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Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights

Rebecca Smith

National Employment Law Project

Ana Ana Avendaño

AFL-CIO

Julie Martínez Ortega

American Rights at Work Education Fund

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Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights

Abstract

[Excerpt] In recent years, however, our federal government's approach to immigration enforcement has severely interfered with the protection of labor rights for immigrant workers. The single-minded focus on immigration enforcement without regard to violations of workplace laws has enabled employers with rampant labor and employment violations to profit by employing workers who are terrified to complain about substandard wages, unsafe conditions, and lack of benefits, or to demand their right to bargain collectively.

Keywords

immigration, enforcement, workers' rights, labor rights, workplace laws

Comments

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ICED OUT

**How Immigration Enforcement Has
Interfered with Workers' Rights**

AFL-CIO

AMERICAN
RIGHTS
AT WORK
EDUCATION FUND

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ICED OUT | How Immigration Enforcement Has Interfered with Workers' Rights

by Rebecca Smith, National Employment Law Project; Ana Avendaño, AFL-CIO;
Julie Martínez Ortega, American Rights at Work Education Fund

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I. INTRODUCTION

For decades, the protections under core labor laws, such as the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA), have applied to immigrants, including those unauthorized to work in the United States under federal law. By enforcing such labor laws, government agencies sought to discourage unscrupulous employers from exploiting these workers. To fail to vigorously enforce these labor laws would lower labor standards for all workers in America. Covering all workers protects all workers, including the millions of U.S. citizens who work alongside immigrant workers. As the United States Supreme Court has recognized: “[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.” *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

In recent years, however, our federal government’s approach to immigration enforcement has severely interfered with the protection of labor rights for immigrant workers. The single-minded focus on immigration enforcement without regard to violations of workplace laws has enabled employers with rampant labor and employment violations to profit by employing workers who are terrified to complain about substandard wages, unsafe conditions, and lack of benefits, or to demand their right to bargain collectively.

To protect workers’ rights and to remove the perverse economic incentives that drive the employment of unauthorized workers, the balance between worksite immigration enforcement and labor standards enforcement must be recalibrated. Labor inspectors must have access to willing complainants and witnesses to pursue the worst labor law offenders. Employers should not be allowed to retaliate against workers who stand up for their rights by reporting these workers to immigration authorities. Immigration enforcement targeting should not be based on media and other accounts of immigrant-dominated worksites where labor disputes are occurring. When immigration authorities become aware of worksite labor complaints in the course of their investigations, they should step aside and let their co-equal agencies, such as the U.S. Department of Labor (DOL), investigate. Finally, when authorities become aware of labor abuses in the course of worksite enforcement actions, workers should be screened for eligibility for special visas as victims of those abuses.

This report shows that in too many instances, Immigration and Customs Enforcement (ICE) worksite raids have prevented meaningful enforcement of labor standards for all workers. ICE actions have created incentives for shady employers to continue hiring and abusing undocumented workers, since the deportation of their employees may excuse those employers from complying with labor laws.

In recent years, with the rise of workplace raids and with more governmental agencies, such as state and local police, involved in immigration enforcement, the government has trampled on the labor rights of workers. In a number of instances, ICE has conducted high-profile workplace raids that have come in the middle, or followed closely on the heels, of a DOL or other agency investigation or court action. ICE has cooperated with employer and other requests to verify workers' immigration status even where workplace disputes exist. In some instances other governmental actors, such as U.S. Attorneys and state and local police, have interfered with workers' assertion of their labor rights, culminating in ICE arrests of the victimized workers. These actions have had the predictable effect of chilling the assertion and exercise of workplace rights, a result that hurts all workers, regardless of immigration status.

The Administration has an opportunity to reset the balance between immigration enforcement and labor enforcement—and now is the time to do so. In the pages that follow, this report reviews existing agency policy directives and current practices, highlights instances in which immigration enforcement has eviscerated labor law enforcement, and recommends policy changes that will restore the appropriate balance between immigration enforcement and labor rights.

II. IMMIGRATION AND LABOR LAW IN CONTEXT

Federal courts and state and federal agencies have consistently held that core labor standards, including the right to organize, to a minimum wage, and to protection from discrimination, cover all workers, regardless of immigration status. In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984), the United States Supreme Court held that undocumented immigrants are “employees” under the National Labor Relations Act. The Court denied review of a lower court decision that “the [Fair Labor Standards Act’s] coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it.” *Patel v. Quality Inn South*, 846 F.2d 700 (1988), *cert denied*, 489 U.S. 1011 (1989). And courts have said time and again that federal employment discrimination laws protect undocumented workers. See, *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

Although employers commonly threaten to turn workers into immigration authorities to gain the upper hand in a labor dispute, *Sure-Tan* and its progeny make clear that employer use of workers’ immigration status to threaten, intimidate or remove workers in retaliation for their union activities constitutes an unfair labor practice (ULP) in violation of the NLRA. Likewise, since immigration status is irrelevant to damages claims for failure to pay wages under the FLSA, employer threats to turn workers into immigration authorities violate the anti-retaliation provisions of that federal law. *Contreras v. Corinthian Vigor Ins. Co.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998)(I); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002). While courts consistently find it illegal under state and federal anti-retaliation laws for employers to use immigration status as a weapon to defeat organizing campaigns or the individual exercise of labor rights, employers continue to do so.

The Trafficking Victims Protection Act of 2000, as amended (TVPA), provides for prosecution, prevention, and protection of immigrant victims of labor trafficking. Trafficking includes recruitment and obtaining of a person for labor through the use of force, fraud or coercion, including debt bondage and involuntary servitude. It provides that a victim is eligible to remain in the United States, under a newly created “T” visa, if he or she is a victim of a severe form of trafficking, complies with any reasonable request for assistance in investigation or prosecution (or was under 18), and would suffer extreme hardship if removed from the country. The TVPA also provides a “U” visa for survivors of crime who have suffered substantial physical or mental abuse and have been helpful or are likely to be helpful in prosecuting the crime. These visas have not been widely granted to victims of severe labor violations.

1. The erosion of the right to organize

In the United States, the National Labor Relations Act protects employees' right to "self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection..."¹

Throughout the late 19th and for much of the 20th century, union representation and the labor movement played a huge role in achieving workplace justice, raising living standards, and enabling many groups of workers to join the middle class. Now, however, U.S. employers have waged, with spectacular results, what *Business Week* has called "one of the most successful anti-union wars ever."² The percentage of union members has dramatically declined: in 1960 private sector union membership was 30 percent;³ by 2008 it had dropped to 7.6 percent.⁴ Of the over 15 million union members in 2006, 12 percent (1.9 million) were foreign born.⁵ Though the share of union members who are immigrants has increased three percent between 1996 and 2006, immigrants are still underrepresented in unions compared to their share of the labor market.⁶

The decline of union membership is no surprise given the severity of employer resistance and the failure of U.S. labor law to prevent employer lawbreaking.⁷ Employers have inhibited workers' voices by threatening to close facilities and to terminate union supporters. And labor law allows employers to require employees to attend anti-union meetings.⁸ One of the most devastating illegal employer tactics is the threat to call immigration authorities on workers. The chilling impact of employers' unlawful threats is felt not only by undocumented workers, but by their co-workers. Documented workers and U.S. citizens may be reluctant to organize their workplaces because properly timed threats to turn workers over to immigration authorities can undermine the union election process. And if workers should win a union election, deportation of their undocumented co-workers will dilute the power of the bargaining unit.

No industry relies solely on an immigrant workforce. The Census Bureau's 2007 American Community Survey found that of more than 330 occupations, only two have immigrant majorities.⁹ This means that threats to call immigration authorities deprive workers in nearly every industry of their right to a voice at work.

NATIVE AND FOREIGN-BORN WORKERS IN U.S. INDUSTRIES: 2006

INDUSTRY	NATIVE BORN	FOREIGN BORN
Agriculture, forestry, fishing and mining	2,713,889	677,400
Construction	11,087,445	2,912,645
Manufacturing -- durable and non-durable goods	16,552,915	3,637,485
Wholesale and retail trade, and transportation and warehousing	29,905,270	4,677,471
Business services	14,986,633	2,988,428
Educational, health and social services	31,907,706	4,441,496
Arts, entertainment, recreation, accommodations and food services	14,144,104	3,167,953
Other services (except public administration)	7,025,803	1,712,596

Source: Pew Hispanic Center, Statistical Portrait of the Foreign-Born Population in the United States, 2006

2. The decline of labor standards enforcement

Every day tens of millions of workers labor as construction workers, retail sales workers, farmworkers, food processors, hotel room cleaners, dishwashers, home health aides and child care workers. In most of these industries, starting wages are low and rarely increase significantly. Benefits are rare. The opportunities for on-the-job training and promotion are minimal. Construction workers, particularly Latino workers, suffer tragic levels of workplace deaths and injuries.¹⁰ In many of these industries growing numbers of unscrupulous employers intentionally misclassify their workers as “independent contractors” to avoid compliance with labor laws, and to allow them to pay less than the minimum wage, avoid overtime pay, and provide unsafe and hazardous working conditions. A recent survey of over 4,000 workers in New York, Chicago and Los Angeles found that 26 percent had not been paid the minimum wage in the workweek preceding the survey. Of those who had worked over 40 hours in the prior week, 76 percent were not paid the legally mandated overtime pay.¹¹ Researchers estimated that workers in these three cities alone were losing more than \$56.4 million per week as a result of labor law violations.¹²

The worker survey reaffirms an earlier series of both governmental and non-governmental surveys and reports that showed as many as 40 percent of construction industry employers misclassify their workers as independent contractors.¹³ In addition,

- Sixty percent of nursing homes were out of compliance with FLSA minimum wage and overtime provisions in 2000;¹⁴
- In 1998, 43 percent of residential care facilities were out of compliance with the FLSA minimum wage and overtime provisions;¹⁵
- Almost no compliance with worker protection laws existed in the poultry processing industry in 2000;¹⁶
- Almost 50 percent of garment manufacturing contractors were out of compliance with FLSA according to a 1996 study;¹⁷ and
- Fifty percent of day laborers suffered wage theft, according to a 2006 survey.¹⁸

Of special significance for this report, the recent three-city survey of workers found that 43 percent of workers who made a complaint to their employer or attempted to form a union experienced one or more forms of illegal retaliation, including threats to call immigration authorities.¹⁹

This stunning portrait of workplace violations underscores the critical importance and urgent need for robust enforcement of labor standards. Yet throughout most of the last eight years, there was a nearly complete failure to enforce our nation’s wage and hour laws. In July 2008, the Government Accountability Office (GAO) issued two reports sharply criticizing the enforcement practices of the DOL’s Wage and Hour Division (WHD). The studies depicted an agency that routinely failed workers.²⁰ GAO found that DOL enforcement actions had decreased from 47,000 in 1997 to fewer than 30,000 in 2007. The DOL had failed to document both complaints by workers and its response to those complaints; it had failed to keep operational many of the hotlines and voicemail systems designed to accept complaints; and it could not show it was using available enforcement tools, such as penalties for willful and repeat violations. In March 2009, GAO’s testimony to Congress described its follow-up eight-month undercover work, in which “testers” posed as aggrieved employees and employer-respondents before the WHD.²¹ Of 10 ficti-

tious complaints filed by GAO investigators, DOL successfully investigated only one. DOL failed to record in its database five complaints and falsely recorded two complaints as having been successfully paid. GAO concluded that the agency employed an “ineffective system that discourages wage theft complaints.”

If government agencies do not enforce wage standards – as the Department clearly has not in recent years – law abiding companies and workers suffer, while employers who hire undocumented workers gain a competitive advantage by operating outside the law.

3. The rise in workplace immigration enforcement

Enforcement of the immigration laws in the workplace is the responsibility of ICE, a division of the Department of Homeland Security (DHS). ICE was created in 2003 as part of the reorganization of government agencies resulting from passage of the Homeland Security Act of 2002. As a response to the September 11, 2001 terrorist attacks, President Bush proposed to Congress the creation of the DHS out of a merger of the principal border and transportation security agencies, including the Immigration and Naturalization Service (INS). The President’s stated intent in merging agencies was to “ensure greater accountability over critical homeland security missions and unity of purpose among the agencies responsible for them.”²² ICE took on the role of enforcing immigration and customs laws, functions formerly performed by the INS, the U.S. Customs Service and the Federal Protective Service.

From 2006 to 2008, DHS and other law enforcement agencies increased enforcement actions at workplaces, on streets, and in individual homes. Immigration prosecutions rose to record levels. A series of very high profile raids captured the headlines, including the December 12, 2006 simultaneous raids at Swift & Company plants in six states.²³ In May 2007, some 160 ICE agents raided a food processing plant in Portland, Oregon, arresting 167 workers – just after local media reported on the settlement of a \$400,000 wage and hour lawsuit brought by the workers in the plant.²⁴ In May 2008, ICE agents arrested another 389 workers in a food processing plant in Iowa, while at least three other agencies were investigating serious labor violations. (Case studies of these and other ICE raids are discussed in Section IV.)

Although ICE claims that the focus of its worksite enforcement is on employers that “egregiously violate immigration laws,” the enforcement data tell a different story: ICE made 6,287 (5,184 administrative, 1,103 criminal) arrests for immigration offenses at workplaces in 2008. Only a small fraction of its arrests (2.1 percent) were of employers or employers’ agents.²⁵ More frequently, the criminal arrests were of workers for using work authorization documents that did not belong to them – a common means of gaining access to work.

ICE’s approach to workplace raids is also ineffective. With eight million unauthorized workers in the U.S. economy and nearly eight million worksites, it would take ICE, working at its current heightened pace, 1,272 years to reach the current unauthorized worker population. More importantly, focusing on raids and other types of immigration enforcement without regard to enforcement of labor and employment laws does not address what is really sustaining illegal immigration—the virtually unfettered ability of employers to exploit immigrant workers economically. As this report shows, current law and practice creates a perverse economic incentive

for employers to employ undocumented workers, because employers can deny undocumented workers the most basic workplace protections and escape responsibility by simply calling for an immigration inspection.

The rise in workplace immigration enforcement is also due to the involvement of new governmental players. Section 287(g) of the Immigration and Nationality Act, as amended in 1996, authorizes the federal government to enter into agreements with state and local law enforcement agencies to train officers to assist in identifying undocumented immigrants. ICE describes the program as directed towards “foreign born criminals” and other individuals who pose a national security threat.²⁶ Under the law, local agencies that wish to engage in immigration law enforcement must enter into a Memorandum of Agreement with ICE, which is charged with training and supervising the state and local officers. As of August 2009, ICE reported having enrolled 63 agencies and trained 840 officers under the program. The GAO recently criticized ICE for inadequate oversight and training under this program, which has frequently been cited as contributing to racial profiling.²⁷ In the end, this program has allowed more law enforcement officers to become inappropriately, even unwittingly, involved in labor disputes on the side of employers. The program has also led to state and local police agencies – whether signatories to 287(g) agreements or not – frequently believing that one of their primary duties is immigration enforcement. (In a number of the cases presented herein, even police agencies that are not part of the formal 287(g) program have been drawn into labor disputes that resulted in interrogations or arrests of workers.)

The dramatic increase in ICE raids and similar worksite enforcement actions, coupled with an increase in the number of ICE and non-ICE personnel, reflects a singular federal focus on enforcement of immigration law that has come at the expense of labor standards enforcement. When enforcement is focused on immigration status without regard to the implications for upholding workplace standards, our country’s workers – immigrant and non-immigrant alike – are trapped in abusive jobs at the mercy of abusive employers.

III. FEDERAL POLICIES FAIL TO ENSURE APPROPRIATE BALANCE BETWEEN IMMIGRATION AND LABOR LAW ENFORCEMENT

1. Department of Labor Memorandum of Understanding with Immigration and Naturalization Service

Since 1998, a Memorandum of Understanding (MOU) between the then-named U.S. Immigration and Naturalization Service (INS, now ICE) and the U.S. Department of Labor (DOL) has addressed the intended balance between immigration and labor law enforcement. The stated goals of the MOU include to:

- Reduce the economic incentives for the employment of unauthorized workers and the consequential adverse effects on the job opportunities, wages and working conditions of authorized U.S. workers, by increasing employers' compliance with minimum labor standards;
- Avoid the further victimization of unauthorized workers employed in the U.S. by employers that may seek to abuse the enforcement powers of the signatory agencies to intimidate or punish these workers; and,
- Promote employment opportunities for legal authorized U.S. workers and to improve their wages, benefits, and working conditions.

To meet these goals, the MOU creates a firewall between DOL inspections and INS enforcement actions. The MOU sets out occasions where cooperation and information between the two agencies is appropriate, such as when a DOL wage and hour investigation uncovers serious allegations of harboring undocumented immigrants. The MOU also outlines where such cooperation is not appropriate. For example, it provides that DOL will not conduct reviews of I-9 work authorizations in cases involving complaints about wage and hour violations and will not inquire about the immigration status of complainants.²⁸ The MOU clearly states that the agencies must avoid situations where collaboration would have either the purpose or the effect of placing immigration enforcement in a position to trump labor law enforcement, because the DOL has recognized that immigrant workers will be reluctant to bring complaints about abusive employers to its attention if the situation were otherwise.²⁹

2. INS Operating Instruction 287.3(a) - now designated as ICE Special Agents Field Manual 33.14(h)

Since 1996, an internal immigration policy has existed to ensure that immigration authorities avoid involvement in labor disputes. The INS created this policy after a series of immigration raids interfered with ongoing labor organizing campaigns and with the pending prosecution of minimum wage claims by immigrant workers. The policy, Operating Instruction 287.3(a) (OI), specifies that ICE investigators are required to receive approval from a Director before continuing an investigation where it appears that DHS is being used to interfere with the assertion of workers' employment and labor rights.

The INS OI provides: "When information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with labor rights." The OI contains four basic components:

- First, immigration authorities will look closely at information from any source that raises an issue about whether immigration status is being used as a bludgeon against workers.
- Second, whenever suspicion exists that ICE may become embroiled in a labor dispute, the agency must make specific inquiries into the details of the information it receives.
- Third, while the OI is not mandatory, before any immigration enforcement action takes place some internal discussion must ensue with District Counsel and approval must be received from the Assistant District Director for Investigations or an Assistant Chief Patrol Agent.
- Finally, even if ICE should be approved to proceed with an enforcement action, ICE should assist victims of labor law violations with remaining in the country to pursue their claims. This last provision predated the Trafficking Victims Protection Act, which more broadly provides for special visas, called "T" and "U" visas, for certain victims of forced labor and other crimes, including instances where immigrant workers are kept on the job by illegal actions and retaliation threats.

Advocates have used tools like the MOU and the OI to protect workers' rights. In December 2003, an employer defending a wage claim lawsuit called three police officers to a deposition in Portsmouth, Virginia. During the course of the litigation, defense counsel had repeatedly questioned the immigration status of some of the workers and suggested that plaintiffs' counsel was aiding and abetting illegal conduct by failing to report the workers to immigration authorities. During one worker's deposition, the company's lawyer informed the worker's lawyer that the police were at the deposition to ask the worker questions about his immigration status. The employer's attorneys also called immigration authorities, who likewise arrived at the deposition. Once the worker's attorney briefed the police and immigration agents on the INS OI, the immigration authorities left and the deposition proceeded normally.³⁰

IV. CASE STUDIES: IMMIGRATION ENFORCEMENT TRUMPS LABOR RIGHTS

With the increase in the number of immigration enforcement agents and arrests and prosecutions of immigrants in the U.S., immigration enforcement repeatedly has taken precedence over labor law enforcement. While more immigrants have been jailed and deported, the protection of basic wage and hour, health and safety and union organizing rights has eroded.

The case studies below demonstrate the dire need to update existing tools to restore the principle that immigration enforcement should not trump protection of labor rights.³¹ The case studies also reveal the need to abide by the original purpose of the firewall policies and of the Trafficking Victims Protection Act: to ensure proper screening of immigrant victims of labor law violations.

The case studies describe a series of incidents occurring between 2005 and 2008. The examples are divided into the five categories in which ICE has: (1) taken enforcement action at the behest of employers, their surrogates, and other police agencies; (2) conducted immigration-focused surveillance in the midst of labor disputes; (3) conducted enforcement action with full knowledge of an ongoing labor dispute; (4) engaged in subterfuge to carry out enforcement actions; and (5) directly interfered with the administration of justice by arresting workers on the courthouse steps.

These case studies are not an exhaustive list of all cases in which immigration enforcement has undermined labor law enforcement. They do, however, highlight the experiences of workers and their advocates in defending labor rights. And the stories are harrowing--undermining organizing campaigns, depriving workers of workers' compensation, chilling further exercise of labor rights, and terrorizing victims of labor law violations. Unfortunately, these case studies are not aberrations. Nor do they represent the actions of a few 'bad apple' employers. The practices outlined are standard in too many industries in the U.S. As noted above, a recent three-city survey of low wage workers found that 43 percent of those who complained about workplace violations or tried to form unions were subjected to retaliation, including threats to call in immigration authorities.³²

1. ICE enforcement actions undertaken at the behest of employers, their surrogates, and other police agencies

ICE has been too quick to embrace workplace enforcement actions at the behest of employers and other individuals, including law enforcement, acting directly and transparently on behalf of employers, where a labor dispute was in progress or where some level of due diligence would have uncovered the pending dispute. Under U.S. law, the employer is responsible for verifying a

worker's authorization to work within three days of hire. The fact that employers are calling immigration authorities onto their own worksites indicates that they fear no legal repercussions for doing so.

WOODFIN SUITES HOTEL – EMERYVILLE, CA, 2007

In 2005 in Emeryville, California, the East Bay Alliance for a Sustainable Economy (EBASE) and UNITE HERE Local 2850 helped to pass a ballot initiative for a living wage law. The measure guarantees commercial housekeepers a living wage and sets overtime pay standards and maximum safe workload levels.


In spring 2006, workers at the Woodfin Suites Hotel, which had strenuously opposed the ballot measure, signed a petition asking their employer to comply with the law. Workers also testified before the Emeryville City Council and were interviewed in the media. By December 2006, Woodfin had fired 21 immigrant workers, claiming that it had received letters from the Social Security Administration (SSA) stating that the workers' Social Security numbers did not match SSA's records. When the workers claimed unlawful retaliation, an Emeryville court ordered the hotel to reinstate them.³³

After the court ruling, a Woodfin representative contacted U.S. Representative Brian Bilbray of San Diego.³⁴ Congressman Bilbray wrote a letter to ICE asking that it investigate the immigration status of the Woodfin Suites employees.

Bilbray's February 21, 2007 letter to Julie Meyers, then Assistant Secretary of DHS at ICE, stated, "Constituents of mine have brought to my attention that hotels in Emeryville, CA, are by state court order employing undocumented workers. I am requesting that Immigration and Customs Enforcement (ICE) investigate the immigration status of these hotel workers and resolve the issue."³⁵

On April 2, 2007, ICE conducted an audit of Woodfin, and the hotel then fired 12 additional workers. Later that year ICE agents visited the home of a Mexican immigrant active in the living wage campaign; two agents dressed in civilian clothes came to her home, insisting that they talk to her. They showed her a sheaf of newspaper clippings about the labor dispute. Once in the house, they identified themselves as ICE agents and told her that their bosses in Washington, D.C. had sent them to investigate. They asked for her Social Security number and insisted that she go to their office the next morning to speak with them further. When her immigration attorney intervened, ICE canceled the appointment.³⁶

That the hotel employer had some role in asking immigration authorities to investigate its own employees raises concern, particularly given that the request for an ICE investigation came at the same time that workers were being subjected to intimidation and retaliatory firings and a court had ordered their reinstatement. If Woodfin had legitimate concerns about the immigration status of its own workers, legal avenues existed to address those concerns without seeking ICE intervention. ICE should not have so readily responded to a Congressman's request to engage the immigration service in a labor dispute.



Having ICE at my house affected me a lot. I got so sick from the stress that I had to go to the hospital.

—Mariana (* a pseudonym)

As more local police view their duties as encompassing immigration enforcement, more incidents are occurring in which ICE responds to a report from other law enforcement agencies that have themselves been called by employers to quell a civil labor dispute. The following two examples involved an on-going labor dispute. In each, the local police immediately dropped charges once immigration authorities became involved. ICE should be vigilant to avoid being drawn into local police actions initiated by employers and intended solely to intimidate workers. Effective establishment of a firewall between immigration and labor law enforcement must involve local police training and additional inquiries by ICE when it responds to police information.

**IN FOCUS:
An Advocate's Perspective**

Brooke Anderson, an organizer with EBASE who ran the living wage campaign for the Woodfin housekeepers, shares her experiences from the frontlines:

When I first met the housekeepers at the Woodfin Suites Hotel several years ago, they were hurting. Literally. One worker told me, "I would get home with my feet very swollen, my hands swollen, and with a headache. When we couldn't finish, they made us punch out after eight hours—and finish off the clock. I even started wondering if we were living in times of slavery. I asked God to open up a way for us to get justice because it was too much."

We won higher wages and safe workload levels at the ballot box, but from the get-go Woodfin used the perceived immigration status of the workers to intimidate them. On one occasion, management took workers to the top floor of the hotel and told them that ICE was outside. Workers said that the bosses told them EBASE had called ICE on them, but that the Woodfin would protect the workers from immigration authorities.

Just a couple of weeks later, management called a meeting and told the workers they had received a Social Security no-match letter, and that the workers had only 24 hours to correct their records. Workers were fired 10 days before Christmas. The next day, we had 200 people join them on the picket line.

At one point, students from the UC Davis Republican club came to the picket line. One of the students told workers that the Woodfin had put them up at the hotel. They carried signs and chanted slogans like, "no green card, no job" and "illegals go home." They took pictures of workers and their families on the picket line. Some of the kids said they'd told them they'd be deported. They came out to the picket line about four times.



EMPLOYERS ALL DRY WATER DAMAGE EXPERTS – BEAUMONT, TX, 2008

On September 17, 2008, New Orleans was under a declaration of emergency due to the devastation caused by Hurricane Gustav. In neighboring Texas, Hurricane Ike had made landfall four days before. Four men representing themselves as “Employers All Dry Water Damage Experts” recruited 15 day laborers in New Orleans who were members of the Congress of Day Laborers, a grassroots project of the New Orleans Workers’ Center for Racial Justice. The employer transported them to Beaumont, Texas, a four hour drive. At that time Beaumont’s residents still were being held at evacuation facilities outside the region.

When the day laborers arrived in Beaumont, they were housed in an isolated oil refinery and directed to perform dangerous demolition work. According to the Congress of Day Laborers, the employer failed to pay the promised hourly wage rate of \$13 and failed to keep its promises regarding the work hours and schedule. The employer gave preferential treatment to the white workers who formed a part of the crew, including providing them with safer conditions and easier assignments.

When the immigrant workers complained of their working conditions, they were evicted from the refinery in the middle of the night without pay. The employer had already contacted the Port Arthur, Texas Police, who were waiting outside the refinery, accompanied by an ICE agent. The police arrested 12 day laborers on charges of theft from the demolition site, and they were detained for over 76 days. ICE placed immigration detainers, a request to local police to detain for immigration authorities, on the workers. Although the local district attorney ultimately dismissed the criminal charges against the workers, ICE detained 11 of them and placed them in removal proceedings. While advocates with the Congress of Day Laborers secured the release of eight of the workers from detention after an additional 48 days, proceedings to have the workers deported were nonetheless initiated.³⁷

DURRETT CHEESE – MANCHESTER, TN, 2007

Durrett Cheese in Tennessee hired indigent Mexican workers to perform various jobs at the factory, including the slicing, packaging and processing of cheese. The company specifically targeted

members of the Mixteco indigenous group in the area of Manchester, Tennessee to work at the factory. These workers allege that they were subjected to an abusive work environment where they were referred to as “stupid Indians” and “donkeys.”³⁸

The company repeatedly failed to pay the Latino workers on time. Some workers worked for more than a month without pay. Other times the employer underpaid the workers or paid them with checks backed with insufficient funds. Durrett also repeatedly changed their pay dates. One of Durrett’s supervisors threatened that if the workers quit they would not receive any back pay.

On October 22, 2007, the workers refused to leave the company break room and return to work until they received their back pay. When a supervisor fired them and told them to leave, they refused.

The company called the local Coffee County Sheriff’s Department and the workers were arrested, even though the police were informed that the workers were involved in a pay dispute. The sheriff’s Incident Report says that law enforcement was told that “several Hispanic employees were refusing to work.” Rather than conclude that a labor dispute was in process or investigate the employer for violation of Tennessee’s laws prohibiting theft of services, the sheriff arrested and jailed the workers for trespassing — a charge dropped by the district attorney the next day. Even after the charges were dropped, the county sheriff’s office continued to detain the workers and arranged for them to be turned over to immigration officials. ICE took the workers to the Elizabeth Detention Center in Nashville, some 65 miles away, where they were interrogated and detained. Many of the workers were mothers of young children, some of whom were disabled or very ill. An attorney eventually secured the workers’ release.³⁹

The Employers All Dry Water Damage Experts and Durrett Cheese cases are troubling both because local police stepped in on the side of employers in what are clearly civil labor disputes, and because the police dropped charges as soon as ICE responded. These actions suggest an underlying agenda to prioritize the deportation of otherwise law-abiding immigrant workers over protecting their labor rights. In both cases the police dropped the charges as soon as ICE responded to the police agency. In both cases ICE either knew, or with minimal investigation would have learned, that the workers had been arrested in the course of a labor dispute. Each case illustrates the need, in an era of increasing police enforcement of immigration law, for training of local police and a strong firewall to exist between immigration enforcement and labor enforcement.

CESSNA AIRCRAFT – WICHITA, KS, 2006

Rogelio Ortega-Guzman worked as an aircraft interior installer at Cessna Aircraft in Wichita, Kansas. He slipped while climbing the ladder of a plane. Soon after he was fired. According to press reports, the company said that it had no work for him given his medical restrictions. Ortega went to the press to complain about his struggles to receive medical care after his injury.

Cessna’s attorney promptly sent Ortega’s lawyer a letter indicating that contacting the media would be “a dangerous move given his illegal immigration status.” A few weeks later, on May 26, 2006, the *Associated Press* carried a story about the tragic level of workplace injuries and deaths involving Hispanic workers and cited the Ortega case. In pain and with bills mounting at home,

Ortega pleaded his case to media outlets. “I don’t care if they deport me,” Ortega was quoted as saying in Spanish. “I want people to know how big companies use people up.”

By mid-June Mr. Ortega had been arrested and indicted, along with five other Cessna workers. Cessna spokespeople were quoted in newspaper articles as saying that the company had found a “discrepancy” in employment records and turned the workers over to immigration authorities. When Mr. Ortega’s wife called the *Associated Press* to report her husband’s arrest, she was also indicted for use of a false Social Security number.

The United States Attorney for the District of Kansas issued a press release stating, “Cessna did the right thing in reporting these workers.”⁴⁰

FORSHEE PAINTING CONTRACTORS – WICHITA, KS, 2005

Francisco Berumen Lizalde worked as a painter in Wichita, Kansas. He was injured on November 6, 2005, when he fell eight feet from some scaffolding. He suffered fractured bones in his wrist and arm that required surgery, leaving him temporarily disabled and unable to work. On December 22, 2005, Mr. Lizalde missed a scheduled doctor’s appointment for continuing medical treatment for his workers’ compensation claim. Instead, he was arrested and detained by ICE. He was charged with using fraudulent documents to obtain employment, to which he pled guilty, and he was sentenced to time served and deported in February 2006.

Although Mr. Lizalde had not fully recovered from his work-related injury when he was deported, the workers’ compensation insurance carrier stopped making temporary total disability payments in December 2005. Mr. Lizalde had not completed medical treatment with his treating doctors in Kansas, and at his last appointment a Kansas doctor advised him to seek physical therapy and follow-up medical treatment in Mexico for his work-related injuries.⁴¹

The two workers’ compensation cases above are troubling for a number of reasons. First, in Kansas, as in nearly every other state, immigrant workers injured on the job are entitled to workers’ compensation coverage, regardless of their immigration status. Workers’ compensation is insurance meant to finance the medical care and lost wages incurred by workers injured on the job and to encourage employers to provide safe workplaces. Neither Mr. Ortega nor Mr. Lizalde was doing anything illegal by claiming compensation for their injuries. The cases are particularly chilling in light of recent research finding that only 8 percent of workers injured on the job had filed claims for workers’ compensation.⁴² Fifty percent of those who told their employer about the injury were reported to immigration authorities, fired, or were instructed not to file claims.⁴³

Second, allowing employers to use immigration status to get a “free pass” on workers’ compensation—if workers are deported, the claims often remain unpaid—creates perverse incentives for employers to expose workers to unsafe conditions in the hope that any accidents that occur can be “deported” away. Finally, the reaction of the U.S. Attorney to the Cessna situation raises questions regarding whether not only ICE, but U.S. Attorneys in Kansas and perhaps elsewhere may be implicitly condoning employers’ use of immigration status to retaliate against injured workers for seeking compensation to which they are legally entitled. In spring 2006, an Assistant U.S. Attorney in Wichita, Kansas presented a paper to the American Bar Association Labor and Employment section expressing his view that U.S. Attorneys have an obligation to pursue immi-

gration-related criminal claims against workers and a duty to assist the state, the employer and the insurance company to minimize their obligations.⁴⁴

ICE surveillance of picket lines or other labor activities

The disturbing presence of ICE agents at picket lines or other labor activities, or in response to local police officers who have themselves been watching workers engaged in labor activities, is another example of direct interference in workers' organizing campaigns. Picketing is, of course, protected activity under the NLRA, which protects workers regardless of immigration status. All workers face obstacles to organizing for a voice at work, but immigrant workers face staggering challenges. When ICE, which has no role in labor law enforcement, shows up at a picket line, workers get the message loud and clear that they had better refrain from such organizing—a message that has a chilling effect on all workers, regardless of immigration status.

SUN COAST-GOLD CANYON – PINAL COUNTY, AZ, 2008

As part of its ongoing organizing campaign in the residential construction industry, the Iron Workers union was picketing subcontractors of Sun Coast, who fired union supporters and refused to hire others who supported the union.

On August 29, 2008, Brady Bratcher, an organizer with the Iron Workers union, arrived in a pick-up truck at a construction site in Gold Canyon, Arizona. Bratcher was driving five Latino workers, who were joining four other workers picketing at the site of a Sun Coast subcontractor. Pinal County Sheriff deputies (in four patrol cars) were on site after being called by security guards at the behest of the management company.

Bratcher indicates that he began to explain to the deputies what he and the workers were doing at the site and others similar sites around Pinal County. Bratcher was told by the officer to get back in his truck. The deputy then demanded to see identification from each of the occupants, along with work authorization, stating that some of the occupants were not wearing their seat belts. Bratcher, who is white and was not wearing his seat belt, was never asked to show his identification.

The officer confirmed to Bratcher that they were being asked for identification because the group was protesting. The police officer detained the workers on immigration charges. ICE was called to the sheriff's sub-station, released one worker, and took four others into custody. The released worker, Jaime Zavala, had shown his valid identification to the deputies initially, but the police still took him into custody.⁴⁵

AMERICAN BUILDING SERVICES – SAN FRANCISCO, CA, 2007

Members of the Service Employee International Union Local 87 were janitors for American Building Services at the Federal Building in San Francisco, California, when they were notified on September 27, 2007, that the company was losing the contract to a non-union janitorial firm. In response, Local 87 organized daily pickets of the Federal Building, demanding reinstatement of the workers.



On October 2, 2007, Local 87, community allies, and approximately 60-to-70 janitors were picketing in front of the Federal Building and were passing out informational flyers. About one hour into the picket, approximately six ICE officers arrived, dressed in uniform and armed with assault rifles and tear gas.⁴⁶ Several ICE officers attempted to question some of the workers but organizers quickly moved to prohibit questioning.⁴⁷ The officers told the group that they could not picket on federal property but must move onto the sidewalk, and they then proceeded to stand guard at the Federal Building doors throughout the entire picket.⁴⁸ Two ICE helicopters also hovered over the picket line for several minutes.⁴⁹

SIGNAL INTERNATIONAL WORKERS – PASCAGOULA, MS AND NEW ORLEANS, LA, 2008

Indian welders and pipefitters employed as guestworkers for Signal International, based in Pascagoula, Mississippi, left their labor camps and reported themselves to the Department of Justice (DOJ) as victims of trafficking and forced labor in March 2008. The guestworkers say they had been charged recruitment fees of up to \$20,000, were housed in closely guarded, overcrowded labor camps and were regularly threatened with deportation. When the workers reached out to a local church for help defending themselves against what they viewed as illegal activity by the employer, they say that Signal International conducted a pre-dawn raid on its own labor camp,

detaining five worker-leaders under armed guard. Signal publicly defended its actions with statements that it conducted the raid after consultation with ICE.⁵⁰

When the workers went on a Ghandian truth pilgrimage to illustrate their plight, ICE engaged in covert surveillance of their Montgomery, Alabama visit to a site honoring martyrs of the civil rights movement in the South.⁵¹ The DOJ and ICE have each refused to explain or disavow the surveillance. The DOJ continues to work with ICE, the agency in charge of arresting, detaining and deporting immigrants as the lead investigative agency on this and many other human trafficking crimes.

As of one year later, despite inquiries on the workers' behalf by members of Congress, labor unions, civil rights leaders, and religious allies, and despite the workers' own investigation, in which they have amassed extensive evidence against the company, no governmental action has been taken against Signal.⁵²

3. Enforcement operations conducted with ICE knowledge of an ongoing organizing campaign or labor dispute

In a number of recent cases, ICE has conducted worksite enforcement actions, not necessarily because of employer tips, but despite on-going workplace labor disputes. In the cases summarized below, ICE was fully aware of labor law violations occurring at particular workplaces, but chose nonetheless to engage in enforcement actions. In most of the following cases, ICE agents actually cited labor law violations or pending investigations as reasons they suspected employers of “harboring” undocumented workers. By all accounts, ICE did not screen arrested workers as potential victims of crimes eligible for special visas, as is provided in the TVPA. Instead, enforcement personnel prioritized immigration enforcement over labor law enforcement.

While in some cases ICE has pursued criminal violations against employers in the wake of worksite immigration enforcement actions, this has almost always occurred in tandem with prosecuting and/or deporting immigrants employed by those companies. In every case that we reviewed, workers were arrested and some processed for deportation. In some cases ICE enforcement was delayed until the workers' wage or labor standards litigation was resolved, but because the ICE enforcement action came on the heels of these worker claims, the message to immigrants in the workforce remains clear: complain about conditions at work, and a raid is sure to follow.

AGRIPROCESSORS – POSTVILLE, IA, 2008

One of the largest immigration raids in U.S. history occurred in Postville, Iowa in May 2008.⁵³ The raid occurred in the context of large-scale, longstanding allegations of safety and workplace violations, as well as an ongoing labor organizing campaign by the United Food and Commercial Workers (UFCW). At the time of the ICE raid, at least three state and federal labor agencies were investigating the slaughterhouse Agriprocessors, and ICE knew this. On May 2, 2008, the union sent a letter to the ICE Special Agent in Charge stating that an organizing campaign had been underway since 2006, that local and federal departments of labor were investigating the plant, and that ICE enforcement actions could have a chilling effect on labor rights.⁵⁴ One week later, ICE submitted a search warrant application to a federal district magistrate judge in Iowa. In the

warrant application, an ICE agent cited repeated serious health and safety and wage and hour violations as evidence that the company may be guilty of harboring unauthorized workers.⁵⁵ ICE did not consider whether workers may have been victims of labor trafficking or other workplace abuses, even though the warrant affidavit also recited allegations that a supervisor “duct-taped the eyes of an employee” and then “took one of the meat hooks and hit the Guatemalan with it.”⁵⁶

On May 12, 2008, ICE raided the plant. Of some 600 workers arrested in Postville, Iowa, 306 were turned over to the U.S. Attorney’s office to face criminal charges for working with false papers, including Social Security fraud and identity theft.⁵⁷ Rather than interview the workers as potential victims of crimes perpetrated by the employer, ICE chose to prosecute them. Two days later the *Des Moines Register* published an article detailing a lengthy history of workplace safety violations at the plant, including nine citations in two years.⁵⁸

When Iowa Congressman Bruce Braley wrote to the DHS and DOL after the raid, asking them whether they had been cooperating with one another, he received conflicting answers. In a letter dated July 3, 2008, ICE told the Congressman, “Please be aware that prior to the May 12, 2008, operations at the Agriprocessors facility, ICE fully coordinated its activities with other Federal agencies, including the Department of Labor (DOL).” The DOL Wage and Hour Division letter, sent at the same time as that of ICE, confirmed an ongoing, but incomplete, investigation of Agriprocessors. DOL said, “The raid occurred without the prior knowledge or participation of WHD” and that “no advance notice was given to WHD or any other DOL agency prior to the raid.”⁵⁹

Of the many troubling aspects of the Agriprocessors raid, two are especially worth noting. First, ICE raided the worksite after having received notification from a union that labor organizing was underway. In the past, unions have sent letters to enforcement officers to let them know that a labor dispute is in process at a workplace so that ICE will comport with the OI’s admonition not to undermine labor standards enforcement. While these letters were sometimes effective at creating a firewall between labor law enforcement and immigration enforcement, this was not so in the Agriprocessors case. Second, in Agriprocessors and in many of the cases summarized here, advocates, not ICE, interviewed the workers and determined that many were under-age or suffered workplace abuses, including sexual abuse, discrimination and extortion, and were therefore eligible for immigration and other legal remedies.⁶⁰ Immigration and labor advocates offered assistance to workers with their “U” visa applications. However, many others still in detention were processed, transferred and deported before they were able to obtain assistance.⁶¹

PILGRIM’S PRIDE – CHATTANOOGA, TN, 2008

On April 16, 2008, ICE raided poultry plants in five states owned by Pilgrim’s Pride, including one based in Chattanooga, TN, which employs 1,350 workers.⁶² Over a two-year investigation, ICE had developed a target list of 102 workers. It detained 146 workers.⁶³ Subsequently 36 were released for humanitarian reasons and were subjected to tracking with bracelets.⁶⁴

The Pilgrim’s Pride plant participates in the DHS’s Electronic Verify Program (E-Verify), which gives employers protection from liability for having hired unauthorized workers, in exchange for

agreeing to check employees' immigration status in a federal database.⁶⁵ ICE contacted management of Pilgrim Pride before the raid and received its full cooperation.⁶⁶

On the day of the raid, plant management singled out workers on the ICE target list and informed them of a mandatory fire safety workshop in the company break room. Once all the workers were assembled, ICE closed the doors and fully armed ICE agents in riot gear entered and announced that they were detaining the workers.⁶⁷

The United Steelworkers District 9 represented the workers at the plant. In January 2008, the union had begun an internal recruitment campaign among Latino workers, very few of whom were members of the union. The collective bargaining agreement was due to expire in July 2008 and the timing of the internal recruitment campaign was tied to the upcoming contract negotiations.

During the recruitment campaign, union organizers discovered that an outside law firm was developing a wage-and-hour class action lawsuit challenging the company's failure to pay workers while they put on and took off required equipment, a violation of federal wage and hour laws.⁶⁸

After the April raid, very few workers joined the union. The Steelworkers representative said, "These workers are in no shape to engage in a contract fight with Pilgrim's Pride. They're terrified."⁶⁹

After the lawsuit, at the beginning the company changed their strategy. But that didn't last long, maybe about two months. Then, they continued being the same. We felt horrible. The managers intimidated the workers a lot. The work was very heavy, and we could not complain. We had to work up to 14 hours at a time, doing heavy lifting, and we were not paid for all of our time. We were often not given breaks. If we complained, they would punish us by cutting our hours or giving us more difficult work.

There was a lot of favoritism among the managers. For example, when immigration came to raid the plant, the managers hid their family members who were workers. Some of these family members were never arrested.

During the raid some of the immigration officials said, "this is not your country, and you knew this. You have to leave." One official said, "Why are you crying?" The workers were crying out of shock, and mostly out of fear, out of fear of the uncertainty of what was going to happen. The uncertainty about going to our countries and what was going to happen to our children? For most of the workers, they had never experienced anything like that before. When immigration was arresting each of us, they had to touch our bodies, but the way that they touched our bodies, it was like we had a virus, like we were contagious.

After I was arrested, I went back to pick up my last check. When I was there, one of the managers told me rudely, "It is all your fault. The company is going to go bankrupt, because the workers used false papers." But they knew very well the whole time that almost all the workers had false papers.

— Rosa Elena Castaneda, former employee, Del Monte Fresh Foods

At the same time, the class action wage-and-hour lawsuit was pending. Attorneys representing workers were clear as to the effect of the raid: “The raid definitely had a chilling effect. Immigrant workers, even those legally authorized to work in the United States, were afraid of opting in to the class because they were afraid that somehow it would jeopardize a family member.”⁷⁰ Attorneys tried to contact workers whose rights were affected through DHS, but ICE would not help ensure that notices of their rights to join the lawsuit reached the detained workers.⁷¹

In the last two case studies (Agriprocessors and Pilgrim’s Pride), ICE conducted raids in spite of pending labor disputes, taking the approach that policies in favor of deportation of undocumented immigrants always take precedence over serious labor disputes. In the next two cases (Del Monte Fresh Foods and Shipley Do-Nut Flour and Supply Company), ICE conducted raids that followed closely on the heels of resolved labor disputes. While waiting for labor agencies to conclude their investigations may seem adequate, in practice, both of ICE’s approaches send a message to workers: “Complain about labor abuses at your peril. A complaint will always draw action from ICE.” A more focused investigation that centers on the employers’ violation of immigration and labor laws, rather than simply on the deportation of workers who could actually help prove those violations, makes for a more balanced and sensible policy.

DEL MONTE FRESH FOODS – PORTLAND, OR, 2007

In August 2006, eight former workers from Del Monte Fresh Foods in North Portland, Oregon, settled a lawsuit with the company for \$400,000. The Latino workers had raised ongoing safety concerns at the plant, and were fired by the staffing agency that hired them to work at Del Monte, according to news reports of the incidents.⁷²

Following the settlement, a local journalist for the *Willamette Week* went undercover at Del Monte Fresh Foods. She was hired as a quality assurance supervisor, and wrote about health and safety and pay violations she observed at the plant and also reported that three workers at the plant had indicated to her that they were not authorized to work in the U.S.⁷³

On June 12, 2007, some 160 ICE agents swept into the plant, arresting 167 workers.⁷⁴ The affidavit requesting the search warrant cites the *Willamette Week* article as one of the factors that supports the issuance of the warrant, and quotes over three pages and 19 paragraphs from the article, outlining unlawful required purchases of safety equipment, failure to pay overtime, and failure to pay for all hours worked. The affidavit also cites conditions noted by an ICE informant at the plant, “He observed the following extremely unsanitary and dangerous conditions: electrical extension cords that are beneath the standing water; the proximity of the workers who are wielding large knives to each other; the supervisors were not diligent about the cleanliness of the vegetables before boxing them up for shipment; and the employee bathroom and cafeteria are extremely dirty and not cleaned on a regular basis.”⁷⁵

Although ICE was clearly aware of the workplace labor violations, no indication exists that the agency considered the labor issues in its timing of the raid. While ICE informed state labor authorities that it intended to conduct a raid, and invited them to interview some of the workers, ICE provided no details. State authorities were able to interview a few of the workers who were released for humanitarian reasons, but most of the workers were sent to a detention center in

Tacoma, Washington, approximately 150 miles away. Labor authorities were never able to secure a definite commitment from ICE that if they traveled to Tacoma, the workers would be made available at a particular time and place. Nor is there any indication that ICE agents screened arrested workers as potential victims of human trafficking as provided for by the TVPA. Workers were simply placed in removal proceedings.

Had labor investigators had the opportunity to interview these workers, they would have learned of serious allegations of egregious labor standards violations. Following the raid, some of the workers filed a class action suit alleging a series of violations, including failure to pay overtime wages, discipline for complaining about workplace conditions, refused bathroom breaks, lack of safety training and disregard of workplace injuries, and a pattern of discrimination against Guatemalan and women workers.⁷⁶ Additionally, and independently of immigration officials, the Multnomah County Sheriff's Office opened a criminal investigation into the workplace violations, and signed "U" visas certifications for a number of victims.

SHIPLEY DO-NUT FLOUR AND SUPPLY COMPANY – HOUSTON, TX, 2008

The Equal Employment Opportunity Commission (EEOC) filed a lawsuit against Shipley in Houston in 2006 on behalf of one worker who was discharged after filing a national origin discrimination complaint. At the same time, a separate class action lawsuit was filed on behalf of the same plaintiff, Gerardo Guzman, and 14 other employees, claiming that they had suffered beatings, threats, sexual advances, and racial slurs, and that they had been forced to pay a supervisor for the opportunity to work overtime.⁷⁷

According to news reports, ICE initiated a criminal investigation of Shipley in January 2008, after learning of the federal employment discrimination lawsuit then pending in the Houston Division of the Southern District of Texas. A worksite raid followed in April 2008, during which 20 workers were arrested.⁷⁸ By summer 2008 some of the principals of Shipley were prosecuted for criminal violations of immigration law.

At first glance ICE appears to have followed appropriate procedures in the Shipley and Del Monte Fresh cases, since in both cases it waited until the conclusion of the civil cases before raiding the worksite. However, the end result of these two raids is that workers learn that a complaint about labor law violations results in an immigration raid. Workers also see that ICE seems more interested in their deportation than in protecting them as potential victims of trafficking (an issue that will be further discussed below). In many such cases, ICE says that its focus is on unscrupulous employers, and in the Shipley case, ICE pursued criminal charges against the employer – but not before workers were deported. A more effective policy in these circumstances would be for immigration authorities to use focused investigation techniques to uncover wrongdoing by an employer, rather than mass raids that target workers. Authorities should refer victims to the appropriate state and federal agencies, who should interview and protect them as witnesses or victims, rather than deporting them.

4. ICE has tolerated or taken part in subterfuge to lure workers into an enforcement action

In July 2005, ICE agents arrested 49 immigrant workers who were employed by subcontractors working on a housing project at an Air Force Base in Goldsboro, North Carolina. The workers had been presented with a flyer instructing them to attend a mandatory Occupational Safety and Health Administration (OSHA) briefing at the base theater, and were promised free coffee and donuts. When the workers gathered in the theater, the 'OSHA' agents informed them that they were actually ICE agents and arrested them.⁷⁹

OSHA complained that the trick undermined its efforts to develop trust in the already wary immigrant community. Allen McNeely, head of the North Carolina Labor Department's Occupational Safety and Health division, said "the ruse eroded trust between the Labor Department and the workers it is trying to keep safe ... We are dealing with a population of workers who need to know about safety. Now they're going to identify us as entrappers."⁸⁰ ICE eventually agreed to abandon its use of OSHA's name as a cover to snare undocumented workers.⁸¹

Since the North Carolina incident, ICE agents no longer appear to be masquerading as OSHA agents. However, reports exist that ICE agents have continued to misrepresent themselves in other ways or tolerated an employer's misrepresentation. In the Pilgrim's Pride case noted above, workers reported that the day before the raid, ICE agents came to the plant, representing themselves as fire safety inspectors, and went through the plant noting its physical layout and locating exits.

5. ICE enforcement actions have directly interfered with the administration of justice: arrests of workers on courthouse steps

When immigration authorities misrepresent themselves as agents intending to help workers protect themselves on the job, they undermine the work of other state and federal agencies. In some cases, immigration authorities have directly interfered with the justice system as it protects injured workers or prosecutes criminals. In the following two cases workers were arrested while in the process of enforcing their rights.

BILLY G'S TREE SERVICE – PROVIDENCE, RI, 2006

Edgar Velasquez was a 22-year-old migrant from Mexico who worked for a small landscaping company in Rhode Island. In March 2006, he was chopping tree branches with a chain saw. The saw struck a chain-link fence, kicked back and cut through his nose, left eyelid and forehead. Mr. Velasquez filed a workers' compensation claim, which was heard at a pre-trial hearing and then repeatedly continued. On August 2, 2006, Velasquez was arrested as he entered a Providence judicial complex. According to Mr. Velasquez, his employer stood by, smiling, and called out, "Now Edgar, I'm sending you back to Mexico ... I have no use for you now," and "Edgar, Adios!"⁸²

CARLOS CRUZ GALLEG0 – MIAMI, FL, 2007

ICE detained an undocumented day laborer after he testified in court against a man accused of attacking him. In November 2007, Carlos Cruz Gallego, a Colombian immigrant, was taken into custody at his Miami home shortly after he left the witness stand.⁸³

The Florida Immigrant Advocacy Center, which represented Mr. Cruz Gallego, says that the worker has the right to remain in the country while his “U” visa is pending. According to Gallego’s attorney, Brooke Greco, Mr. Gallego had a “U” visa petition pending at the time of his arrest, and had been cooperating with prosecutors to bring charges against his attacker. According to the attorney, “detention under these circumstances is totally unprecedented.”⁸⁴

V. THE NEED TO IDENTIFY AND ASSIST WORKERS WHO ARE VICTIMS OF LABOR TRAFFICKING RATHER THAN FOCUSING ON THEIR DEPORTATION

In a number of the cases, including Agriprocessors, Del Monte Fresh Foods, Shipley, and Woodfin, ICE was fully aware at the time it conducted its investigation that labor disputes and labor law violations were ongoing. Even though warrant applications, often prepared by ICE agents who are part of an anti-trafficking team, routinely cite labor law violations, these do not appear to have deterred ICE from workplace raids, in contravention of the OI and the MOU with the Department of Labor. Moreover, ICE failed to secure interviews with the workers as potential victims of trafficking, and failed to cooperate with workers' attempts to establish their status as trafficking victims.

Protection of victims and whistleblowers would be fully consistent with the OI, which provided that ICE should not deport workers who may be witnesses in prosecution of claims, and with the MOU, which calls on immigration authorities and the DOL to develop criteria for allowing witnesses and victims to stay in the country pending the outcome of investigations. The OI predated the Trafficking Victims Protection Act, which more broadly covers victims of labor law violations who are willing to cooperate with labor enforcers.

Under the Trafficking Victims Protection Act (TVPA), the U.S. monitors anti-trafficking efforts worldwide. In an annual report the U.S. State Department reviews the indicia of trafficking, conducts case studies worldwide, recommends "best practices," and generally evaluates foreign governments' anti-trafficking efforts.⁸⁵ A disconnect exists between the State Department's recommendations and the actual practices within U.S. law enforcement, including ICE. The State Department criticizes countries that focus on the voluntary nature of transnational movement but fails to see undocumented workers as potential victims of transnational organized crime. The State Department recommends that destination countries have systems in place to screen workers to identify victims of trafficking before they are deported for immigration violations. However, as this report has shown, deportations frequently occur in our own country without workers having been screened as potential victims of trafficking. While the Equal Employment Opportunity Commission has a program in place for screening victims of workplace crime, the DOL does not, despite that it is named in the regulations governing "U" visas as a certifying agency.⁸⁶ While the State Department identifies debt bondage for foreign temporary workers as a form of trafficking, the DOL has, in the past, refused to follow court rulings that would serve to cancel these debts.⁸⁷ And the State Department identifies confiscation of documents as a trafficking tool, but the U.S. has never prosecuted a major employer for document confiscation. To ensure that worksite

enforcement does not undermine the TVPA and the underlying labor rights of workers, federal agencies need to take a cooperative approach to identifying and protecting victims.

AUDUBON POINTE – NEW ORLEANS, LA, 2008

On February 27, 2008, ICE arrested and then detained several Honduran construction workers at the apartment building where they lived and worked in the New Orleans area. Audubon-Algiers, LLC employed these workers. They were living in a hurricane-damaged complex and working to rebuild it at the same time. Some workers alleged that they were often not paid for up to 16 weeks at a time. When the employer did pay, the payments were often only at bare subsistence levels to enable the workers to service increasing debts and to keep them on the job. When the workers tried to stop working in protest, they were routinely threatened with eviction, arrest, and deportation. On at least one occasion, workers who refused to work were locked out of their housing.

In a search warrant affidavit filed in Louisiana federal district court, ICE agents made clear that they knew workers were not being paid. “[The ICE informant], related that many times, the aforementioned workers were not paid for their services at which time they would refuse to work.” According to the informant, the business owner “demanded that she change the locks on the workers’ apartments and not allow them to continue living there.”⁸⁸ While the search warrant was authorized in an investigation for “harboring” and “employing illegal aliens,” the workers were arrested for violation of immigration laws. Despite ICE’s knowledge of labor violations at the work-site, the workers were not questioned about these. According to ICE interview notes, at least one worker indicated that he had not been paid for six-and-a-half weeks. Nor, to date, has ICE filed any charges against the employer, although workers arrested spent as long as nine weeks in ICE detention and were placed in deportation proceedings. While a U.S. district court judge certified the workers as victims of involuntary servitude eligible for “U” visas in April 2008, to date backlogs have prevented any of these workers from receiving a visa or the interim work authorization as provided under the TVPA.⁸⁹

VI. RECOMMENDATIONS FOR RESTORING THE BALANCE BETWEEN IMMIGRATION AND LABOR LAW ENFORCEMENT

Our nation's public policy must ensure that enforcement of immigration laws does not interfere with workers' exercise of workplace rights, including the right to join and form unions. But as the cases described in this report reflect, that policy has been turned on its head. This report illustrates the serious impact on workers, both native and immigrant, of allowing immigration enforcement to overshadow the equally important goal of protecting labor rights. The recommendations that follow will help restore balance to enforcement in ways that ensure fulfillment of both priorities.

Recommendations to the Obama Administration:

- The Administration should establish a Taskforce to oversee the development and implementation of policies that ensure that enforcement of immigration laws does not interfere with workers' exercise of their rights;
- The Taskforce should include representatives from the Department of Labor (Wage and Hour Division, Office of the Solicitor and others); Department of Homeland Security (Immigration and Customs Enforcement, Citizenship and Immigration Services and others); the Department of Justice; the Department of State; and the Domestic Policy Council;
- The Taskforce should revise existing policies (the Labor Dispute Operating Instruction and Memorandum of Understanding) as set forth below, and develop other policies as necessary. In so doing, the Taskforce should work with the National Labor Relations Board, the Equal Employment Opportunity Commission and other appropriate agencies;
- The Taskforce should hold regular public meetings, where all social partners have an opportunity for input and dialogue.

Recommendations to the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE):

- ICE should revive its policy of non-interference in labor disputes (Operating Instruction 287.3a, “Labor Dispute Operating Instruction”);
- ICE should revise the Labor Dispute Operating Instruction to ensure that immigration enforcement, including I-9 audits, does not interfere with workers’ exercise of workplace rights in all instances, not only when enforcement is based on tips from employers;
- ICE should ensure that the definition of labor dispute encompasses all labor and employment rights, including the right to join a union and bargain collectively; be paid the minimum wage and overtime; to have safe work places; to receive compensation for work related injuries; to be free from discrimination based on race, gender, age, national origin, religion, handicap, or to retaliate against employees for seeking to vindicate these rights;
- ICE should issue a directive to all field offices to abide by the terms of the Labor Dispute Operating Instruction, and ensure, through its Worksite Enforcement personnel and other appropriate avenues, that the OI is fully distributed throughout the agency, and incorporated into policy and training manuals;
- ICE should train all agents involved in workplace enforcement on the use of the Labor Dispute OI. This training should be part of an initial training for existing agents, part of training for new agents at the Federal Law Enforcement Training Center and part of the annual training updates; should designate a Labor Dispute OI contact a person in each Regional Office and in the office of the Chief of Worksite Enforcement;
- ICE should ensure that all signatories to 287(g) agreements receive the same training on the Labor Dispute OI as do ICE personnel, and agree to abide by it as one of the terms of the 287(g) Memorandum of Agreement; and
- In addition to amending the 287(g) agreements, the OI should address local law enforcement’s involvement in labor disputes that result in workers being detained.

ICE should improve agency protocol in worksite investigations

ICE should take all necessary steps to determine whether a labor dispute exists at the site of any planned worksite enforcement action, including I-9 audits. In particular:

- ICE should consult with labor enforcement agencies, including federal and state Departments of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board, and the U.S. Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to determine whether a labor dispute is in process;

- ICE should contact labor enforcement agencies, including federal and state Departments of Labor, the Equal Employment Opportunity Commission, and the National Labor Relations Board, and the U.S. Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), if during an enforcement action workplace violations are discovered that were not previously identified;
- ICE should require agents to document the source of any “tips,” and reject “tips” from employers or from individuals who refuse to identify themselves;
- ICE should not target its worksite raid or enforcement actions based on media reports or other accounts of worker assertion of labor standards rights, including news accounts of lawsuits for unpaid wages or workers’ compensation claims;
- ICE should inform “tipsters” that it is a violation of federal labor law to report workers to ICE in retaliation for workers’ exercise of their rights;
- ICE should not initiate any worksite enforcement action if an employer or other entity (including local law enforcement) calls ICE with a “tip” when labor dispute is in progress;
- ICE should refer any employer (or its agent) who reports workers to ICE during a labor dispute for prosecution by the appropriate agency;
- ICE should document compliance with the Labor Dispute OI in each worksite investigation, including the steps agents took to determine whether a labor dispute is in progress, its consultations within the agency and with other labor and law enforcement agencies;
- ICE should take all necessary steps to identify potential victims of trafficking and other crimes and coordinate with CIS in a timely manner;
- ICE should expedite work authorization and access to “T” and “U” visas for victims of trafficking and other immigration relief in cooperation with other state and federal agencies and NGOs;
- ICE should not engage in surveillance at the site of a vigil, picket or any other lawful demonstration in support of workers;
- ICE should not masquerade as personnel from an agency or organization that enforces health and safety or other labor laws, provides health care or domestic violence services, or any other services intended to protect life and safety; and
- ICE should formally adopt the revised DOL-INS MOU.

Recommendations to the Department of Labor:

- DOL should revise the Memorandum of Understanding so that it applies to all WHD investigations, including those initiated by individual complaints and by the agency;
- DOL should develop a protocol for training its officers in the substance of its MOU;
- DOL should revise its Field Operations Handbook to make it consistent with the Memorandum of Understanding and to make it clear that it plays no part in enforcement of employer sanctions;
- DOL should train and enable its investigators to identify, screen and certify victims of trafficking and to make appropriate referrals in these cases;
- DOL should designate a person in its regional offices and national headquarters to be the point person on the MOU and the point of contact for ICE in its coordinating role;
- DOL should have a written policy that forbids agency personnel from reporting workers' immigration status to ICE in both complaint-driven and targeted investigations;
- DOL should train all WHD investigators and others on implementation of the OI; and
- In order to ensure that all workers can pursue their claims, DOL should not require Social Security Numbers for labor claims at the liability stage.

Recommendations to other labor law enforcement agencies—National Labor Relations Board, Equal Employment Opportunity Commission, Office of Special Counsel for Unfair Immigration-Related Employment Practices:

- Each agency should have in place a Memorandum of Understanding that delineates its agreement with ICE to protect workers' rights in the context of immigration enforcement, and that covers all compliance investigations—complaint-driven and targeted—by the agency;
- Each agency should develop a protocol for training its officers in the substance of its Memorandum of Understanding;
- Each agency should designate a person in its regional and/or national headquarters to be the point person on the Memorandum of Understanding and the point of contact for ICE in its coordinating role;
- Each federal agency that enforces workplace rights should have a written policy in place that forbids agency personnel from reporting workers' immigration status to ICE in complaint-driven and targeted investigations; and
- Each agency that is designated as a certifying agency for trafficking visas should train its front line officers to identify cases of trafficking, make certifications and make appropriate referrals to other agencies.

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AFL-CIO

815 16th Street NW
Washington, DC 20006

www.aflcio.org

**AMERICAN RIGHTS AT WORK
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1100 17th Street NW, Suite 950
Washington, DC 20036

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75 Maiden Lane, Suite 601
New York, NY 10038

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