EQUAL JUSTICE CENTER

510 S. Congress Ave.
Suite 206
Austin, TX, 78704
(512) 474-0007

Statement of Bill Beardall
Director of the Equal Justice Center and the
Transnational Worker Rights Clinic – University of Texas School of Law

before the U.S. House of Representatives Committee on Education and Labor

Hearing on: "Do Federal Programs Ensure U.S. Workers are Recruited First Before Employers Hire from Abroad"
Tuesday, May 6, 2008

Mr. Chairman, members of the Committee, thank you for the opportunity to address the critical issue of whether federal programs adequately protect the jobs and working conditions of U.S. workers in a labor market that includes high numbers of documented and undocumented immigration.

I am the Executive Director of the Equal Justice Center and have practiced as an employment lawyer for low-income working people for 30 years. I also serve as a clinical professor of law at the University of Texas Law School, where I direct the Transnational Worker Rights Clinic.

The Equal Justice Center (EJC) is a privately-funded, non-profit employment justice organization based in Texas which helps low-income working men and women enforce their employment rights, especially when they have not been paid for their labor. In the Transnational Worker Rights Clinic at the University of Texas School of Law, our law students represent low-wage workers in cases to recover their unpaid wages, while pioneering new methods for protecting the wage rights of all workers in our transnational labor economy. Both programs represent low-income working people regardless of their immigration status and many of our clients are U.S. citizens and legal immigrants.

Summary

In my testimony before this Committee, I would like to focus on three key points which I hope will assist the Committee in devising wise and realistic policies related to immigrant labor and protection of U.S. workers:

1) Our federal government's failure to enforce wage laws and other employment protections for *all* workers has increased the exploitation of undocumented workers and thereby depressed the wages, working conditions, and job opportunities of U.S. workers.

2) The best and most immediately available means to sustain job opportunities and wages for U.S. workers is to ensure that wage laws and other labor protections are fully enforced for all workers regardless of their immigration status.

3) Future immigration reform legislation and guestworker policies are doomed to fail U.S. workers, if they do not include full labor protections and full ability to enforce these protections for all workers regardless of their immigration status

The Federal Government's Failure to Enforce Wage Laws and Other Employment Protections for All Workers Has Increased the Exploitation of Undocumented Workers and Thereby Depressed the Wages, Working Conditions, and Job Opportunities of U.S. Workers

This Committee has heard testimony today, and on many previous occasions, about the failure in our federal *guestworker* programs to ensure that U.S. workers are given full and fair opportunity to secure those jobs at fair wages and decent working conditions. Serious as the failure has been in these guestworker programs, there is another federal program failure that has an even larger adverse effect on job opportunities, wages and working conditions of U.S. citizens and legal work-authorized immigrants – and that is the federal government's failure in the broader low-wage labor market to enforce our most basic labor, employment, and civil rights laws. I am speaking here of the federal government's failure to fully and effectively enforce the minimum wage and overtime laws, our workplace safety laws, union and collective bargaining rights, and laws forbidding discrimination on the basis of race, national origin, and gender.

This failure to enforce workplace protections has had the effect of depressing wages and working conditions for all workers – *especially* for U.S. citizens and legal work-authorized immigrants. Moreover, the failure to enforce our labor, employment, and civil rights laws has created an ironic incentive for unscrupulous employers to actually *prefer* hiring undocumented immigrants over U.S. workers. The main reason so many employers prefer hiring undocumented workers is because – in the absence of effective federal enforcement of worker protection laws – employers know their undocumented workers are easier to exploit and easier to intimidate into silence.

A Graphic Illustration of How Some Employers Use Immigration Status to Exploit Workers

I would like to illustrate how I see this harsh reality play out every day with a graphic example, which comes from my own practice: I have provided the Committee with an audio recording of a voice mail message that was left on the cell-phone voice mail of one of my clients, by his employer.

Background to the recorded message: My client, whose name was Gabriel, had performed some basic landscaping labor on a home construction project. Gabriel came to our office because his employer had failed to pay Gabriel approximately $600.00 owed to him for a couple of weeks of work. Gabriel explained that, in his continuing effort to collect the wages he had earned, he had gone back to the worksite to look for the employer. The employer was not there, but the homeowner was and the homeowner asked Gabriel why he was looking for the employer. Upon hearing Gabriel's explanation, the homeowner, wanting to be helpful, said he would try to get a message to the employer on Gabriel's behalf. The employer apparently got the message and then called Gabriel on his cell phone leaving the voice message that is transcribed in Attachment A to this statement.

In the voice message (Attachment A), the employer, in language that is both explicit and menacing, threatens to turn Gabriel over to both immigration authorities and local enforcement and to use Gabriel's perceived immigration status to "ruin" him. At the end of the message, the employer makes it clear he will continue to refuse to pay the worker his earnings.

What is remarkable about this audio recording is not that the employer sought to intimidate the employee in this fashion; such threats are made, in one form or another, probably thousands of times a day across our nation. The only thing that makes this message unique is that it was captured on an audio recording and that it is so disturbingly explicit.

This recording helps illustrates (1) how some employers use their workers' undocumented status to exploit them; (2) why it is many employers prefer to hire undocumented workers over U.S. workers who would not be so subject to intimidation and exploitation of this type; and (3) how more vigorous enforcement of wage laws and other employment protections for all workers – documented and undocumented – is essential if we ever hope to uphold basic employment rights and opportunities for U.S. workers.

Federal Government Enforcement of Wage Rights and Other Employment Protections for *All* Workers is Vital to Sustaining Wages, Working Conditions, and Job Opportunities for U.S. Workers.

It should be noted here, that under our system of employment laws, *all* workers have historically been protected by the same wage, safety, and labor protections – regardless of their immigration status.[1] We have always observed this principle as a nation for the very sound reason that, if we allow one group of workers to be treated as second-class employees with second-class employment rights, this would inescapably lead many employers to *prefer* those second-class workers and would thereby undermine the employment rights of all other working people.

But just as important as ensuring that all workers are nominally covered by the same wage and other employment protections, it is vital to that we effectively *enforce* those wage and employment protections fully for all workers - and equally regardless of the workers' immigration status. So long as we continue failing to effectively enforce the wage laws and other employment protections for any workers, the special vulnerability and exploitability of undocumented workers will cause them to be, in effect, second class workers with second class employment rights and will perversely make them more attractive to many employers. Easy exploitation of such second-class workers undermines the wages and working conditions of all workers because it stimulates a "race to the bottom" competition and reduces opportunities for workers to protect their wages and working conditions through collective action.[2]

If we are successful in returning the federal government to its historic role of protecting the rights of working men and women, it will be crucial that the responsible federal agencies enforce the laws vigorously for all workers, regardless of their immigration status. Otherwise, the differential enforcement would continue to consign undocumented workers and guestworkers to the status of second-class workers with second-class rights status and would perpetuate the exploitative preference for undocumented workers and the self-defeating adverse impact on employment opportunities and employment protections for U.S. workers that have been noted above.

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[1] An important, but still-limited, recent exception to this principle is the U.S. Supreme Courts holding in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275 (2002). See further discussion of this ruling and its consequences below.

[2] *See, for example.,* Amy M. Traub, PRINCIPLES FOR AN IMMIGRATION POLICY TO STRENGTHEN & EXPAND THE AMERICAN MIDDLE CLASS: 2007 EDITION (Drum Major Institute for Public Policy, 2007), available at http://drummajorinstitute.org/immigration/; Jennifer Gordon, TESTIMONY BEFORE THE SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES (Fordham University School of Law, June 21, 2005), available at http://judiciary.house.gov/OversightTestimony.aspx?ID=431.

Future Immigration Reform Legislation and Guestworker Policies are Doomed to Fail U.S. Workers, if They do not Include Full Labor Protections and Full Ability to Enforce these Protections for All Workers Regardless of their Immigration Status

Immigration reform measures and guestworker policies that do not have as a central element the full enforcement of full labor protections for all workers – documented and undocumented – will inevitably be self-defeating. As outlined above, the lack of wage and other labor protections – or equally important the ability to enforce these protections – gives many employers a powerful incentive to *prefer* these more tractable and exploitable employees. History teaches us that a willing and desperate workforce will find employers willing to take advantage of their availability, reduced-cost, and exploitability. This preference for undocumented workers is not theory. It is exactly what happened in the late 1980's and 1990's in response to the imposition of a ban on hiring unauthorized immigrants (so-called "employer sanctions") in the 1986 Immigration Reform and Control Act.[3]

Moreover, as illustrated by the audio recording discussed above, without vigorous and affirmative enforcement of wage laws and other labor protections, many employers twist immigration law into a tool to intimidate or punish workers seeking to enforce their labor rights. Many of them knowingly violate IRCA's employment verification provisions to hire undocumented workers whom they know will then be reluctant to hold them accountable for labor law violations. As in the audio recording, it is common practice for these same employers to use the existence of the employer sanctions scheme to threaten undocumented workers with deportation if they do indeed complain about non-payment of wages or other deplorable working conditions. In other examples, an employer may not verify a worker's employment authorization at the time of hire but will conveniently remember the requirements under IRCA only after the worker complains of some labor violation or attempts to organize a union to improve their working conditions. Implementation of a system that only enforces hiring sanctions without increased enforcement and improvement of existing labor and employment protections will further exacerbate these problems, and create additional incentives for unscrupulous employers to recruit, hire and exploit even more unauthorized workers. This exploitation of course not only harms the undocumented worker, it just as surely harms U.S. born workers who find their job opportunities, wages and working conditions undermined by the incentives thus created for employers to hire and take advantage of vulnerable undocumented workers.

These same dynamics are true for guestworker programs. If guestworkers are not protected by the full set of labor and employment protections, or if they are not afforded fully effective and affirmative government and private enforcement measures, then employers have a strong incentive to prefer hiring the guestworkers over U.S. workers – and an equally strong incentive to exploit them in ways that undermine job opportunities, wages and working conditions of U.S. citizens and permanent resident immigrants.

In addition to increasing the opportunity for exploitation of vulnerable workers, an immigration policy that relies on employer sanctions and lacks strong labor rights enforcement will be counter-productive for three other important reasons: First, it will create an economic incentive

[3] Donato, K. M., J. Durand and D. S. Massey. 1992. Stemming the Tide? Assessing the Deterrent Effects of the Immigration Reform and Control Act, *Demography* 29: 139-158.

for even more employers to hire workers "off-the-books" in unreported, cash- based employment relationships.[4] Second, it will encourage more employers to evade employer sanctions by misclassifying their employees as "independent contractors." Third it will encourage companies to interpose substandard, middleman labor contractors between themselves and their employees, pretending the workers are employees of these sham contractors and exposing the workers to marginal fly-by-night employment practices by the middlemen. All of these practices in fact increased dramatically following the imposition of employer sanctions in the 1986 IRCA. And all of these practices have harmful economic and social impacts beyond the increased exploitation of workers. For example, they increase our reliance on an unregulated cash economy; reduce the collection of payroll and income taxes; reduce participation in the unemployment insurance, workers compensation and social security safety net programs; reduce the ability of government regulators and workers to monitor and enforce basic labor protections; and reduce employers' general respect for operating legally and above-board. These substandard practices have an adverse effect on everyone in our society, but they are especially – and ironically - harmful for U.S. workers, whose employers will be forced to compete with a growing sector of businesses that are unconstrained by the regulatory apparatus that is supposed to protect us all and is designed to underpin our basic standard of living.

Indeed it is not just *unscrupulous* employers who respond to the negative incentives created by the lack of vigorous enforcement of wage and employment rights. Even legitimate employers end up being compelled to rely more on low-cost undocumented labor and substandard employment practices or to contract their work out to exploitative contractors or suffer a competitive disadvantage and risk going out of business.

Stronger Enforcement of Wage and other Employment Protections for All Workers is the Single Most Promising Strategy that is Immediately Available to Manage our Immigration Challenge and Support U.S. Workers

As a practical matter, the only law enforcement approach that is very likely to succeed in addressing the problems associated with unauthorized employment in our economy is the comprehensive enforcement of labor and employment protections for all working people without regard to their immigration status. This would be by far the most effective way to remove employers' incentive to hire and exploit unauthorized workers, while also removing employers' incentive to adopt substandard employment practices that evade our core tax, social benefit, and regulatory systems. On the other hand, ramping up enforcement of employer hiring sanctions alone will surely do more harm than good, at least without vastly increased enforcement of employment protections for both undocumented and documented workers.

If immigrants enjoy the same workplace protections and economic mobility as others, they will be less subject to exploitation at the hands of employers whose practices will then undermine the wages and working conditions of other workers. In addition, there is evidence that raising the wages and working conditions of low-wage workers will actually reduce immigration by making the existing workforce of U.S. workers more attractive to employers relative to undocumented

[4] *See* Jim McTague, "The Underground Economy: Illegal Immigrants and Others Working Off the Books Cost the U.S. Hundreds of Billions of Dollars in Unpaid Taxes," THE WALL STREET JOURNAL CLASSROOM EDITION, April 2005, http://wsjclassroom.com/archive/05apr/econ_underground.htm; Lora Jo Foo, "The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation," YALE LAW JOURNAL, 103 Yale L.J. 2179, May 1994, available at www.wiego.org/papers/FooImmigrantWorkers.pdf.

workers.[5] Therefore, it is imperative, for the benefit of all workers, to eliminate the vulnerabilities and marginalization inherent in the existence of a large, economically vulnerable undocumented workforce. In the long run the only practical way to do this is to enact comprehensive immigration reforms that (1) provides a comprehensive path to earned legal status for currently undocumented immigrants; and (2) provides an orderly and realistic means for the future flow of immigrant workers to be employed in our economy while upholding U.S. labor standards for all workers. But in both the short- and long terms the most important step we must take is to ensure that all immigrants – current and future, documented and undocumented – are protected by full labor and employment rights and by fully effective status-blind enforcement of those rights.

The U.S. Department of Labor Should Attend to Three Special Aspects of Its Enforcement of Wage and Hour Laws to Effectively Uphold the Rights of Both U.S. Workers and Immigrant Workers

Three special points should be emphasized regarding enforcement of the wage and hour laws by the U.S. Department of Labor (USDOL). First, it is not enough for the Department of Labor to enforce wage and hour laws based mainly on complaints by made by employees. As noted, undocumented workers are particularly vulnerable to intimidation and have reason to be particularly reticent about enforcing their employment rights or otherwise making themselves visible – particularly to an agency of the federal government. For that reason the USDOL must return to aggressively exercising its traditional authority to undertake investigations and enforcement actions on its own initiative, especially in those industries where exploitation of undocumented workers is widespread.

Second, it is critical that USDOL enforcement of wage and hour laws be carefully separated from enforcement of immigration laws by the Department of Homeland Security (DHS). Under a now long-standing Memorandum of Understanding between the USDOL and the former Immigration and Naturalization Service (and now with the DHS), the USDOL is not to undertake enforcement of immigration laws in connection with investigations driven by complaints from workers. That is not currently true however for investigations of wage violations that are undertaken by the USDOL on its own initiative. Nevertheless separation of wage and hour enforcement from immigration enforcement *should* be maintained in both types of USDOL investigation. Otherwise, workers, who are normally key witnesses in such cases will not make themselves available to assist the USDOL investigation and USDOL enforcement capability will be dramatically undermined, to the detriment of U.S. workers who depend on such investigations to uphold wage and hour standards for all employees. USDOL should reaffirm, update and refine its policies on separation wage and hours enforcement from immigration enforcement.

Third, the USDOL should revise and strengthen its policies with respect to workers' ability to make anonymous complaints and with respect to keeping the identity of complaining workers confidential in appropriate cases. Workers' organizations and employee advocates would gladly cooperate with the USDOL to devise new policies that appropriately balance employees' need to be protected from retaliation by their employers against the need to properly verify the authenticity of complaints and ensure due process for employers. Strengthened policies in this

[5] "How L.A. kept out a million migrants" Ivan Light, Los Angeles Times, April 16, 2006.

area are especially vital to ensure that employers are not able to underpay undocumented workers to the detriment of all workers, including citizens and lawful work-authorized immigrants.

The Private Right of Action is a Vital Form of Federal Enforcement and Should be Preserved and Strengthened in Future Labor and Immigration Legislation

Since the establishment seventy years ago of the federal wage and hour laws, a critical component of the federal enforcement policy has been enforcement of the law by employees themselves, through their ability to enforce their rights through private actions in the courts. This has proven to be an indispensible aspect of enforcement which complements agency enforcement by the USDOL. Indeed in recent years as agency enforcement efforts by the USDOL have flagged, this private right of action has had to shoulder most of the burden of sustaining enforcement of the wage and hour laws and has served as the most effective on-going check against employer abuses of all workers, including U.S. workers. Moreover, the private right of action is an especially cost-effective enforcement tool in that it imposes very little direct expense on the federal government and the ordinary taxpayer; instead it shifts the cost of enforcement onto those employers who are proven to have violated the law and harnesses free market incentives to encourage compliance with the law.

As the Congress considers future legislation related to guestworker programs and immigration reform, it should make optimum use of the private right of action approach, supporting the right of all working people to full and equal access to the courts and equal ability to enforce their wage rights and other employment protections regardless of their immigration status. This is an area in which it is particularly important to avoid consigning guestworkers, transitional immigrant workers, and undocumented workers to a second-class set of rights, with a consequent adverse impact on U.S. citizen employees and other lawful immigrant workers.

Restrictions on the Federal Legal Services Program have Resulted in a Failure to Ensure that Job Opportunities, Wages, and Working Conditions of U.S. Workers are Protected

The private right of action is one of the most effective, cost-efficient, and available remedies through which working people can enforce their wage and hour rights. However, for most low-income working people the only viable avenue for obtaining legal representation to help them enforce their wage and hour rights or other labor protections, is through legal aid programs funded through the federal Legal Services Corporation. Yet for the last decade, these federally funded legal services programs have been prohibited from providing legal assistance to immigrant workers who are undocumented, or to immigrants lawfully present in the U.S. under the H-2B guestworker program, or to lawful immigrants residing in the U.S. under several other forms of immigration status. The fact that these workers do not have an effective means to enforce their wage and other employment rights has made them especially attractive to many employers and has fed these employers' preference for hiring these workers over U.S. citizens and other documented workers. This restriction on the federal Legal Services Corporation and its grantees turns out to be one of the principal mechanisms that has turned undocumented workers and hundreds of thousands of legally-documented into a huge underclass of second-class workers with second-class employment rights. And as noted above, the resulting exploitability of this huge underclass of workers has severely undermined the job opportunities, wages, and

working conditions of all U.S. workers.

Congress Should Enact Legislation to Eliminate the Adverse Impact of the *Hoffman Plastic* Decision on Enforcement of Labor Protections for All Workers, but in the Meantime Agencies Such as the USDOL Should Not Be Deterred from Enforcing Wage Laws and Other Labor Protections

While it has been noted above that all workers, regardless of immigration status, continue to be covered under labor and employment protective laws, a 2002 Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*,[6] has had a dampening effect on immigrant workers' ability to exercise some of their rights. The *Hoffman* decision found that undocumented workers who are illegally fired for engaging in union organizing activities are not entitled to receive back pay wages, the only really effective remedy available under the National Labor Relations Act (NLRA). The *Hoffman* decision was limited to undocumented workers' right to back pay under the NLRA, but employers have attempted to extend the scope of the decision to workers who have filed complaints of discrimination, minimum wage and overtime violations, health and safety violations, and even personal injury cases.[7] A 2004 Human Rights Watch report noted that "[e]mployment law in the wake of *Hoffman Plastic* remains in flux, and immigrant workers' rights remain highly at risk."[8]

The *Hoffman* decision has actually undermined the employer sanctions system by creating a new economic incentive to hire undocumented workers: companies *benefit* if they hire undocumented workers because they perceive such workers as carrying reduced liability for labor law violations.[9] The decision also weakens the position of *authorized* workers confronting abuse or exploitation because their undocumented coworkers have fewer legal avenues for redress of labor violations, including unlawful retaliation, and therefore they have far less incentive to participate in efforts to improve conditions, such as by serving as a witness in a sexual harassment, discrimination, or wage claim. Businesses that take advantage of this situation can cut legal corners and thereby gain a competitive advantage over law-abiding employers.

Strong labor law protections for all workers can be meaningfully realized only if the law prohibits employers from using a worker's immigration status to interfere with these rights. The fear and division resulting from the *Hoffman* decision has had an adverse impact on all workers' rights, including the right to organize and bargain collectively.[10] *Hoffman* also has resulted in limiting workers' access to the legal system, particularly since many of the cases being litigated

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[6] 535 U.S. 137, 122 S.Ct. 1275 (2002).

[7] *See, e.g.,* cases where Hoffman has been expanded to deny immigrant workers basic employment and labor rights: Crespo v. Evergo Corp., N.J. Super. Ct. App. Div. No. A-3687-02T5 (Feb. 9, 2004) (denying victim of pregnancy discrimination back pay, economic damages for emotional distress); *R*enteria v. Italia Foods Inc., N.D. Ill., No. 092-C-495 (Aug. 21, 2003) (workers fired for filing an overtime pay), *see* www.nilc.org/immsemplymnt/emprights/emprights067.htm; Majlinger v. Casino Contracting, et al., 2003 N.Y. Misc. LEXIS 1248 (Oct. 1, 2003) (workers' compensation denied to injured worker), *see* www.nilc.org/immsemplymnt/emprights/emprights072.htm.

[8] BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS (Human Rights Watch, 2004), www.hrw.org/reports/2005/usa0105/.

[9] *See, for example,* Christopher Ho and Jennifer C. Chang, "Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies For Protecting Undocumented Workers in the Title VII Context and Beyond," HOFSTRA LABOR & EMPLOYMENT LAW JOURNAL, Vol. 22:473, 2005, available at http://www.hofstra.edu/pdf/law_labor_Ho_Chang_vol22no2.pdf.

[10] *id.*

arise from defendants seeking discovery into the plaintiffs' immigration status, which serves to chill and intimidate immigrants from pursuing legal claims.[11]

For these reasons, the Congress should act to restore the fundamental employment rights that were diminished by the *Hoffman Plastic* ruling, rejecting the Supreme Court's supposition that our immigration laws "trump" our employment laws. As long as the *Hoffman Plastic* is the law of the land, it will undermine job opportunities and employment protections for U.S. workers as much or more than for undocumented immigrants.

In the meantime, however, courts have continued to emphasize that the *Hoffman Plastic* ruling does not diminish the rights of any worker under the Fair Labor Standards Act to recover unpaid wages for labor they have already performed.[12] It is especially important for the USDOL to vigorously enforce the wage and hour laws and workplace safety laws under its jurisdiction without regard both to immigration status, both to protect the rights of U.S. workers and immigrant workers and to dispel the widespread mistaken impression among many employers that somehow the *Hoffman Plastic* decision gives them a free hand to hire and then exploit undocumented immigrants without fear of enforcement by these immigrant workers.

Expanding Sanctions on Employers for Hiring Unauthorized Workers and Requiring an Electronic Employment Verification System as Currently Proposed Would Do More Harm than Good for U.S. Workers

The solution to our current immigration challenge lies in (1) reforming our immigration laws in a comprehensive and realistic way – one that also includes strengthening our labor, employment, and civil rights laws, and (2) vigorously enforcing these laws. The Equal Justice Center does not support an expansion of the employer sanctions scheme, including the pending legislation that would mandate an Electronic Employment Verification System (EEVS), because of the way in which such schemes have been used to circumvent and weaken workers' rights. The currently pending EEVS proposals would result in negative consequences for workers who are U.S. citizens and work-authorized immigrants and they do not include basic safeguards that are necessary to deter employers from knowingly hiring and exploiting undocumented workers.

As Congress considers creating a mandatory EEVS, this Committee must understand that an approach that relies only on enforcement of hiring sanctions will not solve the problems associated with unauthorized employment. In fact it is doomed to fail – again – as it did after 1986. An employment verification system has no real chance of succeeding unless it is also accompanied by (1) a comprehensive opportunity for currently undocumented immigrants to earn legal status; (2) a realistic opportunity for the future flow of immigrant workers to work in our economy with fully effective employment rights; (3) vigorous, status-blind enforcement of

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[11] *See* Rivera et al., v. Nibco, Inc., 364 F.3d 1057 (9th Cir. 2004) (upholding a protective order prohibiting the disclosure of plaintiffs' immigration status noting that "while documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution").

[12] *E.g., Ponce v. Tim's Time Inc.,* 2006 WL 941963 (N.D. Ill., 2006)*; Galaviz-Zamora v. Brady Farms,* 230 F.R.D. 499 (W.D. Mich. 2005)*; Bernal v. A.D. Willis Company, Inc.,* No. SA-03-CA-196-OG (W.D. Tex., San Antonio Div., April 1, 2004, unpublished order denying motion to compel); *Renteria v. Italia Foods, Inc.,* 2003 WL 21995190 (N.D. Ill. Aug. 2, 2003)*; Flores v. Amigon,* 233 F.Supp.2d 462 (E.D.N.Y. 2002)*; Zeng Liu v. Donna Karan International, Inc.,* 207 F.Supp.2d 191 (S.D.N.Y. 2002);*, citing In Re Reyes,* 814 F. 2d 168 (5th Cir. 1987)*; Flores v. Albertsons, Inc.* 2002 WL 1163623 (C.D. Cal. April 9, 2002)*; Singh v. Jutla,* 214 F.Supp.2d 1056 (N.D. Cal. 2002); *Cortez v. Medina's Landscaping,* No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D.IL. Sept. 30, 2002).

our nation's labor and employment laws for U.S. workers, documented immigrant workers and undocumented immigrant workers alike.

It is in this context that we ask Congress to consider an approach to immigration worksite enforcement that doesn't rely *only* on enforcement of hiring sanctions, but also addresses the way in which immigration law often "trumps" labor law. Without addressing this problem, an enforcement-only policy will be counter-productive because it will not address the economic incentive that employers have to hire undocumented workers through subterfuges that entirely bypass out system of basic wage and employment protections, including moving into the underground economy, misclassifying workers as independent contractors, and using sham subcontracting arrangements.[13]

This last point is critical: the main effect of the EEVS proposals currently pending in the Congress will likely be to encourage many employers to evade the EEVS system by misclassifying their employees as independent contractors or by pretending that their employees are employed by some fly-by-night, sham entity. Since and employer would only be responsible for verifying its own employees under the EEVS, this simple evasion, based on sham mischaracterization of the workers' employment status, would sidestep the intended purpose of the EEVS. This has already been one of the primary consequences of the IRCA employer sanctions and the current EEVS proposals would merely intensify this effect. Moreover, when we induce employers to mischaracterize the true employer-employee status of their workers, we deny the working men and women of our nation the basic employment protections which apply to employees but not to independent contractors – protections like the minimum wage, overtime compensation, unemployment insurance, workers compensation.

There is also another simple device many employers would be given an incentive to use to avoid the pending EEVS proposals. Just as the IRCA employer sanctions have done, the pending EEVS proposals would encourage many employers to simply conduct their employment relationships entirely off-the-books in an underground cash economy, often without even bothering to characterize the worker as an independent contractor since no payroll records or reporting are done anyway.

The ease with which the simple evasions can be accomplished serves to point out again how no scheme of immigration control – even the most carefully crafted – can be successfully and constructively implemented unless they are accompanied by comprehensive and vigorous enforcement of labor and employment laws as an integral component of the scheme.

In addition, to protect U.S. workers and authorized immigrants, who will all be required to comply with any mandatory EEVS system, any EEVS legislation should include safeguards – not found in the current proposals – to ensuring that: (1) The EEVS requirements are phased in at a realistic rate after meeting objective benchmarks for database accuracy, privacy, and employer compliance with system requirements; (2) The EEVS requirements will apply only to new hires; (3) Enforceable measures are in place to prevent employer misuse of the electronic database to discriminate or retaliate against workers; (4) Workers have due process protections against erroneous determinations; (5) Strict privacy and identity theft protections are in place; (6) There will be independent monitoring and reporting on the accuracy and integrity of the system and on any employer misuse of the system; (6) Employees will have realistic flexibility in the

[13] *See* fn. 4 *supra.*

documents they can provide to demonstrate that they are work-authorized; (7) Newly legalized immigrant employees will show up in the verification system; and (8) The Social Security Administration and apparatus will not be diverted from its core function of providing a social safety net for workers who retire or become disabled.

Conclusion

In our legitimate efforts to uphold job opportunities and employment protections for U.S. workers in our now thoroughly global economy and labor market, it is critical to remember that enforcement measures intended to control undocumented immigration may instead have the unintended and counter-productive effect of encouraging many employers to hire and exploit of undocumented immigrants. Moreover, in the real world labor market, the unchecked exploitation of undocumented immigrants depresses the wages and working conditions of U.S. workers and undermines the integrity of our system of employment laws. The only effective method for upholding job opportunities and employment protections for U.S. workers is to vigorously and comprehensively enforce our wage laws and other employment protections for all workers, regardless of their immigration status. While comprehensive enforcement of employment laws is not a magic bullet that will solve the entire immigration challenge, it is the most effective method currently available for dealing with that challenge – and no approach to the immigration dilemma can succeed without comprehensive enforcement of the employment rights of all workers in our economy.[14]

[14] I wish to acknowledge the National Immigration Law Center for its contribution to much of the analysis, content, and research included in this statement.

Attachment A

Transcript
Voice message left by an employer
on the cell phone of an employee who was seeking to be paid for his labor
Austin, Texas - June 2004

(see background following the transcript)

"Gabriel, its _____ . I just got a call from the homeowners of the house that y'all did work at and they said that y'all went – that you went by looking for money. Gabriel, if you ever f___ing do that again, I will turn your f___ing brown ass into INS and I will personally escort you to the g__d___ border. F___ with me anymore, and I'm gonna ruin you, Gabriel. Don't f___ with me anymore. You go back to that house, and I swear to God I will take this to the next level and I will turn you in to the Sheriff's department. Good luck on any – on getting – on getting any more money." [end of message]

Background:
Employee, Gabriel, had performed some basic landscaping labor on a home construction project in Austin, Texas. Gabriel came to the Equal Justice Center, office because his employer had failed to pay Gabriel approximately $600.00 owed to him for a couple of weeks of work. Gabriel explained that, in his continuing effort to collect the wages he had earned, he had gone back to the worksite to look for the employer. The employer was not there, but the homeowner was and the homeowner asked Gabriel why he was looking for the employer. The homeowner, wanting to be helpful, said he would try to get a message to the employer on Gabriel's behalf. The employer apparently got the message and then called Gabriel on his cell phone leaving the voice message that is transcribed above.

Attachment to statement of Bill Beardall
to U.S. House Committee on Education and Labor
original audio recording provided to Committee