

Workers on the Fringe

Exploring the Legal Status of America's Most
Marginalized Workers

Organizing the Traditionally Unorganized

Symposium February 15, 2003

**Sponsored by University of Pennsylvania
Journal of Labor and Employment Law**

Art Read, Friends of Farmworkers

Presentation Expanded February 25, 2003

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Exploring the Legal Status of America's Most Marginalized Workers

NLRA Fundamental Rights Section 7, 29 U.S.C. 157

Employees shall have:

- * the right to self-organization, to form, join, or assist labor organizations,
- * to bargain collectively through representatives of their own choosing, and
- * to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and
- * shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment....

Marginalized Workers

Legally Marginalized and Traditionally Unorganized:

- * Agricultural Workers
- * “Domestic service” Workers
- * Undocumented Workers
- * Temporary and Contingent Workers

Marginalization of agricultural & domestic service workers

29 U.S.C. Sec. 152(3), Definitions

- * The term "employee" ... shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, ... or any individual having the status of an independent contractor....

Basis for NLRA Exclusion of Agricultural Workers

Examination of the 1935 Wagner Act and other contemporaneous New Deal legislation which included exemptions for “agricultural” workers:

- * Austin Morris, “Agricultural Labor and National Labor Legislation”, 54 Cal. L. Rev. 1939, 1951-56 (1966);
- * Maurice Jourdane, Note, “The Constitutionality of the NLRA Farm Labor Exemption,” 19 Hastings L.J. 384, 384-386 (1968);
- * Marc Linder, *Migrant Workers and Minimum Wage: Regulating the Exploitation of Agricultural Labor in the United States*, 126-175 (Westview Press, 1992).

Organizing without NLRA Protection

The exclusion of agricultural workers from the NLRA does not preempt the right of states to protect the rights of groups of workers which are protected under state law. See:

- * *Giorgi v. Pennsylvania Labor Relations Board*, 293 F. Supp. 873, 875 (E.D. Pa. 1968)
- * *Willmar Poultry Co. v. Jones*, 430 F. Supp 573 (D.Minn.1977)

See also,

- * *NLRB v. Committee of Interns and Residents*, 556 F.2d 810 at fn. 5 (2nd Cir. 1977)
- * *United Farm Workers Organizing Committee v. Superior Court*, 4 Cal. 3d 556, 483 P.2d 1215, 94 Cal. Rptr. 363 (1971) (En banc).

State Agricultural Labor Relations Acts

Four states -- Arizona, Kansas, Idaho and California – have agricultural labor relations laws that apply only to farmworkers. These laws (except for California) may have sought to restrain collective activity.

- * California Agricultural Labor Relations Act (1975)
- * Arizona Agricultural Employment Relations Act
- * Idaho Agricultural Labor Relations Act
- * Kansas Agricultural Labor Relations Act

Labor Relations Acts Not Excluding Farmworkers

The Commonwealth of Puerto Rico does not exclude agricultural workers.

- * 29 Laws of Puerto Rico § 62, Constitution Art. II, § 19

New Jersey Constitution, Article I, Sec. 19

- * See, COTA v. Molinelli, 552 A.2d. 1003 (N.J. 1989)

State Labor Relations Acts which do not exclude agricultural workers

- * Hawaii
- * Wisconsin
- * Massachusetts (excludes workers under contracts approved by federal government)
- * South Dakota (special anti-union agricultural provisions)

State Labor Relations Acts Excluding Farmworkers

States with Labor Relations Acts excluding Farmworkers:

- * Colorado
- * Connecticut
- * Michigan
- * Minnesota
- * North Dakota
- * Pennsylvania
- * Rhode Island
- * Utah
- * Vermont
- * Virginia
- * West Virginia

Anti-injunction Statutes and Labor Disputes

Federal Norris-La Guardia Act, 29 U.S.C. §§101 *et seq.*, is intended to restrict federal use of injunctions in labor disputes.

See, Federal Norris-La Guardia Act, §2 policy declaration, 29 U.S.C. §102

“Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.”

Anti-injunction Statutes and Labor Disputes – State Statutes

State laws modeled on federal Norris-La Guardia Act, 29 U.S.C. §§101 *et seq.*, restrict use of injunctions in labor disputes

See state statutes in: Connecticut, Hawaii, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington, Wisconsin, and Wyoming

Argument that public policy declarations of state Norris-La Guardia law confers substantive recognition of right to organize. *See:*

* *Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Manufacturing Company*, 256 N.W. 56, 60-61 (Wisconsin S. Ct. 1934)

- * *Krystad v. Lau*, 400 P.2d 72 (Washington S.Ct. 1965). *But see*, *International Union of Operating Engineers v. San Point Country Club*, 519 P.2d 985 (Washington S.Ct. 1974) (no employer duty to bargain).
- * *Garza v. Patnode*, 65 Lab. Cas. ¶ 52,570 (1971) in Washington state protections extend to farmworkers.

Protections in Right to Work Laws

Argument that “right to work law” may include substantive protections that reach farmworkers.

See, Florida Statutes, Chapter 31, §447.03:

- * “Employees' right of self-organization.--Employees shall have the right to self-organization, to form, join, or assist labor unions or labor organizations or to refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

States with “Right to Work” laws are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming

Defining Excluded Agricultural Workers

The Wagner Act (NLRA) as enacted in 1935 contained no definition of an “agricultural laborer.” §2(3), 49 Stat. 450 (1935).

- * The National Labor Relations Board’s (NLRB) initial interpretation and application of legislative intent of the scope of the 1935 Wagner Act exclusion of “agricultural laborers” which was not otherwise explicitly defined either therein or in the legislative history thereof was far more narrow than the definition of agricultural laborer which now controls at the NLRB.

It was the NLRB itself which was required without statutory guidance as to the meaning of the term “agricultural laborer” under the NLRA until a 1946 Congressional appropriations rider mandating usage of the Fair Labor Standards Act (FLSA) definition of agriculture

* *See*, July 26, 1946, National Labor Relations Board Appropriation Act for 1947, 60 Stat. 698. Annually renewed requiring usage of FLSA definition of agriculture

FLSA Definition Agriculture, 29 U.S.C. Sec. 203(f)

"**Agriculture**" includes **farming in all its branches** and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, **and**

“any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.”

Status of Nursery, Greenhouse, Mushroom Workers

Pre-1946 NLRB decisions included nursery, greenhouse and mushroom workers as non-agricultural workers.

* *The Park Floral Company*, 19 N.L.R.B. 403, 413-414, 5 LRRM 514 (1940).

* *Great Western Mushroom Company*, 27 N.L.R.B. 352, 357-359, 7 LRRM 72 (1940)

* *Knaust Brothers, Inc.*, 36 N.L.R.B. 915, 917-918, 9 LRRM 183 (1941)

1946 NLRB Appropriation Rider – Nursery, Greenhouse, Mushroom Workers

Nowhere does the Congressional Record of the 1946 floor debates reflect any consciousness of the impact on “horticultural” workers in greenhouses and mushroom operations of the adoption of the FLSA definition of agriculture.

See: July 26, 1946, National Labor Relations Board Appropriation Act for 1947, 60 Stat. 698

Post 1946 NLRA– Nursery, Greenhouse, Mushroom Workers

In *Michigan Mushroom Co.*, 90 N.L.R.B. 119, 26 LRRM 1279 (1950), the NLRB abandoned its assertion of jurisdiction over mushroom workers because of the Congressional mandate for the NLRB to employ the Fair Labor Standards Act definition of agriculture.

- * This definition provided that “agriculture” includes “...the production, cultivation, growing and harvesting of any agricultural or horticultural commodities....”
- * The NLRB concluded that it was thereafter required to respect the US Department of Labor’s treatment of mushroom harvesting workers under the Fair Labor Standards Act as agricultural workers.

State Labor Relations Acts – Definition of Agriculture

* Pennsylvania has consistently held that the NLRA 1946 appropriation rider does not require it to hold that mushroom workers are excluded agricultural workers under the 1937 Pennsylvania Labor Relations Act. 1937, June 1, P.L. 1168, No. 294. *See*, 43 P.S. §211.1 *et seq.*

* Issue is largely untested under other acts (except Colorado)

Pennsylvania and Mushroom Workers

- * *In the Matter of the Employees of Grocery Store Products Company*, (PLRB, Case #22, 1956), the PLRB held that mushroom workers were not

agricultural laborers within the meaning of the PLRA. That decision has been followed since.

- * See, *Vlasic Farms Inc. v. Pennsylvania Labor Relations Board*, 777 A.2d 80 (PA, 2001) and the prior decisions of the Commonwealth Court in *Blue Mountain Mushroom Co. v. PLRB*, 735 A.2d 742 (Pa. Cmwlth. 1999), and *Vlasic Farms, Inc. v. PLRB*, 734 A.2d 487, 489-90 (Pa. Cmwlth. 1999).

NLRA, Sec. 10(a) Deferral to State Labor Jurisdiction

See, NLRA, Sec. 10(a), 29 U.S.C. Sec. 160(a):

- * ...[P]rovided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, *unless* the provision of the *State* or Territorial *statute* applicable to the determination of such cases by such agency *is inconsistent* with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

In *Produce Magic, Inc. v. UFW*, 318 N.L.R.B. 1171, 150 L.R.R.M. 1241 (1995) the NLRB rejected a request by the California Agricultural Labor Relations Board to defer to the California Agricultural Labor Relations Board

Authority of Sec. 10(a) has never been exercised, but should be explored

Flexible Alternatives to NLRB Procedures

The labor movement would benefit from examining the strengths and weaknesses of alternative statutory structures such as the California ALRA and the 20 day election provisions of the Pennsylvania PLRA as well as the importance of access to equity courts under the New Jersey constitutional provision in evaluating what changes should be sought to the NLRA.

See: David A. Morand, "Questioning the Preemption Doctrine: Opportunities for State-Level Labor Law Initiatives," 5 *Widener J. Public L.* 35, 73-77 (1995)

Changes to NLRA Appropriation Rider Definition of Agriculture

- * Some California Agricultural Employers familiar with delays inherent in NLRB proceedings have sought to extend NLRB jurisdiction to cover agricultural workers.
- * Any revision to NLRA Appropriation Rider Definition of Agriculture to include workers in nursery, greenhouse and mushroom operations should include provisions authorizing NLRB Section 10(a) deferral to states with labor relations acts protecting workers not covered under NLRA currently.

Protections for Nursery, Greenhouse & Mushroom Workers

Expansion of collective bargaining protections nationally to Nursery, Greenhouse and Mushroom Workers would affect tens of thousands of workers.

The [1998 Census of Horticultural Specialties](http://www.nass.usda.gov/census/census97/horticulture/horticulture.htm) reported 19,876 operations had 376,194 jobs and total payrolls of \$3.6 billion in horticultural specialties (including some that would not have been covered under a pre-1947 NLRA definition). See, U.S. Department of Agriculture, 1998 Census of Horticultural Specialties, Tables 19,49, and 50.

<http://www.nass.usda.gov/census/census97/horticulture/horticulture.htm>

The Right to Organize is an Inherent Right of Workers

The right of workers to organize collectively is a fundamental human right recognized by the United States as a principal of international law.

International Law Protection

See Brief of *Amicus Curiae*: Labor, Civil Rights and Immigrants' Rights Organizations in the United States, Appendix C, Table 1, Inter-American Court of Human Rights, In the Matter of Request for Advisory Opinion Submitted By the Government of the United Mexican States, OC-18.¹

- * [American Declaration of the Rights and Duties of Man \(ADHR or American Declaration\)](#),² Article XXII Right of Association
- * [American Convention on Human Rights \(ACHR or American Convention\)](#),³ Art. 16.1-16.2
- * [Organization of American States \(OAS\) Charter](#), Article 45(c) & 45(g)
- * [International Covenant on Civil and Political Rights](#),⁴ Article 22
- * [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#),⁵ Article 8
- * [International Labour Organization \(ILO\) Convention 87](#),⁶ Article 2;
- * [International Labour Organization \(ILO\) Convention 98](#), Article 1.1
- * [North American Agreement on Labor Cooperation](#) Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States ([NAALC](#)),⁷ Articles 2 and 4
- * [Universal Declaration of Human Rights \(UDHR\)](#),⁸ Article 23.4

International Law

[Organization of American States Charter](#) (1951), Article 45(c):

- * Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws..."

International Covenant on Economic, Social and Cultural Rights, **Article 8**

- * (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- * (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- * (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- * (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

First Amendment Speech Protections

See, [*Babbitt v. United Farm Workers*](#), 442 U.S. 289 (1979):

...Accepting that the Constitution guarantees workers the right individually or collectively to voice their views to their employers, see *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979); cf. *Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 173 -175 (1976), the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen.

Marginalization of Undocumented Workers – *Hoffman Plastics*

The U.S. Supreme Court held in [*Hoffman Plastic Compounds, Inc. v. NLRB*](#), U.S. , (March 27, 2002) that the NLRB does not have statutory authority under its remedial scheme to order

payment of wages lost by an undocumented worker as a result of his firing for union activities.

The U.S. Supreme Court in [Hoffman Plastic Compounds, Inc. v. NLRB](#) ruled:

“...allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”

The General Accounting Office “Collective Bargaining Rights: Information on the Number of Workers With and Without Collective Bargaining Rights” [GAO 02-835](#) (September 2002) estimates that undocumented alien workers potentially affected by the Hoffman decision are estimated to number 5.5 million.

See: <http://www.gao.gov/new.items/d02835.pdf>

Actual impact on workers of Hoffman Plastics decision is much larger. It impacts on mixed documented / undocumented households and any workplace with significant minority of undocumented workers in workforce.

See report of Mexican American Legal Defense Fund and National Employment Law Project (January 2002): [The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds V. NLRB](#), <http://www.nelp.org/pub230.pdf>

Workers Compensation: Undocumented Workers

Following the U.S. Supreme Court decision in *Hoffman Plastics* the right of undocumented workers to receive workers compensation benefits has increasingly come under attack.

See: Mexican American Legal Defense Fund and National Employment Law Project “[Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds V. NLRB](#)” (January 2003) <http://www.nelp.org/pub230.pdf> at page 5.

- * Pennsylvania recognizes the right of undocumented foreign workers to pursue claims for workers compensation benefits even when they are not authorized to work. Continuing benefits for partially disabled benefits undocumented workers may not be available. [Reinforced Earth Company v. Workers Compensation Appeal Board](#), A.2d (Pa. Supreme Court, Nov. 6, 2002).
- * The Michigan Court of Appeals held in January 2003 that undocumented workers cannot receive workers compensation weekly benefits from the point that the employer terminates their employment for presentation of false documents. [Sanchez v. Eagle Alloy, Inc. and Vasquez v. Eagle Alloy, Inc.](#), No. 238003 and 239592 WCAC, 2003 WL 57544, A.2d (Mich. Ct. App 2003).
- * In most states undocumented workers continue to qualify for workers compensation benefits, but employers and insurance carriers can be expected to continue to challenge such benefits.

FLSA Claims for Unpaid Wages for Undocumented Workers

- * Unpaid minimum or overtime wage claims and claims for liquidated damages by an undocumented worker should not be affected by the U.S. Supreme Court decision in *Hoffman Plastics*. See: U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, [Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division](#)
- * The U.S. Department of Labor, Wage and Hour Division does not give the INS information on the immigration status of workers making complaints to it. See, [Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor, November 23, 1998.](#)
<http://www.dol.gov/dol/esa/public/whatsnew/whd/mou/nov98mou.html>

Retaliation Protections

Absence of effective retaliation protections under the NLRA makes it particularly important to examine other statutes and theories that provide retaliation protections for workers (including undocumented workers).

FLSA Claims for Retaliation

29 U.S.C. Sec. 215(a)(3) provides that it shall be unlawful:

“...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 chapter, 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. Sec. 216(b) provides:

“Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.”

FLSA retaliation claims can be brought in a direct cause of action not merely as an administrative complaint. 29 U.S.C. Sec. 216(b).

FLSA Claims for Retaliation and Undocumented Workers

It is unknown at this time whether courts will construe the broad remedial language of 29 U.S.C. Sec. 216(b) as authorizing shaping of appropriate retaliation remedies for undocumented workers.

Legal relief, as contemplated by the FLSA, includes both compensatory and punitive damages. Broad remedial provisions may survive rationale of *Hoffman Plastics* decision.

See, Travis v. Gary Community Mental Health Ctr., Inc., 921 F.2d 108, 111 (7th Cir. 1990). *Marrow v. Allstate Security and Investigative Services, Inc.*, 2001 U.S. Dist. LEXIS 17508 (E.D.Pa. Oct. 4, 2001) (Judge Pollock)

- * But *see, Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928 (11th Cir. 2000) (rejecting Plaintiff's argument that "legal relief" includes punitive damages, finding section 216(b) to be compensatory in nature, and designed to make the Plaintiff whole).

Other Retaliation Protections

Migrant and Seasonal Agricultural Worker Protection Act

- * Retaliation claims can be made under the Migrant and Seasonal Agricultural Worker Protection Act, [29 U.S.C. § 1855](#), for covered workers and can be enforced by private cause of action without exhaustion of administrative remedies.

Occupational Safety and Health Act

- * The Occupational Safety and Health Act, Section 11(c), 29 U.S.C. § 660(c), includes an administrative procedure for protecting workers retaliated against for health and safety complaints. See, [29 U.S.C. § 660\(c\)](#):

“(c)(1) No person shall discharge or in any 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 because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

“(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, ***within thirty days*** after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall

bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and *order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.*

“(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.”

See, [Discrimination Against Employees Who Exercise Their Safety and Health Rights](http://www.osha.gov/as/opa/worker/whistle.html), <http://www.osha.gov/as/opa/worker/whistle.html>

In states with approved state OSHA plans, it is important to also look at state law.

The reach of the remedial provisions of OSHA 11(c)(2) to protect undocumented workers are likely to be challenged following *Hoffman Plastics*.

Claims Before the Equal Employment Opportunity Commission (EEOC)

Retaliation is Prohibited Under:

- * [Title VII of the Civil Rights Act of 1964, Section 704\(a\) of Title VII](#), 42 U.S.C. § 2000e-3(a).
- * [The Age Discrimination in Employment Act](#), Section 4(d) of the ADEA, 29 U.S.C. § 623(d).
- * The [Americans with Disabilities Act](#), Section 503(a) of the ADA, 42 U.S.C. § 12203(a) and Section 503 (b) of the ADA, 42 U.S.C.12203(b).
- * the [Equal Pay Act](#), Section 15(a)(3) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3).

See: <http://www.eeoc.gov/docs/retal.html>

EEOC may continue to pursue enforcement proceedings for undocumented workers facing race and national origin discrimination.

See: [EEOC directives transmittal Number 915.002 June 27, 2002](http://www.eeoc.gov/docs/undoc-rescind.html):
<http://www.eeoc.gov/docs/undoc-rescind.html>:

“The Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work. When enforcing these laws, EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge. The Commission will continue vigorously to pursue charges filed by any worker covered by the federal employment discrimination laws, including charges brought by undocumented workers, and will seek appropriate relief consistent with the Supreme Court's ruling in *Hoffman*. Enforcing the law to protect vulnerable workers, particularly low income and immigrant workers, remains a priority for EEOC.”

Retaliation Protections: 42 U.S.C. Sec. 1981

42 U.S.C. Sec. 1981, as amended by the Civil Rights Act of 1991, provides:

“*All persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exaction of every kind, and to no other.”

In *Runyon v. McCrary*, 427 U.S. 160, 168, 174-75 (1976), the Supreme Court held § 1981 prohibited discrimination in the making and enforcing of contracts on the basis of race.

In *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) the Court elaborated on the definition of racial discrimination, holding:

“Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory. “

Plaintiffs are entitled to punitive damages under Sec. 1981

Undocumented workers should remain protected under Sec. 1981 after *Hoffman* *Plastics* since protections reach “*all persons*.”

State Law Tort Claims for Wrongful Discharge and Other State Law Claims

- * State law will determine possibility of tort claim for wrongful discharge if discharge.
- * State law may include additional statutory causes of actions protecting workers.

Organizing the Unorganized

AFL-CIO Executive Council: Immigration February 16, 2000

“Current efforts to improve immigration enforcement, while failing to stop the flow of undocumented people into the United States, have resulted in a system that causes discrimination and leaves unpunished unscrupulous employers who exploit undocumented workers, thus denying labor rights for all workers.

“We strongly believe employer sanctions, as a nationwide policy applied to all workplaces, has failed and should be eliminated. It should be replaced with an alternative policy to reduce undocumented immigration and prevent employer abuse. Any new policy must meet the following principles: 1) it must seek to prevent employer discrimination against people who look or sound foreign; 2) it must allow workers to pursue legal remedies, including supporting a union, regardless of immigration status; and 3) it must avoid unfairly targeting immigrant workers of a particular nationality.”

See: <http://www.aflcio.org/aboutaflcio/ecouncil/ec0216200b.cfm>. See also, July 2001 <http://www.aflcio.org/aboutaflcio/ecouncil/ec0731a2001.cfm> and August 2002 <http://www.aflcio.org/aboutaflcio/ecouncil/ec0807d2002.cfm>.

Organizing the Unorganized

- * Organized labor has long professed to place a high value on the organization of unorganized labor.
- * Recent changes within the AFL-CIO national leadership have helped to focus greater resources and commitment to this task.

- * However, the barriers to effective organization of the organized remain substantial. This is particularly true amongst limited English proficiency immigrant and migrant workers.

Alternative Organizing Models

Organized labor would benefit from studying alternative community based organizing strategies employing popular education models to support immigrant communities engaging in collective action.

History of support for farmworker and mushroom worker organizing in Pennsylvania and New Jersey by Comité de Apoyo a los Trabajadores Agrícolas ("CATA") is a useful model to examine.

Worker Rights Law Projects can support community education and advocacy in conjunction with community based organizing strategies.

Contingent Work Abuse

“Contingent Workers” have been marginalized as a result of their legal classification. Workers from immigrant communities often find employment opportunities as “contingent workers.

See: [From Orchards to the Internet: Confronting Contingent Work Abuse](#) A Report from the National Employment Law Project and the Farmworker Justice Fund (2002)

<http://nelp.org/swi/>. Download: <http://www.nelp.org/pub120.pdf>

- * Labor subcontracting in its various forms affects a significant portion of today’s workforce.
- * Subcontracting includes the use of temporary help agencies, labor contractors, labor leasing firms, and outsourcing.
- * The subcontractor may be used by the larger company to perform all or part of a project that requires production of goods or provision of services.

- * Labor subcontracting can also entail an outsourcing of human resource functions, such as recruitment, hiring, payroll, and transportation.

Contingent Work Abuse

Those subcontracted workers suffering the worst conditions are likely to be immigrant workers (both documented and undocumented) and “guest workers” (who technically are “nonimmigrants” employed in temporary jobs under temporary visas).

Labor subcontracting often is used in an effort to reduce labor costs by using a subcontractor who will pay workers less than the larger company would have paid.

In many cases, the subcontractors are not paid enough to comply with their legal obligations toward workers or to pay a court judgment.

Many employers engaged in subcontracting seek to avoid minimum wage, overtime, and other legal responsibilities applicable to “employers,” by characterizing the subcontractor as the sole “employer.”

The reality in many cases is that the subcontracting company retains substantial control over the work performed by subcontracted workers because it will not take the financial risk of entrusting its business plans to labor contractors.

Independent Contractors

Independent contractors are categorically excluded from the reach of federal and state employment and labor laws.

Employers often deliberately misclassify their temporary, leased, and other workers as independent contractors. Even in situations where employers closely control workers’ performance, they skirt employment laws by providing workers with contract documents specifying that workers are independent contractors.

“Self-Employed” Workers

Subcontracted “Self-Employed” Workers in the absence of joint employer liability, subcontracting allows employers:

- * to deny workers fringe benefits,

- * to avoid paying Social Security and other taxes, and
- * to use the lack of a direct employment relationship as a defense to claims brought against them under worker protection laws.
- * Workers must pay self-employment taxes and are deprived of virtually all legal protections.

Temporary Guestworker Programs

Temporary Guestworker Programs such as the non-agricultural H-2B and the agricultural H-2A programs are designed to create a legally marginalized temporary non-immigrant workforce unable to organize and act collectively for better wages and working conditions.

- * Workers employed under guestworker programs are tied to particular employers and are subject to critical threats to collective activity through the employer control over which workers are allowed to re-enter the country.
- * Proposals for expanded guestworker programs are likely to be pursued legislatively by employers.
- * H-2B workers are denied the right to representation by Legal Services Corporation funded programs.

See, discussions at:

- * Farmworker Justice Fund, “[The Basics About Guestworker Programs](http://www.fwjjustice.org/talking.htm)” at <http://www.fwjjustice.org/talking.htm>
- * California Rural Legal Assistance Foundation “[National Clearinghouse On Agricultural Guest Worker Issues](http://www.crlaf.org/gworkers.htm)” at <http://www.crlaf.org/gworkers.htm>
- * Federation for American Immigration Reform (FAIR) “[Permanent Guests: How Guestworker Programs Harm America](http://www.fairus.org/html/04194302.htm)” at <http://www.fairus.org/html/04194302.htm>
- * Center for Immigration Studies, “[Guestworker Programs: A Threat to American Agriculture](http://www.cis.org/articles/2001/back801.html)” at <http://www.cis.org/articles/2001/back801.html>

Subcontracting: the Legal Framework

From Orchards to the Internet: Confronting Contingent Work Abuse:

Appendix A: Subcontracting: the Legal Framework

<http://nelp.org/appendices/swi/a/goldsteinlegal.pdf>

- * By: Bruce Goldstein, Farmworker Justice Fund;
- * Cathy Ruckelshaus, National Employment Law Project;
- * Larry Norton, Texas Rural Legal Aid and Community Justice Project; and
- * Brent Garren, UNITE, the Union of Needletrades and International Textile Employees

The key to addressing abuse of contingent workers lies in establishing joint employer liability rather than allowing the economic beneficiaries of such abuse to escape liability.

See, discussion in <http://nelp.org/appendices/swi/a/goldsteinlegal.pdf> on:

- * The National Labor Relations Act
- * The Fair Labor Standards Act and Agricultural Worker Protection Act
- * The Occupational Safety & Health Act
- * The Equal Employment Opportunity Act
- * The Family & Medical Leave Act
- * The Federal Insurance Contributions Act and Federal Unemployment Insurance Act.

National Labor Relations Act: Employers

* The legal test for determining “employee” status under the NLRA is the common law agency test that examines factors to determine whether the company possesses the “right to control” the manner in which the work is performed. This standard is both restrictive and unpredictable in outcome.

- * The Single Employer Theory: Two Businesses Acting as One

- * The Joint Employer Theory: Two or More Employers of a Worker where separate entities:

“share or codetermine matters governing essential terms and conditions of employment. . . . The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction.”

National Labor Relations Act – Joint Employers

The NLRB has found joint employer status in some instances, particularly where the dominant enterprise, or “user employer,” utilizes workers from a temporary worker agency, employee leasing company or other “supplier employer.”

- * See, [M.B. Sturgis, Inc.](#), 331 N.L.R.B. 173 (2000)
- * Employers hope to have current NLRB overturn Sturgis

Laws With a Broad Definition of Employment Relationships

- * Fair Labor Standards Act of 1938
- * Migrant and Seasonal Agricultural Worker Protection Act of 1983
- * Equal Pay Act
- * "'Employ' includes to suffer or permit to work."
- * "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee."
- * The Supreme Court, in *Nationwide Mutual Insurance v. Darden* (1992), reiterated that the FLSA definition's "striking breadth" in comparison to the common law's narrow "right to control" standard.
- * In 1937, then-Senator, later-Justice, Hugo Black described it as "the broadest definition that has ever been included in any one act."

- * In enacting FLSA, Congress concluded that substandard working conditions harmed workers and also constituted an "unfair method of competition" that harmed law-abiding, decent companies.
- * Legislators understood that their goal of eliminating these harms would be undermined if companies could engage in subcontracting to avoid responsibility as employers and blame all violations of the law on subcontractors. One of its tools was a broad definition of employment relationships.
- * A court will look at the "economic reality" of a worker's relationships with alleged employers and will de-emphasize contractual labels and technical concepts developed under the common law. It will try to determine whether the worker is "economically dependent" on the alleged employer(s).
- * This "economic dependence/economic reality" standard is broader than common law and than other "economic reality" tests (such as under the Occupational Safety and Health Act).

The Occupational Safety & Health Act - Employers

- * The purpose of the federal Occupational Safety and Health Act (OSH Act) is to ensure "so far as possible [to] every working man and woman in the Nation safe and healthful working conditions."

Occupational Safety and Health Review Commission (OSHRC) in considering whether an employment relationship exists relies primarily on who has control over the work environment such that "abatement" of occupational hazards can be obtained.

- * Because the OSH Act does not contain a special definition of employment relationships, recent Supreme Court holdings probably require application of the common law definition. *See Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).
- * Anticipating that the Supreme Court would probably reject any modification of the common law test, the OSHRC now says that there is no practical difference between its current test and the common law standard. *Loomis Cabinet Co.*, 1992

The Equal Employment Opportunity Act - Employers

Discrimination in hiring and employment on the basis of sex, race, and national origin is outlawed by the Equal Employment Opportunity Act, also known as Title VII of the Civil Rights Act of 1964.

- * Courts generally have followed Title VII's approach to subcontracting issues when ruling on cases under the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA).
- * Companies can be engaging in discrimination on the basis of national origin, race, or sex by selecting labor subcontractors according to the makeup of their crews.
- * Such companies often will argue that they are not liable for the discrimination because it is the subcontractors who control their own work forces.
- * In other situations, employment agencies will refer workers to jobsites where workers suffer discrimination or sexual harassment.
- * Recent court opinions on subcontracting under Title VII have applied the restrictive approach that has been developed under the National Labor Relations Act.
- * A minority of court decisions has concluded that particular language in Title VII requires a more generous view of employment relationships.
- * Specifically, although Title VII does not contain any special definitions of "employee" or "employer," it prohibits discrimination against any "individual," and not merely against an employee, and it imposes liability on employers as well as their "agents."

The Equal Employment Opportunity Act Employment Agency Liability

* Title VII makes it unlawful for an employment agency to discriminate in the job referral process. The fifteen-employee requirement applicable to employers does not apply to referral agencies being sued for referral activities.

Addressing *Hoffman Plastics* and the Marginalization of Workers

- * No legislation to address *Hoffman Plastics* decision was introduced in the 107th Congress ending in December 2002. The *Hoffman Plastics* decision will continue to undercut rights for all workers until addressed by legislative action.
- * Appropriation Riders to Legal Services Corporation funding have continued to deny undocumented workers and temporary non-immigrant guest workers under the H-2B program representation by any program which accepts Legal Services Corporation funding.
- * Changes to Guestworker Programs should not only seek to protect workers otherwise in the country, but should provide freedom of choice of employers to guestworkers.
- * State and local legislative action could address some issues affecting legally marginalized workers. See, National Employment Law Project “[LOW PAY, HIGH RISK: State Models for Advancing Immigrant Workers' Rights](http://www.nelp.org/lowpayhighrisk/toc.htm)”
<http://www.nelp.org/lowpayhighrisk/toc.htm> or [download](http://www.nelp.org/pub229.pdf) at:
<http://www.nelp.org/pub229.pdf>

**IN THE MATTER OF REQUEST FOR ADVISORY
OPINION SUBMITTED BY THE GOVERNMENT OF THE
UNITED MEXICAN STATES OC-18**

Appendix C

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Treaty Provisions Protecting Labor Rights of Workers in the United States

- Table 1: Binding Treaty Provisions Protecting the Right to Freedom of Association to Protect Labor Union Interests**
- Table 2 Binding Treaty Provisions Protecting the Rights to Equality Before the Law, Equal Protection and Non-Discrimination**
- Table 3 Binding Treaty Provisions Protecting the Right to Fair Remuneration**
- Table 4 Binding Treaty Provisions Protecting the Right to Proper Working Conditions**
- Table 5 Binding Treaty Provisions Protecting the Right to Effective Recourse Through Legal Aid**

* Note: Brief authored by: attorneys Rebecca Smith of the National Employment Law Project, Professor Sarah Cleveland, Amanda Levinson and Emily Rickers of the University of Texas School of Law, Professor Beth Lyon of Villanova University School of Law, Ana Avendano of the National Immigration Law Center and D. Michael Dale of the Northwest Worker Justice Center.

Table 1: Binding Treaty Provisions Protecting the Right to Freedom of Association to Protect Labor Union Interests

Treaty	Article	Text	Basis of Obligation
American Declaration	Article XXII Right of Association	Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.	Binding by reference to the OAS Charter. (The United States ratified the OAS Charter in 1951.)
American Convention	Art. 16.1-16.2 Freedom of Association	1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. 2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.	Obligation not to defeat the object and purpose of the treaty by virtue of 1977 signature.
OAS Charter	Article 45(c) & 45(g)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (...) c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws; (...) g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighborhood, and community associations to the life of the society and to the development process;	Binding by virtue of U.S. ratification, 1951.

Treaty	Article	Text	Basis of Obligation
International Covenant on Civil and Political Rights	Article 22	<p>1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.</p> <p>2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.</p> <p>3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.</p>	Binding by virtue of U.S. ratification, 1992.
International Covenant on Economic, Social and Cultural Rights	Article 8	<p>1. The States Parties to the present Covenant undertake to ensure:</p> <p>(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;</p> <p>(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;</p> <p>(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;</p> <p>(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.</p>	Obligation not to defeat the object and purpose of the treaty by virtue of 1977 signature.

Treaty	Article	Text	Basis of Obligation
		<p>2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.</p> <p>3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.</p>	
ILO Convention 87	Article 2	Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.	Defines freedom of association, one of four fundamental principles which, under the 1998 Declaration on Fundamental Principles and Rights at Work , the United States is bound to protect by virtue of ILO membership.
ILO Convention 98	Article 1.1	1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.	Defines freedom of association, one of four fundamental principles which, under the 1998 Declaration on Fundamental Principles and Rights at Work , the United States is bound to protect by virtue of ILO membership.
North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (NAALC)	Article 2: Levels of Protection	Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.	Binding by virtue of U.S. ratification, 1993.

Table 1

Treaty	Article	Text	Basis of Obligation
NAALC	Article 4: Private Action	<p>1. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law.</p> <p>2. Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under:</p> <ul style="list-style-type: none"> * its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and * collective agreements, can be enforced. 	Binding by virtue of U.S. ratification, 1993.
Charter of the United Nations	Article 55(a)	<p>With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:</p> <p>a. higher standards of living, full employment, and conditions of economic and social progress and development;</p>	Binding by virtue of U.S. ratification, 1945.
Universal Declaration	Article 20.1	Everyone has the right to freedom of peaceful assembly and association.	Considered to have become customary law.
Universal Declaration	Article 23.4	Everyone has the right to form and to join trade unions for the protection of his interests.	Considered to have become customary law.

TABLE 2: Binding Treaty Provisions Protecting the Rights to Equality Before the Law, Equal Protection and Non-Discrimination

Treaty	Article	Text
American Declaration	Article II	All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
American Convention	Article 1(1)	The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition. 2. For the purposes of this Convention, "person" means every human being.
American Convention	Article 24	All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.
International Covenant on Civil and Political Rights	Article 26	All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
International Covenant on Economic, Social and Cultural Rights	Article 2.2	The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
ILO Convention (No. 111) Concerning Discrimination in Employment//	Article 1(1)	For the purpose of this Convention the term discrimination includes-- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, <i>national extraction or social origin</i> , which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.
ILO Convention (No. 111) Concerning Discrimination in Employment	Article 2	Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.
Universal Declaration	Article 2, cl. 1	Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Universal Declaration	Article 7	All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Table 3: Binding Treaty Provisions Protecting the Right to Fair Remuneration and Equal Pay

Treaty	Article	Text
American Declaration	Article XIV. Right to work and to fair remuneration	Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.
American Convention	Article 26. Progressive Development	The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.
OAS Charter	Article 34(g)	The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: (...) g) Fair wages, employment opportunities, and acceptable working conditions for all;
OAS Charter	Article 45(b)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
International Covenant on Economic, Social and Cultural Rights	Article 7(a)(i)	The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
Charter of the United Nations	Article 55(a)	With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development;

Treaty	Article	Text
Universal Declaration	Article 23.2-23.3	<p>2. Everyone, without any discrimination, has the right to equal pay for equal work.</p> <p>3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.</p>

Table 4: Binding Treaty Provisions Protecting the Right to Proper Working Conditions

Treaty	Article	Text
American Declaration	Article XI. Right to the preservation of health and to well-being.	Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.
American Declaration	Article XIV. Right to work and to fair remuneration.	Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.
American Convention	Article 26. Progressive Development	The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.
OAS Charter	Article 34(g)	The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: (...) g) Fair wages, employment opportunities, and acceptable working conditions for all;
OAS Charter	Article 45(b)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
International Covenant on Economic, Social and Cultural Rights	Article 7(b)	The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (...) (b) Safe and healthy working conditions;

Treaty	Article	Text
International Covenant on Economic, Social and Cultural Rights	Article 12.1, 12.2(b-d)	<p>1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</p> <p>2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:</p> <p>(b) The improvement of all aspects of environmental and industrial hygiene;</p> <p>(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;</p> <p>(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.</p>
Charter of the United Nations	Article 55(a)	<p>With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:</p> <p>a. higher standards of living, full employment, and conditions of economic and social progress and development;</p>
Universal Declaration	Article 23.1	<p>1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.</p>

Table 5: Binding Treaty Provisions Protecting the Right to Effective Recourse Through Legal Aid

Treaty	Article	Text
American Declaration	Article XVIII. Right to a fair trial.	Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.
American Convention	Article 8.1 Right to a Fair Trial	1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
American Convention	Article 25. Right to Judicial Protection	1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.
American Convention	Article 26. Progressive Development	The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.
OAS Charter	Article 45(i)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: i) Adequate provision for all persons to have due legal aid in order to secure their rights.

Treaty	Article	Text
OAS Charter	Article 45(b)	The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working;
International Covenant on Civil and Political Rights	Article 2(3)	3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.
Universal Declaration	Article 10	Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
Universal Declaration	Article 28	Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Endnotes

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² [American Declaration of the Rights and Duties of Man \(ADHR\)](#), OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser. L/V/I. 4 Rev. XX (1948). The [American Declaration](#) was adopted in 1948 as a resolution of the General Assembly of the OAS, and is directly binding on the United States by virtue of the United States' ratification of the [OAS Charter](#) in 1951. See Organization of American States, Signatures and Ratifications of the OAS Charter, available at <<http://www.oas.org/juridico/english/signs/a-41.html>>. The Declaration's original status as a non-binding document has evolved by virtue of the Commission's and the Court's jurisprudence, so that the Declaration is now considered to be indirectly binding. David Harris, *Regional Protection of Human Rights: The Inter-American Achievement*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 5 (David J. Harris & Stephen Livingstone, eds.) (1998). In Advisory Opinion No. 10, the Inter-American Court held that the Declaration had been incorporated into the American system as an authoritative document. See I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 65 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, Series A, No. 10, 36. The Court also held that the [American Declaration](#) defines human rights and individual rights as referred to in the [OAS Charter](#). Id. 45. The Inter-American Commission on Human Rights has further elaborated a complementary principle that allows Petitioners to supplement the [American Convention on Human Rights \(ACHR\)](#) with the [ADHR](#) when the latter document provides more fulsome protection. The Commission notes that American Convention norms will be relied on "insofar as [petitioners allege] violations of substantially identical rights set forth in both instruments." Paul Lallion, Case No. 11.765, Report No. 124/99, 26 (September 27, 1999). Moreover, the U.S. government regularly appears before the Inter-American Commission on Human Rights to defend cases brought against it under the American Declaration.

³ [American Convention on Human Rights](#), Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) (emphasis added). The United States has signed, but not ratified, the American Convention. See Organization of American States, Signatures and Ratifications of the American Convention on Human Rights, Pact of San Jose, Costa Rica, available at <<http://www.oas.org/juridico/english/Sigs/b-32.html>>. The standards laid out in the ACHR should nonetheless be applied to this country's treatment of migrant workers for two reasons. First, as explained [above](#), the [ADHR](#) is binding on the United States, and the American Convention is regarded as an interpretation of the norms contained in the [ADHR](#). Second, according to the [Vienna Convention on the Law of Treaties](#), a state which has signed, but not ratified, a treaty is obliged to refrain from acts that would contravene the object and purpose of the treaty. [Vienna Convention on the Law of Treaties](#), concluded May 23, 1969, 1155 U.N.T.S. 331, 25 I.L.M. 543, art. 18 ("A State is obligated to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . , until it shall have made its intention clear not to become a party to the treaty"). The United States has signed but not ratified

the [Vienna Convention](#), but has accepted that treaty's provisions as binding customary international law. See, e.g., *Treaties and Other International Agreements: The Role of the United States Senate*, S. Rep. No. 106-71, 106th Cong., 2d Sess. 113 (2001) (“During this interim period [prior to ratification] the treaty is not yet in effect, but under international law nations have an obligation not to do anything that would defeat the purpose of the treaty.”). There is no set definition for what level of violation contravenes a treaty's object and purpose, but retrogressive measures such as those described above would seem to fall exactly into this category.

⁴ [International Covenant on Civil and Political Rights](#), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (emphasis added). The [ICCPR](#) was adopted to implement principles set forth in the [Universal Declaration of Human Rights](#) into binding treaty law. The United States ratified the [ICCPR](#) in 1992, and although the United States Senate appended a declaration that the treaty was not self-executing, see United Nations High Commissioner for Human Rights, United Nations Treaty Collection, Declarations and Reservations, available at http://193.194.138.190/html/menu3/b/treaty5_asp.htm, that declaration does not alter the force of the treaty as binding international law.

⁵ [International Covenant on Economic, Social, and Cultural Rights](#), Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). Like the [ICCPR](#), the [ICESCR](#) was adopted to codify into binding treaty law the principles set forth in the [Universal Declaration](#). The United States has signed, but not ratified, the [ICESCR](#). See Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties, available at <http://193.194.138.190/pdf/report.pdf>. The United States' signature nevertheless obligates the United States not to violate the object and purpose of the treaty.

⁶ The ILO has identified four “core” worker rights that are internationally recognized as fundamental human rights. The other core rights are freedom of association, and the prohibition against forced and child labor. These four fundamental rights are supported by eight ILO conventions. See ILO, *Fundamental ILO Conventions*, available at <http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm>. This includes conventions relating to nondiscrimination in employment, e.g., [ILO Convention Concerning Discrimination in Respect of Employment and Occupation \(No. 111\)](#), *supra*, and those relating to freedom of association, e.g., [ILO Convention Concerning Freedom of Association and Protection of the Right to Organize \(No. 87\)](#), July 9, 1948, 68 U.N.T.S. 16 (entered into force July 4, 1950); [Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively \(No. 98\)](#), July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

⁷ Canada-Mexico-United States: [North American Agreement on Labor Cooperation](#), Pub. L. No. 103-182, 107 Stat. 2057, 32 Int'l Legal Materials 1499 (1993). See: <http://www.naalc.org/english/infocentre/NAALC.htm>.

⁸ [Universal Declaration of Human Rights](#), G.A. Res. 217 (AIII), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948). As an early statement of human rights that was unanimously adopted by the U.N. General Assembly, the Declaration is evidence of early and ongoing support for the international norms examined herein. Moreover, the principles of the [UDHR](#) are widely considered to have reached the status of customary international law. See discussion in Richard

B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INTL & COMP. L. 1 (1995/1996).