

## NOTES

# Trabajadores, Unidos: How Labor Unions Empower Low-Wage Immigrant Workers to Advocate for Their Workplace Rights

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*Immigrants working low-wage jobs, especially undocumented immigrants, are particularly vulnerable to workplace violations. Empowered by the Immigration Reform and Control Act, employers retaliate against immigrant workers who complain about workplace conditions, discouraging workers from reporting violations. As a result, immigrant workers often underreport workplace violations due to a lack of confidence in legal remedies. Because of the Supreme Court's decision in Hoffman Plastics, undocumented workers are generally not entitled to backpay, and employers can demand discovery of immigration status. Moreover, the civil and criminal legal systems systematically discredit the stories of immigrants facing workplace abuse.*

*This Note argues that unions serve as one mechanism for protecting immigrant workplace rights. Immigrant workers can be empowered to assert their rights through organizations that investigate and sue on their behalf. As illustrated by the Aramark decision, unions can step into this role while providing a shield of anonymity against retaliation. Furthermore, existing labor laws like California's Assembly Bill 450, which requires notifying unions before workplace raids, can protect immigrant workers. Unions can*

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*also structure collective bargaining provisions to immunize workers from adverse action and shape employer practices by restricting E-Verify use, since unilateral E-Verify implementation violates Section 8(a)(5) of the National Labor Relations Act. Finally, this Note argues that Section 7 of the Act can protect immigrant organizing when immigrant rights are linked to job security and other working conditions under the Eastex “mutual aid” framework.*

*In addition to protecting existing rights, this Note suggests that unions can play an expanded role in broadening immigrant workplace rights. Union education can serve two goals:(1) informing immigrant workers on how to exercise their rights; and (2) educating non-immigrants to prevent immigrant isolation and build collective power. Unions can also provide “diversified” legal representation with competency in immigration issues, which strengthens the efficacy of legal advice for immigrants while facilitating immigrant-friendly bargaining and arbitration. While immigrants have historically faced barriers to union participation, unions can center immigrant voices by promoting goals and policy that stress unity as well as implementing diversity within a union’s bargaining structure. As exemplified by SEIU members’ Justice for Janitors campaign against sexual harassment in the janitorial industry, immigrant-led outreach and advocacy has tremendous potential to revolutionize workplace rights through collective power and legislation not only for unionized immigrants but for entire low-wage industries.*

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## INTRODUCTION

Immigration and labor are intrinsically linked, especially in low-wage industries. In 2020, nearly 70 percent of hired crop farmworkers (excluding H-2A workers) were immigrants.<sup>1</sup> Over 41 percent of all hired crop farmworkers (excluding H-2A workers) were undocumented.<sup>2</sup>

Congress passed the Immigration Reform and Control Act (IRCA) in 1986, which made combating the employment of undocumented workers central to immigration policy.<sup>3</sup> The IRCA established an employment verification system mandating that employers verify the identity and eligibility of all new hires before employment.<sup>4</sup> The IRCA discourages many low-wage immigrants, especially undocumented immigrants, from asserting their workplace rights due to fear of retaliation, and in some cases, deportation.

In this climate, labor unions have emerged as a tool for immigrants working low-wage jobs to enforce their workplace rights. As this Note will discuss, unions not only can protect immigrants who assert their rights, but they can broaden these rights by centering immigrant voices in their educational efforts, legal strategies, organizational structures, practices, outreach, and advocacy.

Part I of this Note discusses barriers for low-wage immigrant workers, especially undocumented workers, to enforcing their workplace rights. Part II discusses how labor unions can protect immigrants who assert their workplace rights. Part III discusses specific areas of potential within the immigrant labor advocacy movement and offers concrete suggestions on how unions can broaden workplace rights for low-wage immigrant workers.

### I. BARRIERS TO IMMIGRANTS ENFORCING WORKPLACE RIGHTS

#### *A. Retaliation*

Immigrants working low-wage jobs often do not assert their workplace rights due to fear of retaliation. Employers may retaliate by threatening their physical safety through deportation, or threatening financial harm through

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1. U.S. DEP'T OF AGRIC., ECON. RSCH. SERV., FARM LABOR (updated Mar. 22, 2023), <https://www.ers.usda.gov/topics/farm-economy/farm-labor> [https://perma.cc/HB8D-2FVN]. USDA categorizes farmworkers into two buckets: hired and self-employed. The H-2A Temporary Agricultural Program is excluded from year-round data for hired farmworkers since H-2A workers are only authorized to work for up to 10 months.

2. *Id.*

3. *See generally* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

4. 8 U.S.C. § 1324a(b).

termination and blacklisting.<sup>5</sup> According to a study by the National Employment Law Project, employers commonly threaten immigrant workers who complain about workplace conditions, and employers can conveniently call the police or Immigration and Customs Enforcement (ICE).<sup>6</sup> This problem is exacerbated when employers know workers are undocumented.<sup>7</sup> Since immigration is often easiest through prior connections, undocumented immigrant workers are often hired by a family friend or connection that knows their immigration status, which allows employers to take advantage of that information when workplace complaints arise.<sup>8</sup>

In addition, immigrants working low-wage jobs are more likely to avoid risks that will jeopardize their future employment.<sup>9</sup> The Human Rights Watch reports that some farmworkers who file sexual harassment lawsuits are blacklisted by employers for future jobs after being fired.<sup>10</sup> Family members of farmworkers often work for the same employer, so they are also at risk of being fired if the employer retaliates against the complaining employee.<sup>11</sup> Therefore, retaliation can lead to families losing their entire household income as well as any employer-provided housing.<sup>12</sup> Ultimately, this leads low-wage immigrants to feel like they have to “put up with more” in toxic workplaces.<sup>13</sup> For example, one immigrant janitorial worker who was sexually assaulted at work described that she “endured awful things” because she needed the job to support her kids.<sup>14</sup>

In many harassment cases, it can also be difficult to find witnesses who will testify on behalf of immigrant workers in low-wage industries who pursue workplace claims since many of their coworkers are undocumented and fear retaliation themselves.<sup>15</sup> Supervisors know other employees fear retaliation, so they can leverage their power to intimidate supervisees into

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5. Elizabeth Kristen et al., *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 186 (2015).

6. Paul Harris, *Undocumented workers' grim reality: speak out on abuse and risk deportation*, GUARDIAN (Mar. 28, 2013), <https://www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation> [<https://perma.cc/B77Q-8DRZ>].

7. See RAPE ON THE NIGHT SHIFT (Public Broadcasting Service 2018) [hereinafter PBS].

8. See *id.*

9. See Kristen et al., *supra* note 5, at 186-87.

10. HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 5 (May 2022), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and> [<https://perma.cc/45EW-C78U>].

11. *Id.*

12. *Id.* (“Twenty-one percent [of undocumented farmworkers] live in housing supplied by the employer, meaning the loss of a job would also result in loss of housing.”).

13. Abigail Hess, *Toxic workplaces are everywhere, but minimum wage workers know them well*, CNBC (Oct. 1, 2020), <https://www.cnbc.com/2020/09/30/toxic-workplaces-are-everywhere-but-low-wage-workers-know-them-well.html> [<https://perma.cc/N8VE-33AM>].

14. PBS, *supra* note 7.

15. Kristen et al., *supra* note 5, at 187.

providing false information about an immigrant worker who previously complained about a workplace violation.<sup>16</sup> This affects both documented and undocumented immigrants since immigrant workers are often terminated regardless of status in retaliation for complaints when they cannot produce witnesses.<sup>17</sup> As a result, many workplace violations are never reported because victims are deported or do not speak up because there are no available witnesses.<sup>18</sup>

### *B. Lack of Meaningful Remedies*

Immigrant workers also underreport workplace violations because they lack confidence that the legal system can provide any meaningful remedies. According to the American Opportunity Survey conducted by McKinsey in 2022, nearly half of all immigrants report being “independent workers” – whether gig, contract, or freelance – since such work often serves as a gateway to the American labor market.<sup>19</sup> The huge shift to contracting out business means many low-wage immigrant workers are classified (whether correctly or incorrectly) as independent contractors, making it harder to enforce their workplace rights as employees.<sup>20</sup>

On the flip side, many immigrants, and particularly women, work for large corporations in the service industry or as farmworkers.<sup>21</sup> Due to the physical and linguistic isolation of many of these jobs, immigrant workers can find themselves vulnerable to increased workplace abuses and unable to file subsequent claims for meaningful remedies.<sup>22</sup> As expressed by Senator Kirsten Gillibrand in the PBS documentary *Rape on the Night Shift*, the legal system does not provide great comfort to some immigrant workers who experience sexual assault because they “may not be able to navigate the legal system” or “report a complaint” due to language or access barriers.<sup>23</sup> Corporate hierarchies often play a role in deterring workers from asserting their rights.<sup>24</sup> In fact, several large companies such as McDonald’s have

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16. See PBS, *supra* note 7.

17. See Kristen et al., *supra* note 5, at 187.

18. See Harris, *supra* note 6; see Kristen et al., *supra* note 5, at 186.

19. André Dua et al., *Freelance, side hustles, and gigs: Many more Americans have become independent workers*, MCKINSEY (Aug. 23, 2022), <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers> [<https://perma.cc/H5UJ-RZSF>].

20. See PBS, *supra* note 7; RATNA SINROJA ET AL., UC BERKELEY LABOR CENTER, MISCLASSIFICATION IN CALIFORNIA: A SNAPSHOT OF THE JANITORIAL SERVICES, CONSTRUCTION, AND TRUCKING INDUSTRIES 6 (Mar. 11, 2019), <https://laborcenter.berkeley.edu/misclassification-in-california-a-snapshot-of-the-janitorial-services-construction-and-trucking-industries> [<https://perma.cc/9U8B-Z4GV>].

21. See PBS, *supra* note 7.

22. See *id.*

23. *Id.*

24. See Hess, *supra* note 13.

gained a reputation for creating work environments in which employees are discouraged from reporting workplace violations.<sup>25</sup> In this type of environment, workers are expected not to complain, which means that a vast majority of issues are never even brought to human resources departments or management staff.<sup>26</sup>

Undocumented workers face additional hurdles. The Supreme Court's ruling in *Hoffman Plastic Compounds, Inc. v. NLRB* is unclear, if not unfavorable, towards undocumented immigrants as to whether they are entitled to reinstatement or backpay.<sup>27</sup> While state courts have ruled that *Hoffman* does not necessarily preempt some state law claims seeking lost wages,<sup>28</sup> employers are still empowered under federal law to underpay undocumented workers or terminate their employment after learning about their immigration status. *Hoffman* also empowers employers to demand discovery of a complaint's immigration status, which can lead to a chilling effect on the workers' willingness to enforce their workplace rights.<sup>29</sup>

Reinstatement and backpay are not the only remedies unavailable to low-wage immigrants. According to *Rape on the Night Shift*, many immigrant women who were sexually assaulted while working as janitors during the night shift were told by supervisors who assaulted them that no one would "listen," "hear," or "believe" them.<sup>30</sup> As a result, a majority of the women interviewed in the documentary did not report the assault to the police, and even those who did never received any meaningful action or follow-up from the police.<sup>31</sup> For example, Maria Magaña, who was assaulted while working for the janitorial company ABM and became a plaintiff in the largest sexual harassment class action case against the company to date, expressed that her supervisor's comments and subsequent smirk when she told him that she would report the assault "basically told her that he had won."<sup>32</sup> Consequently, she did not report the assault to the police or human resources.<sup>33</sup>

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25. *Id.*

26. *See id.*

27. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002) (concluding that awarding backpay to undocumented immigrants would "unduly trench upon explicit statutory prohibitions . . . as expressed in [the] IRCA"). *But see* *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1069 (9th Cir. 2004) (casting "serious . . . doubt that *Hoffman* applies in [Title VII] actions.")

28. *See* *Salas v. California*, 173 Cal. Rptr. 3d 689, 703 (Cal. 2014) (explaining that "the remedy of . . . lost wages for unlawful termination in violation of [California's Fair Employment and Housing Act] does not frustrate the purpose of the [IRCA], and thus [state law] is not preempted"); *see* Kristen et al., *supra* note 5, at 190.

29. Mondragon, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J. OF L. & SOC. PROB. 447, 447 (2011); *Hoffman*, 535 U.S. at 148.

30. PBS, *supra* note 7.

31. *Id.*

32. *Id.*

33. *See id.*

Finally, the legal environment surrounding workplace abuse systematically overlooks workplace violations faced by low-wage immigrant workers. According to Anna Park, Regional Attorney at the Equal Employment Opportunity Commission's Los Angeles office, companies treat workplace violations against low-wage immigrant women as "part of doing business," and the violations simply "don't matter" to them.<sup>34</sup> Mary Schultz, a former consultant for ABM, expressed that sexual assault in the workplace would be better addressed by the criminal rather than civil system if it is not addressed by the company's human resources department.<sup>35</sup> In reality, the criminal system is notoriously ineffective at addressing sexual assault for low-wage immigrant women, especially when witnesses do not exist or are not willing to testify because they fear retaliation.<sup>36</sup> Cases are often prosecuted as "his word" against "her word," and juries rarely rule in favor of survivors who cannot produce witnesses.<sup>37</sup> Further, the lack of immediate reporting hurts immigrant women who are survivors, both since juries wonder why reporting took so long and because statutes of limitations may bar survivors from obtaining civil redress.<sup>38</sup>

## II. UNIONS AS MECHANISMS FOR PROTECTING IMMIGRANT WORKPLACE RIGHTS

Part II of this Note discusses three major ways unions provide protection for low-wage immigrant workers. First, unions provide legal representation and collective legal action that empowers immigrant workers to assert their rights when violated. Second, unions shield employees, often through a collective bargaining agreement, from employers who wish to discover information about immigration status and use it against workers. Third, unions can advocate directly for expanding immigrants' rights through Section 7 of the National Labor Relations Act (NLRA).

### A. *Proxy for Legal Action*

Immigrant workers often feel more empowered to assert their workplace rights through organizations that can investigate and sue employers on their behalf. For example, immigrant workers employed at the Foundation Food Group factory in Gainesville, Florida were originally reluctant to receive medical aid or speak to investigators following an industrial accident that

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34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.*

38. *Id.*

killed at least seven workers, five of whom were Mexican nationals.<sup>39</sup> However, the workers were much more comfortable speaking with investigators after they obtained legal representation through the worker center Georgia Familia Unidas, which led to a more effective investigation and resulted in a \$600,000 penalty against the Foundation Food Group.<sup>40</sup> While legal representation obtained through other types of worker organizations can empower immigrants, the remainder of this Section discusses ways in which unions specifically can step into this role.

Workplace investigations initiated by unions can expand rights enforcement for immigrant workers. To demonstrate the efficacy of workplace investigations, we look first to an example from the non-union context. Here, a seasonal crawfish worker in Louisiana unsuccessfully attempted to persuade the Occupational Safety and Health Administration that she was fired for seeking COVID-19 medical leave.<sup>41</sup> However, labor wage investigators subsequently found that many immigrant guest workers at the company had been shortchanged on overtime pay, allowing for the crawfish worker to obtain remedies despite the dismissal of her original complaint.<sup>42</sup> Similarly, unions can bring charges against employers to the National Labor Relations Board (NLRB), triggering investigations that lead to sweeping settlements involving reinstatement, backpay, and even temporary injunctions.<sup>43</sup> These settlements ultimately benefit immigrant workers without requiring them to file individual grievances.

In large class actions or representative actions brought by a union, the union often gives undocumented and other low-wage immigrant workers a shield of anonymity that protects them from individualized retaliation. For example, the Service Employees International Union (SEIU) brought suit against Aramark Facility Services when the corporation discharged 33 union employees after they received no-match letters from the Social Security Administration.<sup>44</sup> The Ninth Circuit focused on the no-match letters themselves rather than on the immigration status of the employees, determining that the letters did not put Aramark on notice for immigration violations.<sup>45</sup> According to the Ninth Circuit, the district court could not weigh immigration evidence obtained after discharge because it would disturb the

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39. Susan Ferriss, *These essential workers are afraid to report labor violations*, CTR. FOR PUB. INTEGRITY (Mar. 4, 2022), <https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/immigrants-fear-reporting-labor-violations> [https://perma.cc/F5G3-7MJC].

40. *Id.*; Luis Feliz Leon, *Life and Death in the Poultry Capital of the World*, THE NATION (Feb. 1, 2021), <https://www.thenation.com/article/society/poultry-plant-georgia> [https://perma.cc/6J2C-7W5C].

41. Ferriss, *supra* note 39.

42. *Id.*

43. *Investigate Charges*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges> (last visited Apr. 7, 2023) [https://perma.cc/2HG4-QD9B].

44. *Aramark Facility Servs. v. SEIU Local 1877*, 530 F.3d 817, 820 (9th Cir. 2008).

45. *Id.* at 828, 832.



arbitrator's conclusion that such evidence did not constitute "convincing information" of immigration violations.<sup>46</sup> Thus, the district court was not permitted to reinvestigate the employees' immigration status during litigation even if it was "reasonable to suspect that some of the fired workers were undocumented."<sup>47</sup> The decision not only protected the employees from inquiries into their immigration status during discovery, but also prevented Aramark from leveraging such information obtained post-firing to retaliate against the workers or to force them into settlement.

### B. Direct Legal Protection

Labor laws also provide unionized low-wage immigrants with direct legal protection from adverse immigration action. California's Assembly Bill 450, passed in 2017 with significant union support, prohibits employers from allowing immigration officials to enter private areas of a workplace or providing information in employee records to officials without a warrant or subpoena.<sup>48</sup> Even though a court determined that most of AB 450 was preempted by federal law in *United States v. California*, the decision left in place a provision that requires employers to notify employees and their labor unions of government I-9 inspections before and after they take place.<sup>49</sup> Thus, unions can help relay notice to undocumented workers ahead of such adverse action. Notice can also be a crucial deterrent to ICE actions such as sweeping raids targeting unionized workplaces with a large population of undocumented immigrants.<sup>50</sup>

More importantly, labor law and union contracts themselves can provide for protections for undocumented workers. The Immigration Employee Compliance Handbook notes the reach of these contracts, explaining that employers must be "sensitive to . . . labor law, union contracts, and discrimination considerations in terminating an employee, even when IRCA violations are suspected."<sup>51</sup> The handbook references NLRB decisions which state that using social security number (SSN) verification services to

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46. *Id.* at 830.

47. *See id.* at 830, 832.

48. Immigrant Worker Protection Act, A.B. 450, 2017-2018 Reg. Sess. (Cal. 2017); Steve Smith, *Labor Joins Elected Leaders, Immigrant Workers to Unveil Immigrant Worker Protection Act*, CAL. LAB. FED'N: LAB. EDGE (Mar. 24, 2017), <https://calaborfed.org/labor-joins-elected-leaders-immigrant-workers-to-unveil-immigrant-worker-protection-act> [<https://perma.cc/2S8R-C62C>].

49. *United States v. California*, No. 2:18-CV-490-JAM-KJN, 2018 WL 3361055 at \*2 (E.D. Cal. July 9, 2018), *aff'd in part, rev'd in part*, 921 F.3d 865 (9th Cir. 2019) (affirming that AB 450's employee-notice provisions are not preempted by federal law and therefore remain intact).

50. *See Workplace Raids: Workers' Rights*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/workplace-raids-workers-rights> [<https://perma.cc/S342-PNZZ>] (describing protective measures that can be taken when notice is given).

51. FRAGOMEN & BELL, IMMIGR. EMPL. COMPLIANCE HANDBOOK § 4:135 (2022-23 ed.).

reconcile payroll records can violate a collective bargaining agreement.<sup>52</sup> Therefore, employers with a unionized workforce cannot terminate employees without first ensuring that using an SSN verification service is permitted under its agreement with the union.<sup>53</sup>

Unions have actively shaped collective bargaining agreements to protect undocumented workers in arbitration. In *SEIU-United Service Workers West and SBM Site Services*, a previously undocumented worker completed an employment verification form when she was hired stating that she was a lawful permanent resident of the United States.<sup>54</sup> In the years leading up to the employer's grievance against her, she became a lawful permanent resident and applied for a valid SSN.<sup>55</sup> When the employer later terminated her for using a false SSN on her employment application, the arbitrator ordered that the worker be reinstated with full benefits.<sup>56</sup> The arbitrator specifically relied on the collective bargaining agreement's immigrants' protection provision, which provided that "employees shall not be discharged, disciplined, or suffer loss or [sic] seniority or any other benefit or be otherwise adversely affected by a lawful change of name or Social Security number."<sup>57</sup> The arbitrator found that the change itself was lawful and that nothing in the agreement required a change from lawful immigration status to lawful immigration status.<sup>58</sup>

In addition, unions can shape employer practices around immigration status by restricting use of E-Verify, a web-based government system which confirms individual's eligibility to work in the United States.<sup>59</sup> E-Verify use skyrocketed between 2005 and 2010, and employer enrollment in the program continued to increase until at least 2018.<sup>60</sup> In 2012, the Glass, Molders, Pottery, Plastics & Allied Workers International Union was able to compel an employer, Pacific Steel Casting, to reinstate fired workers and provide full back wages and benefits to terminated employees.<sup>61</sup> The union

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52. *Id.* § 3:13.

53. *Id.*

54. Conor Trombetta, *The Undocumented Workers' Dilemma: Improving Workplace Rights for Undocumented Workers Through Labor Arbitration and Collective Bargaining*, 32 GEO. IMMIGR. L.J. 127, 137 (2017) (citing 14-2 ARB ¶ 6285 (Sep. 5, 2014)).

55. *Id.*

56. *Id.*

57. *Id.* at 137-38.

58. *Id.*

59. *What is E-Verify*, E-VERIFY (updated Dec. 23, 2020), <https://www.e-verify.gov/about-e-verify/what-is-e-verify> [<https://perma.cc/V5T9-2DB5>].

60. David Bier, *The Facts About E-Verify: Use Rates, Errors, and Effects on Illegal Employment*, CATO INSTITUTE (Jan. 31, 2019), <https://www.cato.org/blog/facts-about-e-verify-use-rates-errors-effects-illegal-employment> [<https://perma.cc/HYS6-7XHA>].

61. See N.L.R.B. Gen. Couns., Opinion Letter on Pac. Steel Casting Co. to William A. Baudler, Regional Director, Region 32, 2012 WL 6085159, at \*6 (Feb. 6, 2012) (opining that Pacific Steel Casting "violated Section 8(a)(5) [of the NLRA] by unilaterally implementing E-Verify without first providing

argued that unilateral and voluntary implementation of E-Verify was an unfair labor practice that changed the terms and conditions of employment and was analogous to an employer's decision to implement post-hire drug testing.<sup>62</sup>

In 2018, the NLRB went one step further in ordering Ruprecht, a meat processing company, to rescind its participation in E-Verify and bargain with the union, UNITE HERE Local 1, about whether to use the system.<sup>63</sup> The NLRB opinion does not directly address whether an employer is required to bargain about the decision to implement E-Verify when state or local laws mandate its use, but such laws likely do not “alter an employer’s obligation to bargain about the effects” of implementing the system.<sup>64</sup> Ultimately, the practical effect of the decision was to put employers with unionized workforces on notice that they are required to bargain before E-Verify enrollment.<sup>65</sup>

### C. *Vehicle for Immigrant Organizing*

Unions also provide a vehicle for immigrants to organize for both labor rights and immigrant rights. In the last decade or two, several unions have begun to frame “comprehensive immigration reform advocacy” as inherent in its “pursuit of employees’ interests as employees.”<sup>66</sup> As early as 2009, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)/Change to Win joint platform on immigration emphasized that immigration reform was important because all workers need “full and complete access to the protection of labor, health and safety, and other laws.”<sup>67</sup> In emphasizing this proposition, AFL-CIO claimed that employers have used immigration status to “divide workers . . . in the last decade,” and that this division has made it easier for employers to exploit a “secondary

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the Union notice and an opportunity to bargain”). The employer and union eventually settled the dispute. Trombetta, *supra* note 54, at 139.

62. N.L.R.B. Gen. Couns., *supra* note 61, at \*5; see N.L.R.B. v. Katz, 369 U.S. 736, 747 (1962) (holding that an employer violates Section 8(a)(5) of the NLRA by unilaterally changing a mandatory subject of bargaining without first bargaining to impasse on that subject).

63. The Ruprecht Co., 366 N.L.R.B. 179 (2018).

64. *E-Verify Enrollment Is a Mandatory Subject of Bargaining: NLRB*, PRACTICAL LAW LABOR & EMPLOYMENT (Sep. 5, 2018).

65. *Thinking about E-Verify? Verify with the union first!*, SEYFARTH (Sep. 21, 2018), <https://www.employerlaborrelations.com/2018/09/21/thinking-about-e-verify-verify-with-the-union-first> [<https://perma.cc/3ZB3-FCJJ>].

66. Kati L. Griffith, Tamara L. Lee, *Immigration Advocacy As Labor Advocacy*, 33 BERKELEY J. EMP. & LAB. L. 73, 95 (2012); AFL-CIO, Convention Res. 11, *The Labor Movement’s Principles for Comprehensive Immigration Reform* (Sep. 13, 2009) [hereinafter AFL-CIO], <https://aflcio.org/resolution/labor-movements-principles-comprehensive-immigration-reform> [<https://perma.cc/7H2H-NBB2>].

67. Griffith & Lee, *supra* note 66, at 95; AFL-CIO, *supra* note 66.

class” of immigrant workers.<sup>68</sup> Furthermore, AFL-CIO has framed legalization of undocumented workers as a job security issue.<sup>69</sup> An adjustment of status for formerly undocumented employees can lead to a permanent solution to U.S. labor demand as opposed to depending on the guest worker program, which can only provide temporary jobs to “vulnerable foreign workers who have no real enforceable rights.”<sup>70</sup> Thus, AFL-CIO argues that job security for immigrants helps improve the quality of employment for other workers in the industry, overall benefiting the union workforce.

Through framing immigrant needs as issues of job opportunity and security, unions are able to argue that such needs fall within the definition of Section 7 of the NLRA, otherwise known as the “mutual aid and protection” provision (hereinafter, Section 7 of the NLRA, or “Section 7”).<sup>71</sup> In *Eastex, Inc. v. NLRB*, the Supreme Court determined that workers who earned above the national minimum wage who advocated on behalf of minimum wage workers were engaging in “mutual aid and protection” within the definition of Section 7.<sup>72</sup> Here, immigration reforms that improve the job opportunity and security of union workers are also workplace issues because they affect the working conditions of union workers in many industries.<sup>73</sup> Thus, advocacy by workers and unions for immigrants’ rights—whether by documented immigrants, undocumented immigrants, or those who are not immigrants—should be considered mutual aid and protection within the definition of Section 7.<sup>74</sup> This allows unions to advocate for immigrants’ rights on a broader scale so long as they can argue that immigration advocacy is adjacent or related to wages or working conditions, which the *Eastex* Court defined broadly.

### III. AREAS OF POTENTIAL FOR UNIONS TO EXPAND IMMIGRANT WORKPLACE RIGHTS

Part III of this Note offers concrete suggestions for how unions can expand the workplace rights of low-wage and undocumented immigrants. First, unions can educate members about their workplace rights and the importance of immigrant advocacy in protecting these rights. Second, unions

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68. Griffith & Lee, *supra* note 66, at 96 (omission in original).

69. *Id.* at 105.

70. *See id.* at 105-06.

71. 29 U.S.C. § 157.

72. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570 (1978).

73. *Cf id.* at 569-70; *see* Griffith & Lee, *supra* note 66, at 105-06.

74. *See Eastex*, 437 U.S. at 564 (rejecting Petitioner’s argument that “political” activity in support of employees at other employers would not be covered by the NLRA); *see also* N.L.R.B. Gen. Couns., Opinion Letter on EZ Industrial Solutions, LLC to Terry Morgan, Regional Director, Region 7, 2012 WL 8223257, at \*1 (Aug. 30, 2017) (“We conclude that the employees’ participation in the ‘Day Without Immigrants’ [national protest] was for their mutual aid or protection and constituted a protected strike.”).

can hire legal representation that promises to integrate and expand immigrant rights. Third, unions can center immigrants' needs within their policies and organizational structure. Fourth, unions can center immigrants in their outreach and advocacy efforts.

#### A. *Union Education*

First, unions can serve as hubs for education relating to both labor rights and immigrant rights. Worker centers and immigrant coalition organizations have increasingly used popular education as a tool to organize workers around immigration-related issues. For example, the Coalition of Immokalee Workers (CIW) uses diverse techniques from art to theater to community meetings to communicate pro-immigrant messages in a manner that is accessible to those speaking a large variety of languages.<sup>75</sup> Similarly, the National Network for Immigrant and Refugee Rights (NNIRR) has made a toolbox of training materials on topics such as immigration history, globalization and workers' rights, migrants' rights and human rights, immigrant women leaders, and conflict resolution.<sup>76</sup> Unions can utilize similar techniques and resources among their membership to advocate for immigrant rights within their organizations.

One major goal of union education should be to protect undocumented workers by informing them of their rights and how to exercise them. Once armed with knowledge about anti-retaliation laws, undocumented workers are more likely to speak up on their own behalf and enforce their workplace rights.<sup>77</sup> In addition, know-your-rights education can give workers greater confidence in their union's ability to enforce workplace rights and in union processes.<sup>78</sup> Ultimately, this facilitates greater participation by undocumented workers in union grievance processes,<sup>79</sup> which benefits immigrant workers overall by bringing more workplace violations to the union's attention.

Another benefit of union education is educating workers who are not immigrants on issues affecting immigrants so that non-immigrants are better able to support immigrants who they work alongside day to day. Affirmative union-wide education programs can help build a united voice between immigrant and non-immigrant employees.<sup>80</sup> The union can also raise awareness among its membership about why solidarity with and among immigrant workers is important through the use of various educational

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75. PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS, TEN WAYS TO PROTECT UNDOCUMENTED MIGRANT WORKERS 32 (2005) [hereinafter PICUM].

76. *Id.* at 33.

77. *See* Trombetta, *supra* note 54, at 146.

78. *See id.*

79. *See id.*

80. *See* Griffith & Lee, *supra* note 66, at 115.

tools.<sup>81</sup> One helpful way of building solidarity is teaching non-immigrant members about the various ways in which immigrants contribute to the economy, various union industries, and the union itself. Once a united front is built, undocumented workers are no longer isolated from the rest of the union and are increasingly empowered to engage in collective action.<sup>82</sup>

Union education also creates an environment for immigrant workers to train each other regarding their rights. For example, the SEIU-United Service Workers West (USWW) partnered with the Maintenance Cooperation Trust Fund to coordinate a peer-to-peer education model responding to sexual harassment in janitorial workplaces that was “industry-specific, culturally relevant, worker centered, prevention focused, trauma informed, and available in both English and Spanish.”<sup>83</sup> Covered janitorial employers must provide such peer-to-peer training under the Janitorial Survivor Empowerment Act (AB 2079).<sup>84</sup> According to Annabella Aguirre, a proponent of the bill and a member of SEIU-USWW, she and hundreds of immigrant women janitors are trained to teach courses on sexual assault prevention and to provide “trauma-informed crisis response” aiming to treat the “whole person, taking into account past trauma and resulting coping mechanisms.”<sup>85</sup> In addition to empowering immigrant workers to share valuable information with their peers, this self-education mechanism strikes at the heart of SEIU-USWW’s mission of “developing membership leadership and activism” and “organizing unorganized service workers.”<sup>86</sup> This model proves that unions can most effectively educate immigrant workers about their workplace rights when the education is led directly by immigrants within their membership.

### B. Diversified Legal Representation

Second, unions can provide diversified legal representation to their workers. As discussed in Section II, unions that provide legal representation on behalf of their employees empower immigrant workers to advocate for and vindicate workplace rights. However, unions can take this a step further by providing legal representation that is competent in representing low-wage and undocumented immigrant workers specifically on immigration issues.

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81. PICUM, *supra* note 75, at 49.

82. *See id.* at 49-50.

83. Press Release, Equal Rights Advocates, ERA, Partners Stand with Janitors Saying ‘Ya Basta!’ to Sexual Harassment & Violence at Work (May 23, 2019), <https://www.equalrights.org/news/era-partners-stand-with-janitors-saying-ya-basta-to-sexual-harassment-violence-at-work> [<https://perma.cc/ZS5Z-WHXR>].

84. Janitorial Survivor Empowerment Act, Assemb. B. 2079, 2018 Leg., 2018-2019 Reg. Sess. (Cal. 2018).

85. Equal Rights Advocates, *supra* note 83.

86. *See About*, SEIU UNITED SERVICE WORKERS WEST, <https://www.seiu-usww.org/about> [<https://perma.cc/RSN6-ZKHW>].

Unions can “diversify” legal representation by not only representing immigrant workers in employment and labor law issues, but also offering legal advice and support regarding immigration protections.<sup>87</sup> Rather than depending on outside referrals for information about how immigration situations affect employment, workers can discuss both their employment and immigration needs directly with union-provided legal representation. This streamlines the process of receiving legal information and prevents immigrant workers from having to piecemeal together legal advice received from multiple sources. All in all, this leads immigrant workers to receive more effective advice that considers the immigration consequences of workplace activities.<sup>88</sup> In addition, immigrant workers are often unable to access outside legal services due to cost or the inability of many legal aid organizations to represent undocumented workers,<sup>89</sup> so union representation can be one of the primary ways for workers to receive assistance.

Furthermore, union lawyers competent in immigration representation can advise undocumented workers on potential options to obtaining legal status. When combined with provisions that protect against retaliation when workers change from undocumented to legal status, such representation can effectively immunize previously undocumented workers from adverse action.<sup>90</sup> This has the added policy benefit of encouraging workers to pursue a legal route to citizenship. As more union workers gain legal status, employers are less able to intimidate immigrant workers by threatening retaliatory action. In addition, employers cannot cite IRCA violations as a reason to deny backpay to workers in individual or class actions. This ultimately leads to all workers within the union obtaining greater legal protection from discharge, workplace abuse, and retaliation.

Finally, diversified legal representation can more effectively advise unions in a manner that benefits immigrant workers. Union lawyers with immigration expertise can provide unions with available options to protect documented and undocumented workers.<sup>91</sup> Union lawyers who have a vested interest in the rights of low-wage and undocumented immigrants are also more likely to bring workplace issues affecting these populations to the

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87. See Trombetta, *supra* note 54, at 146.

88. The Supreme Court identified an analogous need within the criminal system, ruling that adequate counsel requires informing criminal defendants about whether their plea carries a risk of adverse immigration action. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010). Scholars such as Matthew Chang have argued that adequate representation extends beyond the *Padilla* mandate. Chang provides examples of public defender offices with immigration units that provide direct representation in removal proceedings. See Matthew Chang, *Immigration Public Defenders: A Model for Going Beyond Adequate Representation*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 29, 40-51, 58 (2022).

89. See Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 619 (2011).

90. See Trombetta, *supra* note 54, at 137-38 (describing how one adjustment of status immunized a previously undocumented worker from termination).

91. See *id.* at 146.

bargaining table when drafting agreements with employers. Similarly, lawyers with diversified skills are better able to facilitate or participate in labor arbitration that is favorable to immigrant workers.<sup>92</sup>

### C. Union Goals and Policies

Unions can center the needs and rights of low-wage immigrants, including undocumented immigrants, within the goals and policies of the union itself. Historically, immigrant workers have faced many barriers to joining unions including, but not limited to racism, discrimination, inability to pay membership dues, intimidation by employers, fear of reporting by fellow employees, union reluctance to engage in what they saw as illegal activity, isolated work structures, and overall discouragement with union effectiveness.<sup>93</sup>

The most effective way to combat these challenges is to remodel the goals and policies of the union to prioritize immigrant protection and center immigrant voices. First, unions must encourage its membership to promote immigrant and non-immigrant unity. To achieve this goal, unions can stress to its membership that building solidarity amongst all workers, including undocumented and non-immigrant workers, is crucial to the union's effectiveness.<sup>94</sup> Unions can also publicly recognize that employers often exploit low-wage and undocumented immigrants in order to create "an experimental ground for the restructuring of the labor market."<sup>95</sup> This means that protecting immigrant workers from exploitation ultimately benefits the labor conditions of all union workers.<sup>96</sup> When unions create a strong impetus for unity between immigrant and non-immigrant workers, they can better work towards a long-term goal of immigrant solidarity.

Second, unions can issue policies in support of undocumented workers that specifically steer away from status-related discussion. Union slogans such as "there's no such thing as an illegal worker" (used in Transport and General Workers' Union campaigns) can raise support for undocumented workers within a union without singling out those workers in a way that makes them vulnerable to workplace abuse.<sup>97</sup> In addition, unions can ensure that databases they use do not make distinctions between documented and undocumented workers. This practice has proven effective in Portugal at facilitating unions where immigration status is not questioned.<sup>98</sup>

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92. *See id.*

93. PICUM, *supra* note 75, at 44-49.

94. *See id.* at 51.

95. *Id.* at 50.

96. *See id.* at 50-51.

97. *See id.* at 49.

98. *Id.* at 50.



Third, diversity, equity and inclusion (DEI) committees can encourage inclusion of immigrant voices by helping unions gain a better understanding of the concerns and needs of their low-wage and undocumented immigrant members.<sup>99</sup> DEI committees are “task force[s] of diverse staff members who are responsible for helping bring about the cultural, and possibly ethical, changes necessary for” an organization.<sup>100</sup> DEI committees can benefit unions themselves because they help provide information about how unions can better represent their membership.<sup>101</sup> In addition, DEI committees with immigrant members can make sure that low-wage and undocumented immigrant voices are included in collective bargaining agreement provisions.<sup>102</sup> Examples of recent provisions negotiated by unions as a result of DEI initiatives include hiring quotas and pay increases, as well as involving union diversity representatives in the hiring process.<sup>103</sup> Diversity initiatives involving immigrants can tailor similar provisions to specifically benefit immigrant workers.

#### D. Outreach and Advocacy

Finally, unions can center the needs of immigrants in their outreach and advocacy efforts. In the 1980s, the SEIU specifically performed outreach to immigrant communities in the Greater Los Angeles Area.<sup>104</sup> The effort revitalized the union’s membership base and ultimately brought about industry-wide changes that have benefited low-wage workers.<sup>105</sup> As a result of this effort, many SEIU chapters have become well-known for immigrant-led advocacy efforts informed primarily by immigrant workers who are SEIU members.<sup>106</sup>

One key example of such an advocacy effort is California’s Assembly Bill 1978, which was later amended by Assembly Bill 2079 discussed in Part III.A.<sup>107</sup> The Bill was informed by a group of immigrant women in the janitorial industry, many of whom were survivors of sexual assault.<sup>108</sup>

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99. Trombetta, *supra* note 54, at 146.

100. Sean Peek, *6 Essential Steps to Creating a Diversity, Equity & Inclusion Committee at Your Company*, CO (Aug. 26, 2020), <https://www.uschamber.com/co/start/strategy/diversity-equity-inclusion-committee> [<https://perma.cc/Y4EV-NKDU>].

101. *See id.*

102. *See* Trombetta, *supra* note 54, at 146.

103. Ken Green, *How Collective Bargaining Agreements Can Encourage Workplace Diversity*, UNIONTRACK (Mar. 10, 2020), <https://uniontrack.com/blog/workplace-diversity> [<https://perma.cc/V5XA-NTAP>].

104. PICUM, *supra* note 75, at 53.

105. *Id.*

106. *See* William Johnson, *SEIU Members Push Their Union to Change Its Position on Immigration*, MONTHLY REV. (Jan. 4, 2007), <https://mronline.org/2007/01/04/seiu-members-push-their-union-to-change-its-position-on-immigration> [<https://perma.cc/N5MJ-RMFC>].

107. Equal Rights Advocates, *supra* note 83.

108. *Id.*

According to a 2019 report by the UC Berkeley Labor Center, over 80 percent of janitors in California are Latino and almost 60 percent are foreign-born, with nearly half of all janitors living in low-income households.<sup>109</sup> As a result of the increased number of immigrants within its membership, the issue of sexual violence towards immigrant women came to the attention of the SEIU-USWW.<sup>110</sup> A group of women, organized by SEIU-USWW Secretary-Treasurer Alejandra Valles, came together to take action against ABM, the largest janitorial company in the nation.<sup>111</sup>

The women ended up planning a massive janitors' march in Downtown Los Angeles to force employers to provide better working conditions, including around safety and response to sexual harassment.<sup>112</sup> The group eventually grew into a larger campaign against sexual abuse in the industry centered around the rallying cry “¡Ya basta!” (“Enough already!”).<sup>113</sup> As a result of the group's efforts, ABM eventually came to the bargaining table with union janitors and promised to work with them to combat sexual assault in the industry.<sup>114</sup> The women also brought change at the state level by organizing a hunger strike in Sacramento on the Capitol steps, which ultimately led to the passage of AB 1978.<sup>115</sup> Ultimately, SEIU's outreach to the immigrant community, both in terms of membership and advocacy efforts, led to a dramatic improvement in workplace rights for low-wage and undocumented immigrants. This improvement occurred not only within the union itself but also in low-wage industries across the state.

#### CONCLUSION

Immigrants working low-wage jobs face unique barriers to asserting their workplace rights. While courts have often worked to limit the rights of immigrant workers, labor unions provide a mechanism through which immigrant workers can both assert and expand their workplace rights. For unions to improve their advocacy for immigrant workers, they must increase popular education that builds union solidarity, provide diverse legal representation that addresses the holistic needs of immigrant workers, pursue pro-immigrant goals and policies, and engage in outreach and advocacy efforts that center immigrants within their membership.

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109. SINROJA ET AL., *supra* note 20.

110. PBS, *supra* note 7.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*