra* note 322, at 2.

343. *Id.* at 1.

344. 2003 PROPOSALS, *supra* note 308, at 11.

345. OVERVIEW OF LICENSE REQUIREMENTS, *supra* note 322, at 2.

346. The National Immigration Law Center has produced a summary of states' current driver's license requirements. *See* OVERVIEW OF LICENSE REQUIREMENTS, *supra* note 322.

347. *Id.* at 1.

348. *Id.* at 1.

349. *Id.* at 1.

as a form of identification.[350] The majority of states also have lawful presence requirements, either under the law, through agency policy, or as a result of the combination of documents required to obtain a license.[351]

In addition to researching the requirements in their home states, advocates can roughly calculate the raw costs of denying licenses to all immigrants, and to undocumented immigrants. The organization Grantmakers Concerned with Immigrants and Refugees ("GCIR") has an interactive map on its website that gives data from the 2000 Census on immigrants in each state.[352] The USCIS has recently issued a report on estimates of the undocumented population in each state.[353] Most states list the cost of driver's licenses on their websites. Estimates of the number of unlicensed drivers in each state are available from the AAA Foundation for Traffic Safety.[354] A calculation of the adult undocumented population multiplied by the cost of driver's licenses will give a rough idea of income lost to a state from denying licenses to immigrants.

VI.
CONCLUSION AND RECOMMENDATIONS

It is likely that cases will arise around the country as employers learn that hiring an undocumented worker could mean getting a free pass on liability for workers' injuries and for violation of labor and antidiscrimination statutes. Unless state laws clearly protect undocumented immigrant workers, state agencies understand that they must enforce the laws for the benefit of these workers, and those agencies serve immigrant workers in their own languages, those immigrant workers, and especially the undocumented, will continue to suffer the most egregious forms of workplace abuse without recourse.

The five areas for advocacy selected in this report have several things in common. They are each the subject of ongoing advocacy from which other advocates can learn. They each concentrate on changes that can be made at the state, rather than federal, level. And each involves protection of a fundamental workplace right or a right central to a worker's ability to continue at a job. We

350. These states are Idaho, Indiana, Kansas, Kentucky, Michigan (on a case-by-case basis), Nebraska, New Mexico, North Carolina, Oregon, South Dakota, Texas, Utah, Washington, West Virginia, and Wisconsin. *Id.* at 2.

351. *Id.* at 1–2. Only Hawaii, Illinois, Michigan, Montana, New Mexico, North Carolina, Oregon, Tennessee, Utah, Washington, and Wisconsin have no lawful presence requirements. *Id.* at 2.

352. GCIR, *U.S. Immigration Statistics by State, at* http://www.gcir.org/about_immigration/usmap.htm (last visited Apr. 14, 2004).

353. U.S. CITIZENSHIP AND IMMIGR. SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 (2003), *available at* http://uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf.

354. AAA FOUNDATION FOR TRAFFIC SAFETY, UNLICENSED TO KILL, THE SEQUEL 71–80 (2003), *available at* http://www.aaafoundation.org/pdf/UnlicensedToKill2.pdf; *see also* Insurance Research Council, *IRC Study Estimates 14% of Drivers Are Uninsured, available at* http://www.ircweb.org/news/2001-02-01.htm.

urge advocates across the country to learn from each other and use this report as a tool to continue their advocacy.

Post-Hoffman: Looking to States to Enforce Labor Rights.

Using the model language given above, advocates should work with labor agencies to adopt policies protecting the labor rights of all workers, including those who may be undocumented. Advocates should stress to state labor agencies that, in order to protect the most vulnerable workers, they must have a firewall between their agencies and the INS, and they must publicize their policies in immigrant communities. Advocacy organizations should also work with local government to encourage implementation of legislation obligating employers not to discriminate on the basis of national origin or immigration status.

Language Access to State Services and Benefits

Advocates should work to ensure that their state law contains express provisions for language access to vital work-related benefits and services, such as unemployment compensation and the assistance of state labor agencies. They can bring attention to the language needs of their communities, using state level data on languages spoken at home in each state from the 2000 census[355] and substate level data from the Census Bureau.[356] Advocates should also consider pushing for implementation of specialized laws requiring state agencies to communicate information about labor rights in workers' primary languages. They should also review the practices of state agencies that are assigned the task of protecting the labor rights of all workers, to make certain that they are accessible to the limited English proficient. In particular, states should provide in-person access to interpreters in locations with large immigrant populations. Advocates should consider litigation under state statutes that protect language access or, more broadly, guard against national origin discrimination by state agencies.

State and Local Confidentiality Rules for Social Service and Law Enforcement Agencies

Advocates should review the practices of their state and local government entities, including social services and policy agencies, to be certain that they assist immigrants regardless of their immigration status, and that they make no reports regarding status to immigration authorities. It is important to remember that eligibility and reporting requirements for benefits programs vary greatly.

355. GCIR, *supra* note 352.

356. Substate data is at the U.S. Census Bureau website, http://www.census.gov (last visited Apr. 14, 2004). Use the "American Factfinder" tool on the website. For help with searching, contact Andrew Stettner at NELP (astettner@nelp.org).

Thus, permissible inquiries vary with each program. Using the models outlined here, advocates can work for better assurances from these agencies, and help them to publicize their policies in immigrant communities, for the safety of all our communities.

Access to Workers' Compensation

Advocates can work to ensure that undocumented immigrants retain their right to be compensated for injuries sustained on the job by working for either a specific state policy on the issue or an amendment to state law. Should undocumented workers be left uncovered by certain aspects of the workers' compensation system, employers will have a powerful incentive to hire only the undocumented. Such an approach would also incentivize negligence in terms of workplace safety. *Hoffman* does not stand for the proposition that undocumented workers have no right to time loss benefits under workers' compensation statutes. There are many reasons to distinguish the discretionary federal NLRA backpay remedy from a mandatory payout of insurance under state law. It is important in the first instance to resist discovery requests aimed at an injured workers' immigration status, and to resist any argument that undocumented workers' compensation rights are diminished by *Hoffman.*

State Legislation Expanding Access to Driver's Licenses

Advocates should make certain that their state does not discriminate against immigrants based on their lack of SSNs or legal status. Advocates should join together to defeat restrictionist licensing policies and to expand access to licenses. They should promote the use of reliable alternative forms of identification, such as the ITIN and the Matricula Consular. Advocates should remind their communities that restricting driver's licenses does nothing to increase community safety; in fact, it may encourage unlicensed driving. It also results in a proliferation of false documents, erodes public safety, and leads to higher insurance premiums for all licensed drivers. If states enact restrictive measures, unlicensed drivers will constitute a true underground, completely unknown to law enforcement authorities. Instead of cutting off access to licenses, states should consider expanding access to driver's licenses for immigrants who can prove their identity via reliable forms of identification, such as the ITIN, or the Mexican Matricula Consular.