

# Navigating the Relationship Between the DHS and the DOL: The Need for Federal Legislation to Protect Immigrant Workers' Rights

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*High-visibility workplace raids have drawn attention to the relationship between the Department of Homeland Security (DHS) and the Department of Labor (DOL) and how it affects workers' rights. To better align their interests, these agencies recently revised their interagency memorandum of understanding (MOU). This updated MOU restricts DHS's ability to conduct immigration enforcement when the DOL is investigating labor violations. This Note highlights the main features of the MOU and looks at its strengths and weaknesses. The MOU protects against immigration enforcement during a DOL investigation, but does not similarly preclude enforcement while workers are asserting their rights in other ways, such as state and federal litigation. After analyzing the MOU, this Note explores other possibilities for protecting workers' rights, including interagency monitoring and limiting immigration enforcement during employment litigation and other agency investigations. Finally, this Note advocates for the passage of the POWER Act, proposed legislation that incorporates components of the DHS-DOL MOU and provides other protections for immigrant workers.*

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## I. INTRODUCTION

Over the past few years, immigration and labor issues have increasingly overlapped with one another.<sup>1</sup> Immigrants comprise 11% of all U.S. residents, 14% of all U.S. workers, and 20% of all low-wage workers.<sup>2</sup> Unauthorized workers<sup>3</sup> make up approximately 5% of the workforce.<sup>4</sup> Immigrants often work in the least desired jobs, congregating in “low-wage, low-skill jobs in marginally profitable, low-capital, small, often new and family-run enterprises; in temporary, seasonal, or irregular employment; and in the underground economy.”<sup>5</sup>

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1. This connection is evident from the increasing wealth of legal scholarship on immigration and workers' rights. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 445–50 (1995); see generally Farhang Heydari, *Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions*, 110 COLUM. L. REV. 1526 (2010); Roxana Mondragón, Note, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447 (2011). This connection is also apparent in the number of immigration advocacy organizations that address labor issues, and employment-rights advocacy organizations that address immigration issues. See, e.g., *Immigrants and Work*, NAT'L EMP'T LAW PROJECT, [http://www.nelp.org/index.php/content/content\\_issues/category/immigrants\\_and\\_work/](http://www.nelp.org/index.php/content/content_issues/category/immigrants_and_work/) (last visited Mar. 16, 2012); *Immigrant Worker Justice Blog*, NAT. EMP'T LAW PROJECT, <http://www.immigrantworkerjustice.org/blog> (last updated Mar. 25, 2013); *Workers' Rights*, NAT'L IMMIGRATION LAW CTR., [http://www.nilc.org/workers\\_rights.html](http://www.nilc.org/workers_rights.html) (last visited Mar. 16, 2012).

2. Randolph Capps et al., *A Profile of the Low-Wage Immigrant Workforce*, THE URBAN INST. 1 (Oct. 23, 2003), [http://www.urban.org/UploadedPDF/310880\\_lowwage\\_immig\\_wkfc.pdf](http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf).

3. There are multiple terms to describe individuals who work in the United States without permission, “illegal” and “undocumented” being two common terms. Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1090 n.1 (2011). Professor Stephen Lee explains why “unauthorized” is an appropriate term, specifically when referring to people who are working in the U.S. without permission: “I use the term ‘unauthorized’ because it avoids the untoward normative implications of the term ‘illegal’ alien or immigrant and it better comports with the relevant statutory provision than the term ‘undocumented.’” *Id.* at 1090 n.1. The Immigration Reform and Control Act, which governs employment of noncitizens, provides that “the term ‘unauthorized alien’ means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.” 8 U.S.C. § 1324a(h)(3) (2006).

4. MARK ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 88 (7th ed. 2011).

5. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 691 (1997) (quoting John Fraser, former Acting Assistant Secretary of the Employment Standards Administration, within the Department of Labor).

Unauthorized workers are especially vulnerable to workplace abuses, as fear of deportation often chills the lodging of public complaints.<sup>6</sup> If an employer violates the law by, for example, paying workers less than the minimum wage or disregarding workplace safety standards, an immigrant worker may rationally decide to not complain to the employer or not report the violations to the appropriate agency, fearing that the employer could jeopardize his or her immigration status. Although the undocumented-immigrant population in the United States is beginning to decrease,<sup>7</sup> protections for unauthorized workers will continue to be important for the foreseeable future,<sup>8</sup> as an estimated eight million unauthorized workers work in the United States.<sup>9</sup> In addition, major industries such as agriculture, construction, manufacturing and hospitality rely heavily on the labor of unauthorized workers, further highlighting the need for protections for these workers.<sup>10</sup>

Despite the fact that immigration and labor problems often accompany one another, the efforts of the government agencies that focus on these issues, the Department of Homeland Security (DHS) (which houses Immigration and Customs Enforcement (ICE)) and the Department of Labor (DOL), sometimes contradict one another. When conflicts arise, it is often DOL's labor-enforcement goals, and not DHS's immigration-enforcement

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6. See, e.g., Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 378 (2001). The word "chill" and the phrase "chilling effect" are often used to describe how a fear of immigration consequences can prevent workers from pursuing workplace claims. See *id.* at 347.

7. See Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISPANIC CTR. 1 (Feb. 1, 2011), <http://pewhispanic.org/files/reports/133.pdf> (showing that the number of undocumented people in the United States rose from 2000 to 2008 and has fallen since 2008).

8. See *id.* (showing that, while the undocumented immigrant population in the United States has declined, there are still approximately 11.2 million undocumented people in the country).

9. See *id.*

10. See Daniel Altman, *Shattering Stereotypes About Immigrant Workers*, N.Y. TIMES (June 3, 2007), <http://www.nytimes.com/2007/06/03/business/yourmoney/03view.html?pagewanted=all>. The importance of unauthorized workers in the agriculture industry was evidenced in the labor shortage that states such as Alabama faced when they passed anti-immigrant legislation, causing undocumented immigrants to flee the state. See Mark Guarino, *Anti-illegal Immigration Bill Stokes Backlash in Alabama Fields*, THE CHRISTIAN SCI. MONITOR, (Oct. 22, 2011), <http://www.csmonitor.com/USA/Politics/2011/1022/Anti-illegal-immigration-bill-stokes-backlash-in-Alabama-fields>.

goals, that are thwarted, due to ICE's unconstrained enforcement power,<sup>11</sup> which can "generate . . . externalities that impact the DOL, chill the reporting of labor violations, and ultimately frustrate the DOL's ability to identify exploitative employers."<sup>12</sup>

These conflicts have manifested themselves in certain work-site raids by ICE, the investigative branch of DHS. For example, in late January 2007, ICE interfered with the labor rights of workers when the agency raided a Smithfield Foods pork-packing plant, searching for undocumented immigrants who might be working at the plant.<sup>13</sup> An organizer for the United Food and Commercial Workers, a union attempting to represent the workers, alleged that management at the plant began collaborating with ICE after a walkout by immigrant workers the previous summer.<sup>14</sup> The raids "provoked protests . . . from union officials, who said the company, Smithfield Foods, had collaborated with the authorities searching for illegal immigrants to discourage its workers from organizing."<sup>15</sup> This use of immigration law to undermine labor rights has been criticized as problematic.<sup>16</sup>

In response to this incident and other workplace raids,<sup>17</sup> including a raid where ICE agents tricked unauthorized workers into meeting and promptly arrested them by pretending to be Occupational Safety and Health Administration (OSHA)<sup>18</sup> officials,<sup>19</sup>

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11. See Lee, *supra* note 3, at 1095 (explaining that ICE's workplace enforcement decisions have been largely insulated from outside review).

12. Lee, *supra* note 3, at 1095.

13. Julia Preston, *Immigration Raid Draws Criticism from Labor Officials*, N. Y. TIMES (Jan. 26, 2007), <http://www.nytimes.com/2007/01/26/us/26immig.html?scp=15&sq=immigration+raid&st=nyt>.

14. *Id.*

15. *Id.*

16. See, e.g., Rebecca Smith et al., *Iced Out: How Immigration Enforcement Has Interfered with Workers' Rights*, AFL-CIO, AM. RIGHTS AT WORK EDUC. FUND & NAT'L EMP'T LAW PROJECT 13-14 (Oct. 2009), [http://www.americanrightsatwork.org/dmdocuments/ARAWReports/iced\\_outreport.pdf](http://www.americanrightsatwork.org/dmdocuments/ARAWReports/iced_outreport.pdf).

17. Examples include the 2008 Howard Industries raids in Laurel, Mississippi and the 2009 Yamato raid in Bellingham, Washington. See Adam Nossiter, *Hundreds of Workers Held in Immigration Raid*, N.Y. TIMES (Aug. 25, 2008), <http://www.nytimes.com/2008/08/26/us/26raid.html> (describing Howard Industries raids); Lornet Turnbull, *Immigration Officials Raid Bellingham Plant*, THE SEATTLE TIMES (Feb. 24, 2009), [http://seattletimes.nwsourc.com/html/nationworld/2008781541\\_webraid24m.html](http://seattletimes.nwsourc.com/html/nationworld/2008781541_webraid24m.html).

18. OSHA is a division of the DOL that regulates safety and health standards at workplaces. See *About OSHA*, OCCUPATIONAL HEALTH & SAFETY ADMIN., <http://www.osha.gov/about.html> (last visited Jan. 20, 2013).

the DOL and DHS altered the terms of their interagency arrangement to ensure that immigration enforcement did not interfere with labor enforcement.<sup>20</sup> To this end, on March 31, 2011,<sup>21</sup> the DHS and DOL revised their Memorandum of Understanding (MOU), enumerating the boundaries of each agency's worksite enforcement activities.<sup>22</sup> With some exceptions, this MOU prohibits ICE from conducting immigration-related investigations while DOL is performing worksite investigations.<sup>23</sup> This means that while the DOL is investigating a worksite for labor violations, workers need not worry about their immigration status being revealed. Further, employers are protected from simultaneous worksite and immigration investigations, as ICE has agreed to refrain from pursuing immigration investigations against employers while DOL investigations are pending.<sup>24</sup>

Although this revised MOU does provide some protections for workers, these protections are incomplete and insufficient because of the agreement's limited scope: it precludes DHS immigration enforcement only during DOL investigations, even though workplace rights can be vindicated in multiple forums, including state and federal courts. Additionally, federal-agency MOUs in general are not a sufficient or stable legal protection because

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19. ICE officers arrested workers suspected of working without authorization at the Seymour Johnson Air force Base in North Carolina. Steven Greenhouse, *U.S. Officials Defend Ploys to Catch Immigrants*, N.Y. TIMES (Feb. 11, 2006), <http://www.nytimes.com/2006/02/11/national/11safety.html>. The officers tricked workers into meeting with the officers by impersonating OSHA officials and pretending to conduct a safety workshop. *Id.*

20. See *Revised Memorandum of Understanding Between the Departments of Homeland Security Labor Concerning Enforcement Activities at Worksites* (Dec. 7, 2011), <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> [hereinafter *MOU*].

21. The agencies entered into a new MOU on March 31, 2011. See Jayesh M. Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, 53 ARIZ. L. REV. 1157, 1166 (2011). The agencies made minor adjustments to the MOU on December 7, 2011. See *MOU*, *supra* note 20. Until this most recent update, the interagency MOU had not been updated since 1998. See Rathod, *supra*, at 1166.

22. See generally *MOU*, *supra* note 20.

23. See *MOU*, *supra* note 20, at 2.

24. *DOL, DHS Agree to Avoid Worksite Investigation Conflicts*, FRAGOMEN LLP (Apr. 5, 2011), <http://www.fragomen.com/untied-states-04-05-2011/>. Employers are subject to labor laws, such as the Fair Labor Standards Act (FLSA), as well as immigration laws concerning work authorization of employees found in the Immigration Reform and Control Act of 1996 (IRCA). See 29 U.S.C. § 206(a) (2006) (FLSA requirement providing that that employers pay their employees a minimum wage); 8 U.S.C. § 1324a(a) (2006) (IRCA provision prohibiting employers from hiring unauthorized aliens).

agencies can revise them without notice or accountability, subject only to limited oversight by the Office of Legal Counsel.<sup>25</sup>

In response to these limitations, this Note argues for the passage of the POWER Act, which would provide extra protections for workers, including those who may try to enforce their rights through legal avenues outside of the DOL, such as state or federal litigation. Part II of this Note contextualizes the MOU and its role in the relationship between the DOL and DHS. Part III explains the importance of the MOU and highlights its key provisions. Part IV analyzes the MOU, pointing out its strengths and weaknesses, before arguing for the passage of the POWER Act as a way to compensate for the MOU's weaknesses.

## II. LABOR RIGHTS AND THE DOL AND DHS'S RELATIONSHIP: CONTEXTUALIZING THE MOU

Before analyzing the strengths and weaknesses of the MOU, it is important to situate it in the broader context of labor rights in order to provide a framework for understanding the relationship between the DHS and DOL. Part II.A provides a brief background on the importance of labor rights, acknowledging that the debate on the exact form that these rights should take with respect to immigration is ongoing<sup>26</sup> and that this Note approaches the topic from a pro-labor rights perspective.<sup>27</sup> Part II.B then explores the relationship between the DHS and DOL and how the MOU fits into that relationship.

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25. See *infra* Part III.A.

26. For example, immigration and employment law played a role in 2012 presidential debates. See Elizabeth Llorente, *Presidential Debate: On Immigration, Romney and Obama Affirmed Their Stances*, FOX NEWS LATINO (Oct. 17, 2012), <http://latino.foxnews.com/latino/politics/2012/10/17/presidential-debate-on-immigration-romney-and-obama-affirmed-their-stances/>; Matt Sledge, *Obama Failed on Immigration Reform, But He Wasn't Getting Any Republican Help, Either*, HUFFINGTON POST (Oct. 17 2012, 9:53 AM) [http://www.huffingtonpost.com/2012/10/17/presidential-debate-immigration\\_n\\_1973121.html](http://www.huffingtonpost.com/2012/10/17/presidential-debate-immigration_n_1973121.html).

27. The debate on labor rights and how the rights of unauthorized workers in the U.S. affect those of other workers is complex, unresolved, and beyond the scope of this Note.

A. THE IMPORTANCE OF LABOR RIGHTS AND RIGHTS OF  
UNAUTHORIZED WORKERS

Labor rights are critically important to the advancement of international human rights, as well as to the development of workplace standards for all workers. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, enumerates the following as fundamental human rights:

(1) [T]he right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) . . . [T]he right to equal pay for equal work. (3) . . . [T]he right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity. (4) . . . [T]he right to form and to join trade unions for the protection of his interests.<sup>28</sup>

The International Covenant on Economic, Social and Cultural Rights, to which 160 countries are parties,<sup>29</sup> also enumerates labor rights.<sup>30</sup>

Labor rights for all workers, authorized or unauthorized, are also important because the wages and conditions of all workers are interconnected. As Professor Lori Nessel explains, “Excluding the undocumented from labor and employment protection statutes allows employers to exploit undocumented workers with impunity and has a chilling effect upon the rights of all workers.”<sup>31</sup> Further, the Supreme Court has acknowledged that “acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish

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28. Universal Declaration of Human Rights Art. 23, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

29. Six of these countries, including the United States, have signed, but not yet ratified, the Covenant. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/21/2200 (Dec. 16, 1966) available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>.

30. *Id.*

31. Nessel, *supra* note 6, at 347.

the effectiveness of labor unions.”<sup>32</sup> Thus, labor rights are important both as a source of individual rights and of workplace standards.

Before discussing how immigration enforcement can interfere with employment rights, specifically those of unauthorized workers, it is important to identify what employment rights these workers have. To fully address this complex, contested issue would require an analysis beyond the scope of this Note.<sup>33</sup> However, some employment rights have been unequivocally held to apply to all workers. Generally, immigration status will not affect an employee’s rights to the wage and hour protections of the Fair Labor Standards Act (FLSA),<sup>34</sup> and the right to organize and participate in a union, as provided by the National Labor Relations Act (NLRA).<sup>35</sup> Thus, this Note proceeds by acknowledging that it cannot fully address the exact rights of unauthorized workers, but that all workers are entitled to certain labor and employment rights under the FLSA and NLRA.

## B. THE DOL, DHS, AND THE IMPORTANCE OF THEIR RELATIONSHIP TO EMPLOYMENT RIGHTS

### 1. *An Overview of the DOL and DHS*

In order to understand the relationship between immigration and labor and employment rights generally, it is important to understand the scope and purpose of the federal agencies that regulate these areas of law, as well as their relationship with one

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32. *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976).

33. The complexity of this issue is seen in courts’ analyses of the employment rights of unauthorized workers. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2503–05 (2012) (discussing the implications of express preemption and obstacle preemption for the rights of unauthorized workers); *Hoffman Plastics v. NLRB*, 535 U.S. 137, 146–52 (2002) (describing a circuit split related to back pay for unauthorized workers); *Zavala v. Wal-Mart Stores*, 393 F. Supp. 2d 295, 321–25 (D.N.J. 2005), *aff’d* 691 F.3d 527 (3d Cir. 2012) (analyzing applicability of FLSA minimum-wage provisions to unauthorized workers).

34. *See, e.g.*, *Patel v. Quality Inn S.*, 846 F.2d 700, 706 (11th Cir. 1988) (“Nothing in the FLSA suggests that undocumented aliens cannot recover unpaid minimum wages and overtime under the act, and we can conceive of no other reason to adopt such a rule.”); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (“[I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant.”).

35. However, if an employer violates the NLRA by unlawfully firing an unauthorized worker, the worker is not entitled to back pay. *See Hoffman Plastics*, 535 U.S. at 149.



another. DOL is the government agency charged with enforcing health, safety, and wage and hour protections, and administering unemployment insurance for members of the U.S. workforce.<sup>36</sup> DOL implements a number of federal employment laws, including laws relevant to low-wage immigrant workers, such as the Fair Labor Standards Act, the Occupational Health and Safety Act, and the Migrant and Seasonal Agricultural Worker Protection Act.<sup>37</sup>

A separate agency executes immigration enforcement. Until 2002, that agency was the Immigration and Naturalization Services, but, since the passage of the Homeland Security Act in November 2002, DHS houses most immigration-related agencies, including ICE.<sup>38</sup> ICE's mission is "to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration."<sup>39</sup> ICE performs these functions through enforcement activity, including deportation of immigrants. ICE "identifies and apprehends removable aliens, detains these individuals when necessary and removes illegal aliens from the U.S."<sup>40</sup> ICE also operates immigration detention centers and investigates compliance with immigration laws.<sup>41</sup>

## 2. *The Interaction of DHS and DOL with Immigrant Workers*

Although DOL and ICE operate independently of one another and enforce different laws, both agencies' missions pertain to immigrant workers and the laws that affect them. As a consequence, the manner in which these two agencies interact and

36. The DOL's mission is to "foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights." *Our Mission*, U.S. DEPT OF LABOR, <http://www.dol.gov/opa/aboutdol/mission.htm> (last visited Jan. 7, 2012).

37. *A Summary of the Major Laws of the Department of Labor*, U.S. DEPT OF LABOR, <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited Nov. 9, 2012).

38. Homeland Security Act of 2002, Pub. L. 107-296, Nov. 25, 2002, 116 Stat. 2135.

39. *Overview*, IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview/> (last visited Jan. 7, 2012).

40. *ICE Enforcement and Removal Operations*, IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/> (last visited Jan. 7, 2012).

41. *See id.*

coordinate enforcement impacts the way that immigrant workers experience immigration laws on the ground. Professors Jody Freeman and Jim Rossi explain why, in recent years, understanding interagency relationships has come to be so important: “so many domains of social and economic regulation now seem populated by numerous agencies, which — to satisfy their missions — must work together cooperatively or live side by side compatibly.”<sup>42</sup>

Governmental agencies’ policies and relationships with one another matter because they can limit, expand, or facilitate immigration enforcement. Especially at a time when Congress has failed to enact comprehensive immigration reform, “agencies increasingly have the final word within [the] immigration system.”<sup>43</sup> ICE’s recent intra-agency memo on immigration priorities, often referred to as the “Morton Memo,” demonstrates that a shift in internal agency policy can have ramifications for how immigration laws affect workers on the ground.<sup>44</sup> This memo directs government lawyers to exercise prosecutorial discretion to achieve DHS’s goal of deporting unauthorized immigrants who pose national security risks or are criminals, rather than individuals who are not perceived to pose such threats.<sup>45</sup> While it does not enumerate new substantive rights for defendants in deportation proceedings, this agency memo serves to prevent a number of deportations of immigrants not deemed national security risks and lacking criminal backgrounds.<sup>46</sup> Thus, agency action can alter the tangible results of immigration law.

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42. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1137–38 (2012).

43. Lee, *supra* note 3, at 1091.

44. The Morton Memo is named after its author, John Morton, the current director of Immigration and Customs Enforcement. See *Director, John Morton*, <http://www.ice.gov/about/leadership/director-bio/john-morton.htm> (last visited Jan. 20, 2013).

45. Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, and All Chief Counsel (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

46. Julia Preston, *Immigration Agency Cancels Some Deportations*, N.Y. TIMES (Aug. 27, 2010), [http://www.nytimes.com/2010/08/27/us/27immig.html?\\_r=0](http://www.nytimes.com/2010/08/27/us/27immig.html?_r=0). But see Julia Preston, *Deportations Under New U.S. Policy Are Inconsistent*, N.Y. TIMES, (Nov. 13, 2011), <http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html?pagewanted=all> (documenting how the Morton

### III. THE DHS-DOL MEMORANDUM OF UNDERSTANDING

Because of the importance of agency action with regard to the rights of immigrant workers, the recently revised MOU between DHS and DOL will likely critically impact immigration law and policy by altering when immigration enforcement can occur. Part III provides an overview of the MOU, its important provisions, and describes how it fits into the larger picture of DHS-DOL relations. Part III.A describes the functions and significance of an inter-agency memorandum of understanding. Part III.B then briefly recounts the history of MOUs between DHS and DOL, and Part III.C highlights the key elements of the most recent MOU between the two agencies.

#### A. FUNCTION AND LEGAL SIGNIFICANCE OF AN MOU

MOUs serve as a way for agencies to contract and enumerate the terms of their relationship and any coordination that might be necessary.<sup>47</sup> Professors Freeman and Rossi have articulated the importance of MOUs in a government context, and describe them as the “most pervasive instrument of coordination in the federal government.”<sup>48</sup> MOUs can perform several functions: “A typical MOU assigns responsibility for specific tasks, establishes procedures, and binds the agencies to fulfill mutual commitments.”<sup>49</sup> MOUs “resemble contracts, yet they are generally unenforceable and unreviewable by courts.”<sup>50</sup> Interagency agreements play a crucial role in government agencies in particular, as “these agreements preserve institutional memories, keep agency commitments, and . . . provide transparency to the public.”<sup>51</sup> MOUs between DHS and DOL serve as a “type of interagency

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Memo’s impact is contested, as it appears to be inconsistently applied in different immigration courts).

47. See Freeman & Rossi, *supra* note 42, at 1161.

48. Freeman & Rossi, *supra* note 42, at 1161.

49. Freeman & Rossi, *supra* note 42, at 1161.

50. Freeman & Rossi, *supra* note 42, at 1161.

51. Patrick Shen, *ICE, Dept. of Labor Reach MOU on Immigration Enforcement*, SECURITYDEBRIEF.COM (May 26, 2011), <http://securitydebrief.com/2011/05/26/ice-dept-of-labor-reach-mou-on-immigration-enforcement/>.

coordination . . . harmonizing the various enforcement goals of agencies.”<sup>52</sup>

Although MOUs between agencies are unreviewable by the courts, they are subject to review by the Department of Justice’s Office of Legal Counsel (OLC), which is charged with rendering legal advice and opinions for Executive Branch agencies in various legal matters, including interagency MOUs.<sup>53</sup> Although these opinions do not carry the same weight as an opinion from a court of law, they are legally significant because they assist the executive, legislative, and judicial branches in making legal decisions.<sup>54</sup> Further, they wield influence over the bar and the legal profession.<sup>55</sup> Thus, although MOUs are usually not enforceable by a court, the OLC may oversee and advise on such an agreement when the agencies are drafting and executing them.

For these reasons, the MOU between DHS and DOL serves as the cornerstone of their relationship by enumerating how these two agencies balance their distinct and sometimes contradictory immigration and employment enforcement efforts by separating these agencies’ enforcement efforts. Part III.B will explore how these two agencies have historically negotiated their dual enforcement goals, providing insight into their ability to coordinate

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52. Lee, *supra* note 3, at 1121.

53. See *Opinions*, OFFICE OF LEGAL COUNSEL, <http://www.justice.gov/olc/opinions.htm> (last visited Mar. 30, 2013) (“The authority of the Office of Legal Counsel to render legal opinions derives from the authority of the Attorney General. Under the Judiciary Act of 1789, the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of Executive Branch departments. This authority is now codified at 28 U.S.C. §§ 511–513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions and legal advice to the various Executive Branch agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.”). In carrying out its mandate to advise federal agencies on legal matters, the OLC has written opinion on interagency MOUs.

For examples of OLC legal opinions concerning agency MOUs, see Department of Labor Jurisdiction to Investigate Certain Criminal Matters, 10 Op. O.L.C. 130 (1982) (explaining that the Attorney General and the Department of Labor may not enter into an MOU delegating the Attorney General’s criminal investigation powers to the Department of Labor unless the DOL has explicit overlapping investigatory powers); The Attorney General’s Role as Chief Litigator for the United States, 6 Op. O.L.C. 47, 58 (1982) (explaining the conditions under which MOUs sharing of litigation powers between the Attorney General and other agencies are appropriate).

54. See *Opinions*, *supra* note 53.

55. See *Opinions*, *supra* note 53.

implementation of federal policies related to unauthorized workers while adequately safeguarding those workers from abuse.

## B. HISTORY OF DHS-DOL MOU'S

The content of previous MOUs helps to reveal the historical evolution of the relationship between the DOL and federal immigration enforcement. It demonstrates that, while the relationship began with an imbalance in favor of immigration enforcement, the agencies have increasingly attempted to evenly weigh the two agencies' priorities. The current MOU is a revised version of a previous MOU, which was initially designed in 1992 and first revised in 1998.<sup>56</sup>

The 1992 MOU favored immigration enforcement over labor enforcement by requiring DOL to assist in the investigation of workers' immigration status.<sup>57</sup> The 1992 MOU required the DOL "to inspect I-9 forms<sup>58</sup> whenever it conducted a labor standards investigation."<sup>59</sup> Further, "[i]f the DOL's investigation uncovered evidence of unauthorized employment, the agency was required to refer the case to the INS."<sup>60</sup> This policy curtailed workers' capacity to force their employers to comply with labor laws, as an unauthorized worker who filed a complaint with the DOL risked being referred to immigration authorities and possibly deported.<sup>61</sup>

The 1992 MOU was updated in 1998, when the former INS was still in existence.<sup>62</sup> The 1998 MOU still contemplated collaboration between the agencies on immigration enforcement, but took measures to prevent immigration enforcement from interfer-

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56. *INS and Department of Labor Sign New Memorandum of Understanding on Workplace Inspections*, NAT'L IMMIGRATION LAW CTR. (Dec. 21, 1998) [http://v2011.nilc.org/immsemplymnt/wkplce\\_enfrcmnt/wkplcenfrc006.htm](http://v2011.nilc.org/immsemplymnt/wkplce_enfrcmnt/wkplcenfrc006.htm) [hereinafter *New MOU*].

57. *Id.*

58. The I-9 is a legislatively mandated employment eligibility form that verifies a person's identity, used to prevent people from working in the U.S. without authorization. See *I-9, Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/i-9> (last visited Jan. 8, 2013). All US employers must complete and retain an I-9 form for every person that they hire, citizen and noncitizens. *Id.*

59. *New MOU*, *supra* note 56.

60. Recall that DHS did not exist until November 2002. See *Homeland Security Act of 2002*, Pub. L. 107-296, Nov. 25, 2002, 116 Stat. 2135.

61. See *New MOU*, *supra* note 56.

62. *New MOU*, *supra* note 56.

ing with labor enforcement.<sup>63</sup> It established that DOL would not inspect I-9 forms where a labor-standards investigation was based on a worker complaint (although DOL would still inspect I-9s in “directed’ investigations of certain industries”).<sup>64</sup> Thus, the 1998 MOU shielded workers from an I-9 audit once a worksite investigation was already in place, but did not provide protections beyond that. It was not revised again until 2011, when, as is described in detail below, the two agencies solidified more protections for workers, generally prohibiting ICE from investigating worksites where a DOL investigation is taking place.<sup>65</sup> Thus, although the first interagency MOU in 1992 prioritized immigration enforcement, each subsequent MOU has given increasing weight to labor-enforcement priorities.

### C. KEY ELEMENTS OF THE 2011 MOU

Key elements of the 2011 MOU highlight how the two agencies are trying to balance competing interests by minimizing the extent to which immigration enforcement can interfere with labor enforcement. The DHS-DOL MOU’s stated purpose is “to set forth the ways in which the Departments will work together to ensure that their respective civil worksite enforcement activities do not conflict and to advance the mission of each Department.”<sup>66</sup> The MOU identifies why labor and immigration law are both critically important and emphasizes the need to harmonize enforcement of the two sets of laws:

Effective enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers regardless of immigration status. Effective enforcement of immigration law is essential to protect the employment rights of lawful U.S. workers, whether citizen or non-citizen,

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63. *New MOU*, *supra* note 56.

64. *New MOU*, *supra* note 56.

65. *Immigration and Labor Enforcement in the Workplace*, NAT’L EMP’T LAW PROJECT & NAT’L IMMIGRATION LAW CTR. 1 (2011), <http://www.nilc.org/document.html?id=358>.

66. *MOU*, *supra* note 20, at 1.

and to reduce the incentive for illegal migration to the United States.<sup>67</sup>

The MOU asserts that “effective enforcement of both labor- and immigration-related worksite laws requires that the enforcement process be insulated from inappropriate manipulation by other parties,”<sup>68</sup> emphasizing noninterference. The MOU specifies the “principal and responsible parties” to the MOU as ICE within DHS; and the Wage and Hour Division (WHD), Office of Federal Contract Compliance Programs (OFCCP), Occupational Safety and Health Administration (OSHA), Office of Labor-Management Standards (OLMS), and Office of the Assistant Secretary for Policy (OASP) within DOL.<sup>69</sup> Thus, the MOU implicates immigration enforcement, as well as enforcement of laws mandating the minimum wage, workplace safety standards, federal contract requirements, and union-management requirements.

The MOU protects limited kinds of labor enforcement-related activity from ICE involvement — only activity that qualifies as a “labor dispute.” “Labor dispute” is defined as

a labor-related dispute between the employees of a business or organization and the management or ownership of the business or organization concerning . . . the right to the legal minimum wage, a promised or contracted wage, and overtime; the right to receive family medical leave and employee benefits to which one is legally entitled; the right to have a safe workplace and to receive compensation for work-related injuries; the right to be free from unlawful discrimination; and, the right to be free from retaliation for seeking to enforce the above rights.<sup>70</sup>

The most recently updated version of the MOU, dated December 11, 2011, also adds “the rights to form, join or assist a labor organization, to participate in collective bargaining or negotiation, and to engage in protected concerted activities for mutual

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67. *MOU*, *supra* note 20, at 1.

68. *MOU*, *supra* note 20, at 1.

69. *MOU*, *supra* note 20, at 1.

70. *MOU*, *supra* note 20, at 1–2.

aid or protection”<sup>71</sup> and “the rights of members of labor unions to union democracy, to unions free of financial improprieties, and to access to information concerning employee rights,”<sup>72</sup> solidifying labor and union-organizing activities as protected activities. Thus, in defining labor dispute broadly, the MOU seeks to protect both individual and collective rights to labor protections.

The substantive provisions are spelled out in Section IV of the MOU, which covers the agencies’ goals of coordination and “de-confliction.”<sup>73</sup> This section specifies the actions that the agencies agree to take (or not take) when a situation might present both immigration- and labor-enforcement opportunities. A key provision prohibits ICE from interfering with DOL investigation sites: “ICE agrees to refrain from engaging in civil worksite enforcement activities”<sup>74</sup> at a worksite that is the subject of an existing DOL investigation of a labor dispute during the pendency of the DOL investigation and any related proceeding.<sup>75</sup> The MOU also provides that ICE will take efforts to insulate the agencies from interference by outside parties:

ICE further agrees to be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes. ICE will continue its existing practice of assessing whether tips and leads it receives concerning worksite enforcement are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws.<sup>76</sup>

Section IV also spells out DOL’s role in identifying attempts at manipulation: “DOL agrees to assist ICE’s efforts . . . by informing ICE of information DOL may have that other parties seek to

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71. *MOU*, *supra* note 20, at 2.

72. *MOU*, *supra* note 20, at 2.

73. *See MOU*, *supra* note 20, at 2.

74. The MOU defines ICE’s civil worksite enforcement to include “the civil authorities of ICE to inspect Forms I-9, to investigate, to search, to fine, and to make civil arrests for violations of the immigration laws relating to the employment of aliens without work authorization.” *MOU*, *supra* note 20, at 2. The MOU goes on to note that “they do not include any of ICE’s criminal authorities.” *MOU*, *supra* note 20, at 2.

75. *MOU*, *supra* note 20, at 2.

76. *MOU*, *supra* note 20, at 2.



manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate enforcement of labor laws.”<sup>77</sup> Thus, the MOU attempts to limit ICE interference in DOL investigations, and to avoid the use of immigration enforcement as a tool of manipulation in labor disputes, by isolating information about potentially unauthorized workers from ICE, protecting the agencies from manipulative outside parties such as employers, and limiting enforcement activities so that the agencies’ actions do not conflict with each other’s goals.

However, the MOU does not absolutely prohibit ICE interference. The MOU contemplates situations where ICE interference in DOL investigations will be necessary and proper. If the Director or Deputy Director of ICE identifies a situation of “national security, the protection of critical infrastructure . . . or a federal crime other than a violation relating to unauthorized employment,”<sup>78</sup> the MOU’s non-conflict agreement does not apply. Further, such conflicting enforcement activity may occur if it is directed by the Secretary of Homeland Security<sup>79</sup> or is requested by a DOL official, such as the Secretary of Labor, the Solicitor of Labor or another official designated by the Secretary of Labor.<sup>80</sup> Thus, there are exceptional circumstances that permit a breach of the firewall between the DOL and ICE.

The MOU does not clearly state how the new interagency policy will be implemented; however, its implementation can be inferred from the text of the MOU pertaining to the affected actors and agencies.<sup>81</sup> Analyzing the text of the MOU, the National Employment Law Project (NELP)<sup>82</sup> and the National Immigration Law Center (NILC)<sup>83</sup> explain how the MOU is triggered:

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77. *MOU*, *supra* note 20, at 2.

78. *MOU*, *supra* note 20, at 3.

79. *See MOU*, *supra* note 20, at 3.

80. *See MOU*, *supra* note 20, at 3.

81. *See MOU*, *supra* note 20, at 3.

82. NELP is a national employment rights advocacy organization that “promote[s] policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing through improved benefits and services.” *Background*, NAT’L EMP’T LAW PROJECT, [http://www.nelp.org/index.php/content/content\\_about\\_us/background/](http://www.nelp.org/index.php/content/content_about_us/background/) (last visited Mar. 28, 2013).

83. NILC describes itself as a “national legal advocacy organization in the U.S. exclusively dedicated to defending and advancing the rights of low-income immigrants and their families.” *Who We Are*, NATIONAL IMMIGRATION LAW CENTER, <http://www.nilc.org/whoweare.html> (last visited Mar. 24, 2012).

ICE will rely on information from DOL to determine that a labor dispute exists at a particular worksite or that an investigation is underway. All accepted complaints and active investigations underway at DOL will be logged in a DOL database, which ICE will cross-check before undertaking any worksite-based enforcement. If an ICE target comes up with a conflict tag from the DOL database, the MOU is triggered. DOL agrees to inform ICE of attempts made by employers and others to retaliate against workers for exercising their workplace rights or to manipulate in other ways pending labor disputes.<sup>84</sup>

They point out that there are still some ambiguities regarding how the MOU will function with respect to individual complaints, recommending that “[a]dvocates should clarify with the DOL whether particular worker complaints or investigations are in the database that could trigger the conflict notice at ICE.”<sup>85</sup>

Additionally, the MOU does not appear to have an enforcement mechanism, which is problematic with respect to its goal of preventing immigration enforcement from interfering with workers asserting their workplace rights. No individual worker has a right of action, as the MOU explicitly states, “This MOU is an agreement between DHS and DOL, and does not create or confer any right or benefit on any other person or party, public or private.”<sup>86</sup> It is unclear whether the MOU has any other enforcement mechanism.<sup>87</sup> Since it is an agreement between two agency parties, it is possible that one agency may have a right of action against the other if it is violated. However, it is unclear what that right of action would be. This lack of enforceability calls into question whether the MOU is a meaningful agreement, or merely an aspirational one. This weakness will be addressed in more detail in the following Part, which will conduct a critical analysis of how the MOU contributes to workers’ protections.

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84. *Immigration and Labor Enforcement in the Workplace*, *supra* note 65, at 2.

85. *Immigration and Labor Enforcement in the Workplace*, *supra* note 65, at 2.

86. *MOU*, *supra* note 20, at 5.

87. Further, Professors Freeman and Rossi state that interagency agreements “are generally unenforceable,” leading to a reasonable conclusion that the MOU does not provide an enforcement mechanism. Freeman & Rossi, *supra* note 42, at 1161.

#### IV. CRITICAL ANALYSIS OF THE CURRENT DHS-DOL MOU

Although the MOU protects unauthorized workers who participate in DOL labor investigations by preventing ICE investigations at these workers' worksites, the agreement is ultimately weak because it is unenforceable and can be changed at any time. Further, the MOU does not protect unauthorized workers who choose to enforce their rights in a forum outside of DOL, such as state or federal court. Part IV.A examines these weaknesses in detail, highlighting the agreement's tentative nature and restrictions based on forum. Part IV.B then presents and analyzes various scholars' suggestions for how to improve the DOL and DHS's relationship. Finally, Part IV.C explains how the proposed POWER Act could compensate for the gaps in the MOU's coverage.

##### A. THE MOU'S WEAKNESSES: TENTATIVE NATURE AND LIMITED FORUM

The main strength of the MOU is the firewall that it establishes between DOL and ICE, limiting the risk that employers who are being investigated will use the threat of immigration enforcement to silence immigrant workers who assert their workplace rights. The MOU helps to prevent "abusive employers from manipulating DHS to rid themselves of workers who assert their rights"<sup>88</sup> by ensuring that immigration enforcement cannot occur while a labor investigation is taking place. However, with respect to the broader goal of balancing immigration enforcement and labor enforcement, the MOU is weak because it is of an impermanent and limited nature and because it does not cover other forums in which workers bring employment law claims.

##### 1. *The MOU is an Impermanent and Limited Measure*

The inherent limitations of an MOU make it a weak tool for protecting unauthorized workers when they bring labor claims and for ensuring that immigration enforcement does not interfere

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88. *Depts. of Labor & Homeland Security Issue MOU*, NAT'L IMMIGRATION LAW CTR., <http://www.nilc.org/2011mar31mou.html> (last visited Mar. 24, 2012).

with labor enforcement. As explained above, interagency MOUs are tentative and limited: they can be changed when agencies see fit and, although they are subject to review by the OLC,<sup>89</sup> they are generally unreviewable and unenforceable by courts.<sup>90</sup> Also, the DOL-DHS MOU specifically states that it does not create a private right of action.<sup>91</sup>

Further, MOUs, like other contracts, are limited to the parties that sign it. Given that labor enforcement occurs in other forums besides the DOL, a balance of labor and immigration enforcement can only be achieved by coordinating with other agencies, such as the U.S. Equal Employment Opportunity Commission (EEOC), and the courts. Thus, the MOU's tentative and limited nature inhibit its ability to achieve coordination in immigration and labor enforcement because it is not a long-term, stable legal mechanism. Because of a greater need for stability and multi-forum change, federal legislative reform may be the best option for securing labor protections for immigrants, an idea that will be discussed in Part IV.C.

## 2. *Protections Are Needed for Federal Litigation*

Another major limitation of the MOU is that it is only between DHS and DOL, and does not limit DHS's ability to conduct immigration enforcement when other agencies, such as EEOC, investigate workplace complaints. The MOU also does not preclude ICE involvement when federal litigation, a crucial means of obtaining redress for wronged workers, is ongoing. Given that the DOL's Wage and Hour Division cannot handle the volume of wage and hour complaints that are filed nationwide,<sup>92</sup> many individuals

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89. See *Opinions*, *supra* note 53.

90. See Freeman & Rossi, *supra* note 42, at 1137–38.

91. See *MOU*, *supra* note 20.

92. One observer has pointed out that the DOL's Wage and Hour Division (WHD) "has not had sufficient resources or successful strategies for wage and hour enforcement," noting that "[f]rom the 1950s to the late-1990s, the ratio of WHD investigators to American workers declined from one investigator for every 46,600 workers to one investigator for every 150,000 workers." Peter Romer-Friedman, Note, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 506 (2006). The problem of the failure of the DOL to enforce employment laws has been detailed in reports by the U.S. Government Accountability Office. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-973T, DEPARTMENT OF LABOR:

choose to file lawsuits in federal court instead.<sup>93</sup> Just as immigration enforcement can interfere with DOL investigations, it can also impede federal litigation.

The 2008 Pilgrim's Pride lawsuit is a prime example of the need for federal employment-rights lawsuits to be protected against DHS involvement.<sup>94</sup> United Steelworkers District 9, which represented poultry workers in Pilgrim's Pride poultry plant in Chattanooga, Tennessee, was recruiting Latino workers, who had low levels of union participation, to join the union.<sup>95</sup> At the same time, a wage-and-hour class action lawsuit against Pilgrim's Pride was pending.<sup>96</sup> When ICE raided the Chattanooga plant in April 2008, the raid had a chilling effect on the workers, even those who were working legally, as they became more hesitant to unionize due to the fear of possible immigration consequences, both to themselves and to family members.<sup>97</sup> The union representative stated, "These workers are in no shape to engage in a contract fight with Pilgrim's Pride. They're terrified."<sup>98</sup>

Further, the ICE raid inhibited the ability of lawyers to contact those who were part of the class-action lawsuit, but were detained in the raid, as ICE refused to ensure that notice of the lawsuit reached detained workers who had a right to join the lawsuit.<sup>99</sup> As an attorney who worked on the wage-and-hour litigation explained, "The raid definitely had a chilling effect. Immigrant workers, even those legally authorized to work in the United States, were afraid of opting in to the class because they were afraid that somehow it would jeopardize a family member."<sup>100</sup>

This chilling effect can be even more drastic for workers who do not have legal status. In a report on immigrant workers in the

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CASE STUDIES FROM ONGOING WORK SHOW EXAMPLES IN WHICH WAGE AND HOUR DIVISION DID NOT ADEQUATELY PURSUE LABOR VIOLATIONS (2008).

93. See *FLSA Cases in Federal Court, 1993-1999, 2000-2012*, SEYFARTH SHAW LLP, [www.seyfarth.com/dir\\_docs/publications/FLSA2.pdf](http://www.seyfarth.com/dir_docs/publications/FLSA2.pdf) (last visited Mar. 7, 2013). The number of FLSA cases federal in federal court has steadily increased over the past two decades. *Id.* Over 7000 FLSA cases were filed in federal court in 2012. *Id.*

94. See Smith et al., *supra* note 16, at 24.

95. See Smith et al., *supra* note 16, at 25.

96. See Smith et al., *supra* note 16, at 26.

97. See Smith et al., *supra* note 16, at 26.

98. Smith et al., *supra* note 16, at 25.

99. Smith et al., *supra* note 16, at 26.

100. Smith et al., *supra* note 16, at 26 (quoting interview with Jenny Yang, attorney at Cohen, Milstein, Sellers & Toll PLLC).

meat and poultry industry, many of whom were unauthorized, Human Rights Watch found:

The possibility of an inquiry into workers' documentation during a proceeding adjudicating their claims creates a dilemma for them. The questions are intimidating — and designed to be so. They force workers to choose between seeking legal recourse for wage and hour violations, health and safety violations, job discrimination, workplace injuries and illnesses, reprisals for union activity and other violations, on one hand, or exposing themselves, on the other hand, to dismissal and deportation by responding to such inquiries when they seek such recourse.

Not surprisingly, they have a chilling effect on workers' willingness to file claims.<sup>101</sup>

The problem of the threat of immigrant enforcement stifling reporting of workplace violations exists in other sectors, including agriculture, the restaurant and hotel industry, and textile manufacturing.<sup>102</sup>

Thus, the documented chilling effect of threats of immigration enforcement on workers reporting workplace violations demonstrate the need to prevent immigration enforcement from thwarting labor enforcement. Although the Fair Labor Standards Act, which enumerates basic employment rights such as the minimum wage and overtime pay<sup>103</sup> and contains an anti-retaliation provision,<sup>104</sup> the fact that federal lawsuits and other forms of legal complaint are still stifled demonstrates that the MOU does not

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101. *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, HUMAN RIGHTS WATCH 112 (2004), <http://www.hrw.org/sites/default/files/reports/usa0105.pdf>.

102. See, e.g., Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in U.S. Cities*, UCLA CTR. FOR LABOR RESEARCH & EDUC. 4 (2009), [labor.ucla.edu/publications/reports/brokenlaws.pdf](http://labor.ucla.edu/publications/reports/brokenlaws.pdf); *Weeding Out Abuses: Recommendations for a law-abiding farm labor system*, FARMWORKER JUSTICE & OXFAM AM. 1 (2010), <http://harvestingjustice.org/sites/default/files/documents/7.2.a.7%20weeding-out-abuses.pdf>.

103. Fair Labor Standards Act, 29 U.S.C. §§ 207, 208 (2006).

104. The Fair Labor Standards Act states that it is a violation for any person to “discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.” 29 U.S.C. § 215(a)(3) (2006).

sufficiently address fears of immigration consequences. Thus, more steps need to be taken to balance immigration- and labor-enforcement priorities in the context of federal litigation.

### 3. *Protections Are Needed for State Litigation and Investigations by State Agencies*

State court cases and state labor-enforcement activities should also be protected from interference by immigration enforcement. States play a role in enforcing labor rights that the DOL-DHS MOU does not address. Much labor, employment, and employment-discrimination law enforcement takes place at the state level; for example, in New York, the state Department of Labor investigates state labor law violations<sup>105</sup> and the Division of Human Rights investigates discriminatory employment practices that violate the state's Human Rights Law.<sup>106</sup> Professor Jayesh Rathod also points out that "all U.S. states, with the exception of Alabama, Louisiana, Mississippi, South Carolina, and Tennessee, have some form of minimum wage law."<sup>107</sup> Further, some states have minimum wage rates above the federal level.<sup>108</sup> Some states "establish independent, more stringent standards and are enforced by state entities that are largely independent of the DOL."<sup>109</sup>

Thus, many workers rationally pursue labor enforcement in state courts or with state agencies, as their rights come from state law and thus their complaint must be resolved by a state agency investigation or in state court. However, workers can experience the same chilling problems that occur in federal litigation, making it appropriate to balance immigration and labor-enforcement priorities in the state context as well.

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105. See *Our Mission*, N.Y. STATE DEP'T OF LABOR, <http://www.labor.ny.gov/about/index.shtm> (last visited Jan. 8, 2013).

106. See N.Y. STATE DIV. OF HUMAN RIGHTS, <http://www.dhr.ny.gov/index.html>, (last visited Jan. 8, 2013) (graphically showing that 87% of the Division's cases in 2011 were employment discrimination cases).

107. Rathod, *supra* note 21, at 1158 n.3.

108. Alaska, California, Connecticut, Illinois, Maine, Massachusetts, Michigan, Nevada, New Mexico, Ohio, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia set the state minimum wage above the federal level. See ROTHSTEIN & LIEBMAN, *supra* note 4, at 393.

109. ROTHSTEIN & LIEBMAN, *supra* note 4, at 393.

#### 4. *Protections Are Needed for State and Local Law Enforcement Interference*

The DOL-DHS MOU also does not address the issue of state and local law enforcement agencies' participation in immigration law enforcement. It is crucial to look at the role that state and local law enforcement may play in the interplay of workers' rights and immigration as, increasingly, local law enforcement is becoming enmeshed in immigration enforcement.<sup>110</sup> For example, in the case of Durrett Cheese Sales, a cheese- and dairy-products wholesale company, a number of workers organized, after having not been paid for several weeks.<sup>111</sup> Realizing that the workers were organizing, their supervisor fired them and contacted the local sheriff's department, who reported them to ICE.<sup>112</sup> Although no charges were filed against the workers, this action surely stifled any subsequent attempt by workers to organize to pursue their right to be paid.

Notably, local law enforcement officials are essentially exempt from the parallel duties that ICE has towards the DOL. As Professor Stephen Lee points out, "had the Durrett supervisor reported the workers to ICE — and had the receiving officer suspected that Durrett was in the midst of a labor dispute — in theory, ICE would have had to withhold or delay action under existing operating instructions."<sup>113</sup> However, local law enforcement agencies do not have such a duty to balance labor-enforcement and immigration-enforcement goals. This is especially concerning due to the increasing participation of non-federal actors in the enforcement of federal immigration laws.<sup>114</sup> The Secure Communities program, which directs state and local law-enforcement agencies to send fingerprints of arrestees to ICE

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110. See, e.g., James R. Edwards, Jr., *Officers Need Backup: The Role of State and Local Police in Immigration Law Enforcement*, CTR. FOR IMMIGRATION STUDIES (Apr. 2003), <http://www.cis.org/State%2526LocalPolice-ImmigrationLawEnforcement>. See also discussions around the role of local and state law enforcement in recent state immigration bills, such as Randal C. Archibald, *Arizona Immigration Bill Divides Law Enforcement*, N.Y. TIMES (Apr. 21, 2010), <http://www.nytimes.com/2010/04/22/us/22immig.html>.

111. See Lee, *supra* note 3, at 1133.

112. See Lee, *supra* note 3, at 1133.

113. Lee, *supra* note 3, at 1133.

114. See, e.g., Laurel R. Boatwright, Note, "Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633, 1634–35 (2006).



to check their immigration statuses, is one example.<sup>115</sup> Thus, because of their potential involvement in immigration investigations, state law-enforcement agencies should also be included in efforts to ensure that threats or fears of immigration consequences do not prevent workers from bringing valid workplace claims.

It is possible that the provision of the MOU according to which ICE has agreed to “be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes”<sup>116</sup> actually prevents local law enforcement from using immigration enforcement to interfere with labor enforcement to some extent. The National Employment Law Project (NELP) has suggested that “[t]his language may mean that retaliation carried out by an employer’s surrogate (such as local police or insurers) could trigger the MOU.”<sup>117</sup> Thus, according to NELP’s interpretation, local law enforcement could be considered a “surrogate” where, as in the Durrett Cheese case, the police officer reported unauthorized workers to ICE at the employer’s behest. If NELP’s interpretation is adopted, ICE would have to be alert to local law enforcement’s efforts to thwart labor enforcement when they report suspected immigration violations. However, this would still not include situations where local law enforcement is interfering with a labor investigation on its own accord, without acting on behalf of an employer. Thus, although the MOU is a valuable tool for enforcing labor rights, it fails to encompass the diverse forums in which labor enforcement occurs, and does not protect against local law-enforcement activity.

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115. *Secure Communities*, IMMIGRATION & CUSTOMS ENFORCEMENT, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Jan. 8, 2013). *Secure Communities* has been criticized by many. See, e.g., Jennie Pasquarella, *Detain First, Investigate Later: How U.S. Citizens Are Unlawfully Detained Under S-Comm.*, ACLU BLOG OF RIGHTS (Nov. 11, 2011, 3:32 PM), <http://www.aclu.org/blog/immigrants-rights-racial-justice/detain-first-investigate-later-how-us-citizens-are-unlawfully>. In fact, California Attorney General Kamala Harris recently directed local law enforcement agencies that they did not have to participate in *Secure Communities*, noting that 28% of the people targeted for deportation as a result of *Secure Communities* were not criminals. Lee Romney & Cindy Chang, *Secure Communities Is Optional, Harris Says*, L.A. TIMES (Dec. 5, 2012), <http://articles.latimes.com/2012/dec/05/local/la-me-secure-communities-20121205>.

116. *MOU*, *supra* note 20, at 2.

117. *Immigration and Labor Enforcement in the Workplace*, *supra* note 65, at 2.

## B. ANALYSIS OF PROPOSALS BY SCHOLARS AND ADVOCATES

As the relationship between employment and immigration has become more salient, professors, lawyers, and policy-makers have suggested ways to better align immigration-enforcement and labor-enforcement goals within the context of DHS and DOL's relationship. In addition, they have devised solutions to ensure that immigration enforcement does not interfere with workplace enforcement that occurs in forums other than the DOL.

One innovative solution, proposed by Professor Stephen Lee, would create a system of "interagency monitoring," which would provide an *ex ante* constraint on ICE to ensure that their immigration-enforcement actions do not interfere with labor enforcement.<sup>118</sup> Labor agencies such as DOL could be empowered "to monitor DHS to ensure that immigration officials account for the labor consequences of their enforcement decisions."<sup>119</sup> Such an approach would enhance accountability between the DHS and DOL. This proposed system would specifically force ICE to take into consideration the effect of its actions on labor violations:

For much of its history, ICE has been largely insulated against meaningful oversight as to its workplace enforcement decisions, enabling its officers to rely on tips, leads, and other information without considering whether an investigation enables a bad-actor employer to escape liability for labor violations or chills the reporting of labor violations by unauthorized workers.<sup>120</sup>

Since ICE does not internally monitor the impact of its actions on worksite enforcement, "only by moving in the direction of an *ex ante* constraint . . . that can be enforced by an external source . . . can any interagency arrangement hope to influence ICE."<sup>121</sup> Professor Lee's proposal would require ICE to obtain permission from DOL before investigating a workplace, and perform a pre-investigation check prior to embarking on a civil in-

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118. See Lee, *supra* note 3, at 1115.

119. Lee, *supra* note 3, at 1094.

120. Lee, *supra* note 3, at 1095.

121. Lee, *supra* note 3, at 1122.

vestigation.<sup>122</sup> Such solutions could help balance the two agencies' enforcement goals by giving DOL more power than it currently has to voice concerns when ICE conducts immigration enforcement at given workplaces.

But while a system of interagency monitoring with pre-investigation checks and balances may increase agency accountability, DHS may be resistant to being monitored by another agency.<sup>123</sup> It may be more feasible to adopt an interagency agreement that does not include monitoring. The proposal also does not address the instances where DHS must be held accountable for its actions when the courts or agencies other than the DOL enforce labor laws.

ICE could also contribute to protecting labor rights by altering its deportation policies to support workers who have experienced workplace violations and who have tried to assert their rights. ICE has the power to exercise prosecutorial discretion to halt deportation in this type of situation.<sup>124</sup> As Professor Lori Nessel explains in defense of such an approach, "the aggressive enforcement of labor and employment laws would further the underlying goals of immigration policy by making undocumented workers less appealing to employers."<sup>125</sup> By exercising its prosecutorial discretion to ensure that workers whose rights are violated are not deported, ICE could remove the disincentives to reporting workplace violations.

Immigration- and employment-policy organizations have also suggested that DHS enter into similar MOUs with other employment-law enforcement agencies. The federal National Labor Relations Board, the Equal Employment Opportunity Commission, and the Office of Special Counsel for Unfair Immigration-Related Employment Practices are the most natural agencies for such programs because they also investigate employment and labor law practices.<sup>126</sup> NELP suggests that, under such a program, "[e]ach agency should have in place a Memorandum of Un-

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122. See Lee, *supra* note 3, at 1125.

123. Professor Jayesh Rathod touches upon this and other ways to improve Lee's proposal, advocating for interagency "cooperation," rather than monitoring. See generally Rathod, *supra* note 21.

124. See Nessel, *supra* note 6, at 389.

125. Nessel, *supra* note 6, at 389.

126. See Smith et al., *supra* note 16, at 35.

derstanding that delineates its agreement with ICE to protect workers' rights in the context of immigration enforcement, and that covers all compliance investigations — complaint-driven and targeted — by the agency.”<sup>127</sup> This way, other employment-law agencies could have a similar firewall, preventing ICE from using labor enforcement as a means for immigration enforcement. These suggestions highlight the need for changes within ICE, as well as alterations to the terms of interagency relationships. However, there is still a need for permanent changes beyond these proposals in order to prevent ICE from interfering with federal and state litigation and other agencies that investigate employment practices.

C. HOW THE PROPOSED POWER ACT INCORPORATES MULTIPLE SUGGESTIONS FOR CHANGE AND FILLS GAPS IN THE MOU'S COVERAGE

The participation of federal and state agencies, as well as federal and state courts, in the redress of employment-law violations indicates that the problem of unauthorized workers failing to report workplace violations because of fear of retaliation or other consequences must be attacked on multiple fronts. Given the breadth of this problem, federal legislation may be the most appropriate measure to address it.

The Protecting Our Workers from Exploitation and Retaliation (POWER) Act tackles the problem of balancing immigration and labor enforcement by ensuring that “immigrant workers who try to exercise their basic civil and labor rights are protected from retaliation.”<sup>128</sup> Its stated purpose is “[t]o protect victims of crime or serious labor violations from deportation during Department of Homeland Security enforcement actions.”<sup>129</sup> The POWER Act was first introduced by New Jersey Senator Robert Menendez on April 14, 2010,<sup>130</sup> and was reintroduced on June 14, 2011 in the Senate by Senator Menendez and in the House of Representatives by Representatives George Miller and Judy Chu of Califor-

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127. Smith et al., *supra* note 16, at 35.

128. *10 Ways to Rebuild the Middle Class for Hardworking Americans*, NAT'L EMP'T LAW PROJECT 20 (Mar. 5, 2012), [www.nelp.org/10WaysToRebuildMiddleClass](http://www.nelp.org/10WaysToRebuildMiddleClass).

129. POWER Act, H.R. 2169, 112th Cong. (2011).

130. S. 3207, 111th Cong. (2010).

nia.<sup>131</sup> Multiple immigration and employment law and policy organizations support the legislation, including the Excluded Worker Congress, Lawyers' Committee for Civil Rights Under Law, and the National Immigration Law Center.<sup>132</sup> The POWER Act's proposed provisions include an expansion of the U visa<sup>133</sup> eligibility criteria to include individuals who have suffered workplace violations.<sup>134</sup> Further, the proposed legislation adds individuals who have been threatened by their employers or who reasonably fear retaliation by their employers to the list of qualifying individuals.<sup>135</sup> Expanding U visa eligibility could confirm and support unauthorized workers' right to report workplace abuses by providing an immigration benefit to individuals who assist in workplace investigations. This reform would balance immigration- and labor-enforcement goals by alleviating the fear of deportation or other immigration consequences that some low-wage workers have, lessening the problem of immigration enforcement interfering with labor enforcement. Thus, the POWER Act would employ the U visa as a tool for protecting workers.

Additionally, the POWER Act requires the DHS to stay pending deportations of individuals who have filed labor claims,<sup>136</sup> which would allow the DOL to fully investigate all workplace violations. This would remove any incentive that employers might have to report their workers to ICE or initiate an immigration investigation at their workplace in order to avoid liability for workplace abuses. Finally, the POWER Act formalizes the fire-

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131. See H.R. 2169.

132. *POWER Act Supporters*, THE POWER CAMPAIGN, <http://thepoweract.com/about/supporters/> (last visited Jan. 10, 2013). Other organizational supporters include the National Guestworker Alliance, National Day Labor Organizing Network, and Jobs with Justice. *Id.*

133. The U visa is a nonimmigrant visa that gives temporary legal status and work authorization to victims of serious crimes who have cooperated with the investigation of the crime. See *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.ucis.gov/portal/asite/uscis> (follow "Humanitarian" hyperlink; then follow "Victims of Human Trafficking and Other Crimes" hyperlink; then follow "U Nonimmigrant Status (U Visa)" hyperlink) [hereinafter *U Nonimmigrant Status*].

134. H.R. 2169. Professor Leticia Saucedo has previously suggested using U visas as a tool for workplace enforcement. See Leticia M. Saucedo, *A New "U": Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 891 (2008).

135. S. 3207.

136. *Id.*

wall that the DHS and the DOL establish in their MOU.<sup>137</sup> This would address one of the primary critiques of the MOU, which is that it is subject to change by both agencies.

It is possible that the POWER Act may be too lenient with immigration remedies, leading to possible abuse. Workers might have an incentive to fraudulently initiate employment-law claims in order to gain immigration benefits. However, this concern should be allayed by the U visa application's rigorous approval process to vet for fraudulent or weak claims,<sup>138</sup> a process that would presumably apply to applications based on labor violations. Further, the POWER Act's procedural limits that define the amount of time that a pending deportation can be stayed and reject complaints made in bad faith make it unlikely that workers would successfully feign labor violations in order to gain immigration benefits. The Act simply requires that pending deportations be stayed; it would not provide a way for people to remain in the country forever or provide a path for legal status in the country.<sup>139</sup> Additionally, the POWER Act provides that workplace claims made in "bad faith," based on a finding by an immigration judge, will not trigger a stay of removal proceedings for an immigrant.<sup>140</sup> Finally, the POWER Act limits stays of removal to three years, limiting the amount of time that a person can stay in the United States based on nothing other than a workplace complaint.<sup>141</sup>

Thus, the POWER Act prevents interference in labor enforcement by providing a path to legal immigration status for workers who stand up for their rights when they have been violated. Further, it solidifies the firewall between the DOL and DHS, responding to the criticism that the firewall established by the MOU is an impermanent solution.

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137. *Id.*

138. In order to obtain a U visa, applicants must include certification by a federal, state, or local governmental official confirming the applicant's past, current or future assistance in the prosecution of criminal activity. They must also provide evidence in support of their application. See *U Nonimmigrant Status*, *supra* note 133.

139. See H.R. 2169.

140. *Id.*

141. *Id.*

## V. CONCLUSION

Given the high number of immigrant workers in the country,<sup>142</sup> the relationship between the DHS and DOL is crucial. The 2011 DHS-DOL MOU is a significant step towards aligning those agencies' law-enforcement goals with the goal of workers'-rights advocacy. Although President Barack Obama and Congress have declared their commitment to enacting comprehensive immigration reform in the coming months,<sup>143</sup> agency action remains an important component of protecting immigrant workers' rights. This Note has highlighted the importance of interagency cooperation in the realm of immigration and workers' rights. The revised DHS-DOL MOU better aligns the interests of the DHS and DOL. However, with respect to the broader goal of workers' rights advocacy, it is an inherently limited tool, because MOUs are only binding on the agencies that are parties to the agreement and are subject to change. Given the importance of protecting all workers, scholars and policy-makers need to search beyond interagency action for solutions. Federal legislation, perhaps in the form of the proposed POWER Act, should advance the multi-faceted reforms that will be necessary to ensure that the rights of all workers are upheld.

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142. See Capps et al., *supra* note 2, at 1.

143. See, e.g., Ashley Parker, *On Immigration, Obama Draws Bipartisan Praise*, N.Y. TIMES (Feb. 13, 2013), <http://www.nytimes.com/2013/02/14/us/politics/senate-panel-tackles-immigration.html>; Ashley Parker, *Senators Call Their Bipartisan Immigration Plan a 'Breakthrough'*, N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/us/politics/senators-unveil-bipartisan-immigration-principles.html>; Elise Foley, *State of the Union Speech 2013: On Immigration, 'Let's Get This Done'*, THE HUFFINGTON POST (Feb. 12, 2013, 9:41 PM) [http://www.huffingtonpost.com/2013/02/12/state-of-the-union-speech-2013\\_n\\_2641382.html](http://www.huffingtonpost.com/2013/02/12/state-of-the-union-speech-2013_n_2641382.html).