

August 2011

## **ADVANCING ENFORCEMENT OF THE NATIONAL LABOR RELATIONS ACT:**

### **National Labor Relations Board (NLRB) Issues [Guidelines](#) for Seeking Deferral of Immigration Action and U Visas for Immigrant Workers**

### **Immigration and Customs Enforcement (ICE) Issues [Guidelines](#) on Exercising Favorable Discretion for Individuals Engaged in Protected Activity**

On June 7, 2011, the Office of the General Counsel of the National Labor Relations Board (NLRB) issued a memorandum on updated procedures for advancing enforcement of the National Labor Relations Act (the “Act”). The memorandum reaffirms that undocumented workers are protected by the Act (though there may still be limited remedies).<sup>1</sup> It also sets out a process for working with immigration authorities to seek deferral of immigration action and/or U and T visas in appropriate cases.<sup>2</sup> U and T visas can provide temporary work authorization, family member visas, and a path to becoming a lawful permanent resident.

On June 17, 2011, Immigration and Customs Enforcement (ICE) issued a memorandum instructing its enforcement staff to exercise favorable discretion for individuals engaged in protected activity, including union organizing, complaints to authorities about employment discrimination, and plaintiffs in lawsuits related to civil rights or liberties violations.<sup>3</sup>

## **BACKGROUND**

### **What is the National Labor Relations Act?**

The National Labor Relations Act (the “Act”) was enacted in 1935 to protect the rights of workers to “form, join or assist labor organizations” and to “bargain collectively.” But the Act does not only protect workers who are actively organizing a union. It also protects “concerted activity” by workers for the “purpose of mutual aid.” Concerted activity for the purpose of mutual aid covers many kinds of workplace activities including making complaints to an employer about improving working conditions (if done by two or more workers or on behalf of two or more workers), talking with co-workers about collective action to address working conditions, circulating petitions to address working conditions, work stoppages to protest

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<sup>1</sup> For an explanation of the rights and remedies available to undocumented workers under the NLRA, see NELP’s fact sheet “Rights and Remedies for Undocumented Workers” <http://www.nelp.org/page/-/Justice/2011/RightsandRemediesforUndocumentedWorkersinOrganizing.pdf?nocdn=1>

<sup>2</sup> Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings. Office of the General Counsel, June 7, 2011, < <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b>>

<sup>3</sup> John Morton Director, U.S. Immigrations and Customs Enforcement, Memorandum: “Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs.” Policy Number: 10076.1. June 17, 2011. <<http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>>

working conditions and other types of activity. It is unlawful for an employer to fire, retaliate, threaten, interrogate, conduct surveillance or discriminate against a worker because he/she has engaged in protected activity.

### **Who is covered under the National Labor Relations Act?**

Generally, workers in the private sector are covered by the Act. However, independent contractors, domestic workers, and agricultural workers are excluded. Workers covered by the Railway Labor Act, such as many railroad and airlines employees, are also excluded from the Act.

### **How is the National Labor Relations Act enforced?**

The National Labor Relations Board (NLRB) is the administrative agency that enforces the Act. The NLRB has regional offices around the country that accept charges of unfair labor practices (“ULP”s), which are charges that an employer has violated the Act. You can find your regional office on the NLRB’s website: <http://www.nlr.gov/who-we-are/regional-offices>. Once a worker has filed a ULP charge, the regional office will investigate the charge. If the regional office believes there is merit to the charge, it will issue a complaint. The region will then seek specific remedies such as reinstatement and backpay, cease and desist orders, notice postings or others at a hearing in front of an administrative law judge.

The General Counsel of the NLRB has instructed the regions to presume that workers who file charges are lawfully authorized to work and advised them that they should not inquire about immigration status.<sup>4</sup> However, the Supreme Court ruled in 2002 that undocumented workers are not entitled to reinstatement or backpay as remedies for violations of the Act.<sup>5</sup> Therefore, immigration status may become relevant during the remedy stage if an employer has established the existence of a genuine immigration issue. However, regions are instructed to contact the Division of Operations-Management if an employer is alluding to a worker’s immigration status in a menacing or suggestive way during proceedings.<sup>6</sup>

### **Are worker centers labor organizations under the NLRA?**

Most worker centers are not “labor organizations” under the NLRA. See Eli Naduris-Weissman’s *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis* 30 Berkeley J. Emp. & Lab. L. 232 for a comprehensive analysis on this issue.

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<sup>4</sup>*Id.* reaffirming GC 02-06

<sup>5</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); see also NELP’s Fact Sheet “Rights and Remedies for Undocumented Workers” <http://www.nelp.org/page/-/Justice/2011/RightsandRemediesforUndocumentedWorkersinOrganizing.pdf?nocdn=1>

<sup>6</sup> *Id.* at note 2.

## **THE NEW NLRB AND ICE GUIDELINES**

### **What are examples of situations in which the NLRB may seek to defer immigration action or certify visas?**

The Board's June 2011 memorandum says that it is committed to seeking the assistance of immigration agencies to advance enforcement of the NLRA. This can include deferring immigration action during a board proceeding, releasing individuals from custody or providing access to witnesses in custody, and providing visa remedies, including U and T visas in appropriate cases.<sup>7</sup> U and T visas can provide temporary work authorization, family member visas, and a path to becoming a lawful permanent resident.

The General Counsel of the NLRB has advised its regions to discuss certain situations with its Division of Operations-Management, the division that will be responsible for the Board's activity in this area. Examples of these situations include (1) where a worker in a case loses his or her immigration status, particularly as a result of protected activities; (2) where the worker's presence in the country is important to enforcement of the Act; (3) where NLRB or immigration processes are being abused by the employer; and/or (4) where the employer knew or was willfully ignorant of the employee's lack of status.<sup>8</sup>

### **In which kind of NLRB cases might a U or T visa be available?**

Both U and T visas can provide temporary work authorization, family member visas, and a path to becoming a lawful permanent resident.

T visas may be available where an applicant is the victim of "severe forms of trafficking of persons," and the victim is present in the United States because of the trafficking. This visa could be applicable for example, where a worker is brought into the country under false pretenses and confined in sweatshop conditions.

U visas may be available where an applicant is the victim of a "qualifying crime." Qualifying crimes that may arise in the workplace, which also constitute violations of the Act in some cases, include peonage, involuntary servitude, unlawful criminal restraint, false imprisonment, blackmail, extortion, felonious assault, witness tampering, obstruction of justice, perjury or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

### **What if an employer threatens to turn a worker in to immigration authorities for concerted activity or for filing a charge with the NLRB?**

Although it is illegal for an employer to retaliate against a worker by calling immigration authorities, many employers either attempt or threaten to do this when immigrant workers voice concerns about working conditions.

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<sup>7</sup> *Id.* at note 2.

<sup>8</sup> *Id.* at note 2.

However, Immigration and Customs Enforcement (ICE) agents are instructed to take extra precautions if they receive a tip about a workplace in which there is reason to suspect there is a labor dispute (including situations where employers may be retaliating against workers for seeking to vindicate their workplace rights).<sup>9</sup> ICE's new guidelines go even further, instructing its enforcement staff to exercise favorable discretion, such as release from detention and deferral or a stay of removal generally, in situations in which individuals are engaging in protected activity, for example union organizing efforts, complaints to authorities about employment discrimination, or participation in a private lawsuit regarding civil rights or liberties violations.<sup>10</sup>

Additionally, if an employer illegally retaliates against protected activity with threats to call immigration authorities or threats to "blacklist" employees, immigration remedies such as the U or T visa may be available.<sup>11</sup> The NLRB has requested that its regions contact its Division of Operations-Management, its internal division responsible for immigration remedies, in cases where an employer is taking advantage of immigration status in an attempt to abuse the NLRB process. This includes citing immigration status as a pretext for an unlawful firing or alluding to a worker's status in a menacing or suggestive way during representation or ULP proceedings.<sup>12</sup>

### **What should a worker or advocate do if he/she believes a worker may be eligible for immigration remedies in an NLRB case?**

A worker or advocate should discuss the specifics of the situation with the regional office of the NLRB and advocate for the necessity of immigration remedies for enforcement of the Act. The NLRB has instructed its Regions to immediately contact Peter Sung Ohr, the Assistant Deputy General Counsel of the NLRB in the Division of Operations-Management, in cases where immigration remedies may be necessary for enforcement of the Act.<sup>13</sup> If you believe that a worker may be eligible for such immigration remedies, you may also contact NELP for assistance.

### **In what situations will ICE exercise "favorable discretion"?**

ICE's new guidelines instruct its enforcement staff to exercise "favorable discretion," such as release from detention and deferral or a stay of removal, in certain appropriate cases in order to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to pursue justice.

Appropriate cases involve (1) victims of domestic violence, human trafficking, or other serious crimes; (2) witnesses involved in pending criminal investigations or prosecutions; (3) plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and (4) individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining

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<sup>9</sup> Formerly INS Operating Instruction. 287.3(a), now designated as Special Agent Field Manual 33.14(h) <<http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-61072/0-0-0-61097.html>>

<sup>10</sup> *Id.* at note 3.

<sup>11</sup> *Id.* at note 2.

<sup>12</sup> *Id.* at note 2.

<sup>13</sup> *Id.* at note 2.

to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord or contractor.

It is important to note that national security concerns, evidence that the individual has a serious criminal history, is involved in a serious crime, or poses a threat to public safety, evidence that the individual is a human rights violator or has engaged in significant immigration fraud, will seriously affect ICE's exercise of favorable discretion.<sup>14</sup>

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For more information, please contact Rebecca Smith at 206-324-4000, [rsmith@nelp.org](mailto:rsmith@nelp.org), or Haeyoung Yoon at 212-285-3025, [hyoon@nelp.org](mailto:hyoon@nelp.org), or Tsedeye Gebreselassie at 212-285-3025, [tsedeye@nelp.org](mailto:tsedeye@nelp.org).

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<sup>14</sup> *Id.* at note 3.