

ARTICLES

IMMIGRATION PROTECTION AS LABOR ENFORCEMENT

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INTRODUCTION

Immigrant workers are a significant and growing share of the labor force in the United States and therefore crucial to effective labor policy: there are nearly eight million undocumented workers¹ and over one million temporary guestworkers in the country,² with foreign-born workers overall composing over eighteen percent of the civilian work force.³ Immigrant workers are in every industry, from construction, agriculture, and service to technology, health care, education, and beyond.⁴ They work in rural areas and in major cities at factories, farms, construction sites, and office buildings.⁵ They usually labor alongside U.S. citizens.⁶

Formally, these immigrant workers enjoy the same labor protections as U.S. citizens. They are entitled to minimum wages, to organize and join unions without retaliation, to health and safety protections on the job, and to not face

1. See Drishti Pillai & Samantha Artiga, *Employment Among Immigrants and Implications for Health and Health Care*, KAISER FAMILY FOUND. (June 12, 2023), <https://www.kff.org/racial-equity-and-health-policy/employment-among-immigrants-and-implications-for-health-and-health-care/> [<https://perma.cc/S7NP-E5XW>]. Throughout this article, the term “immigrant workers” is used to refer to noncitizens working in the United States who could be vulnerable to immigration enforcement or threats of immigration enforcement.

2. See Claire Klobucista & Diana Roy, *U.S. Temporary Foreign Worker Visa Programs*, Council on Foreign Relations (June 8, 2023), <https://www.cfr.org/backgrounders/us-temporary-foreign-worker-visa-programs> [<https://perma.cc/6MHE-AHD7>] (reporting, based on State Department data, that 984,000 temporary foreign worker visas were issued in 2022, a significant increase from 2019) (citing Table XV(B) Nonimmigrant Visas Issued by Classification FY2018-2022, U.S. STATE DEP’T (2022), [https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableXV\(B\).pdf](https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableXV(B).pdf)); Daniel Costa & Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers*, ECON. POL’Y INST. (March 7, 2017), <https://www.epi.org/publication/temporary-foreign-workers-by-the-numbers-new-estimates-by-visa-classification/> [<https://perma.cc/WH4K-LSF6>]. (estimating that 1.42 million temporary foreign workers were employed on nonimmigrant visas in FY2013, representing 1 percent of the labor force).

3. *Foreign-born Workers: Labor Force Characteristics – 2023*, Bureau of Labor Statistics, U.S. DEP’T LABOR (May 21, 2024), <https://www.bls.gov/news.release/pdf/forbrn.pdf> [<https://perma.cc/DH5H-P8MZ>]. Immigrants have been a growing part of the U.S. labor force for at least the past 50 years.

4. Matthew Lisiecki, *High-Growth Occupations Reliant on Undocumented Immigrant Workers in New York State*, CTR. FOR MIGRATION STUD. (July 15, 2024), <https://cmsny.org/high-growth-occupations-reliant-undocumented-immigrant-workers-nys/> [<https://perma.cc/KN7Y-PLPF>] (finding thousands of undocumented workers in construction, housekeeping, food preparation, health care, janitorial, and delivery industries in New York); Jens Manuel Krogstad, Mark Hugo Lopez, & Jeffrey S. Passel, *A Majority of Americans Say Immigrants Mostly Fill Jobs U.S. Citizens Do Not Want*, PEW RSCH. CTR. (June 10, 2020), <https://www.pewresearch.org/short-reads/2020/06/10/a-majority-of-americans-say-immigrants-mostly-fill-jobs-u-s-citizens-do-not-want/> [<https://perma.cc/KFH9-XAJC>] (finding unauthorized immigrants make up a significant share of workers in agriculture, construction, personal and other services, leisure hospitality, and manufacturing industries).

5. See Jeffrey S. Passel & D’Vera Cohn, *20 Metro Areas Are Home to Six-in-ten Unauthorized Immigrants in U.S.*, Pew Research Center (March 11, 2019), <https://www.pewresearch.org/short-reads/2019/03/11/us-metro-areas-unauthorized-immigrants/> [<https://perma.cc/S2HR-8RVP>]; Silva Mathema, Nicole Prchal Svajlenka, & Anneliese Hermann, *Revival and Opportunity: Immigrants in Rural American*, CTR. FOR AM. PROGRESS (Sept. 2, 2018), <https://www.americanprogress.org/article/revival-and-opportunity/> [<https://perma.cc/7ZBH-6XHM>].

6. Researchers have found that “only a small share [of immigrant workers] work in immigrant-only workplaces.” Fredrik Andersson et al., *Workplace Concentration of Immigrants*, 51(6) DEMOGRAPHY 2281 (2014).

discrimination on the grounds of race, religion, disability, gender, or pregnancy.⁷ But behind this formal legal equality for immigrant workers lies the constant threat of immigration enforcement.⁸ Employers exploit immigrant workers because they can wield the threat of deportation against them. That powerful threat can effectively deter workers from complaining about labor abuse and from assisting labor agencies that seek to vindicate these formal labor protections. Some brave immigrant workers defy these threats, report labor violations, and cooperate with investigating labor agencies anyway. Most workers who defy these threats are not deported, but the constant threat lingers, in part because of the history of immigration enforcement in this country, which long targeted organizing workers. Because of this history and these legitimate fears, many more workers stay silent and accept the substandard conditions, because even an exploitive job is better than being ripped away from your home and family only to be permanently banished. Without the assistance of immigrant workers, who provide critical evidence in labor investigations,⁹ labor agencies have struggled to enforce the labor protections in their mandates, leaving both immigrant and citizen workers less protected.¹⁰

Facing this reality, labor agencies charged with enforcing labor protections have tried to adapt. Labor agencies have hired bilingual investigators, reached out to immigrant rights groups and foreign consulates, and moved investigative interviews offsite to community spaces.¹¹ Labor agencies now reassure immigrant workers that they investigate labor violations, that workers' immigration status does not matter, and that they will not turn over workers'

7. The U.S. Department of Labor has set up a website, MigrantWorker.gov, that informs immigrant workers of their labor rights in the U.S. and the appropriate agency that enforces each right. *Migrant Worker Rights*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/migrantworker/rights> [https://perma.cc/NAW6-YRUP]. (last visited Sept. 19, 2025).

8. Workers with no immigration status face the threat of deportation at any time, 8 U.S.C. § 1227(a)(1)(A) & (B), but even those with precarious status like guestworkers may face immigration enforcement for violating the terms of their visa, revocation of their visa, or overstaying, 8 U.S.C. § 1227(a)(1)(B) & (C). Further, some workers have temporary permission to remain in the United States that is not linked to their employer but remains precarious and dependent on discretionary determinations by federal immigration officials, such as deferred action for childhood arrivals (DACA), temporary protected status, 8 U.S.C. § 1254a, or asylum applicants, 8 U.S.C. § 1158(a) & (d). See Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 COMP. LAB. L. & POL'Y J. 111 (2017) (discussing the challenges to workers with temporary status enforcing labor rights). Even legal permanent residents can be at risk of deportation for certain transgressions. 8 U.S.C. § 1227(a)(2), (4), & (6).

9. See *infra* notes 99–102 and accompanying text.

10. See *infra* Section I.E. (discussing numerous studies documenting widespread labor violations in industries with immigrant workers).

11. See, e.g., RACHEL DEUTSCH & TERRI GERSTEIN, ECON. POL'Y INST., POWER IN PARTNERSHIP: HOW GOVERNMENT AGENCIES & COMMUNITY PARTNERS ARE JOINING FORCES TO FIGHT WAGE THEFT (2023), <https://www.epi.org/publication/community-enforcement-partnerships/> [https://perma.cc/8LVP-4WAG].

information to immigration authorities.¹² These assurances are true: immigrant workers are protected by all major labor laws and labor agencies no longer pass information on to immigration agents (though they did as recently as thirty years ago).¹³ But this has not done enough to allay fears because immigration status *does* matter: it matters to immigration enforcement agents, and therefore, it matters to workers who fear arrest and deportation. Immigration status also matters to employers, who can threaten to report a worker or call in a tip to encourage immigration enforcement against a troublesome worker. Against the backdrop of a long history of threats and actual immigration retaliation by employers, often facilitated by immigration agents, these fears are reasonable.¹⁴

Knowing this, workers inevitably ask labor organizers, their attorneys (if they have them), or even the labor agencies themselves, “if I help in this labor investigation and then immigration arrests me or my employer calls ICE on me, will I be protected from deportation?”¹⁵

For years, the answer to this question has been complicated and not exactly reassuring. In general, labor agencies do not have authority over immigration so they cannot grant any immigration protection themselves. Through an intergovernmental agreement, the immigration agencies have agreed to consider standing down from worksite raids where a federal labor agency has an open investigation, but this does not protect an individual worker from other immigration enforcement writ large.¹⁶ Through the same agreement, the immigration agencies screen their tips to generally not act if the source is obvious employer retaliation.¹⁷ But those intergovernmental measures do not offer any form of immigration protection, specifically status or work authorization, to even the most essential witness.¹⁸ Some labor agencies who detect certain crimes, like witness tampering or trafficking, can give the worker-

12. See, e.g., *Important Information About NLRB Investigations for Immigrant Worker*, NLRB, <https://perma.cc/V6TP-H2C7>.

13. See *infra* notes .

14. See *infra* Part I Sections B, C, & D.

15. See Alexandra Martinez, *Immigrant Workers Want Protections from Deportation for Reporting Labor Abuse*, PRISM (Oct. 24, 2022), <https://prismreports.org/2022/10/24/immigrant-workers-protections-labor-abuse/> [<https://perma.cc/S9KL-4VYP>] (quoting Jessica Bansal as recounting that “tons of immigrant workers don’t speak up about really egregious labor rights abuses because they’re scared that their employer will retaliate against them and that they could face deportation.”); see also Ben Penn, *Inside Biden’s Push to Protect Immigrant Workers in Labor Probes*, BLOOMBERG NEWS (Oct. 14, 2021), <https://news.bloomberglaw.com/daily-labor-report/inside-bidens-push-to-protect-immigrant-workers-in-labor-probes> [<https://perma.cc/6S3G-HWSW>] (“If I am talking to a worker who is suffering from wage theft, who feels like they are stuck in forced labor, and their question to me is, ‘If I speak out, will I be deported?’ the answer to that question right now is ‘Maybe,’” said Mary Yanik, . . . “And workers need more than that.”).

16. See U.S. Dep’t of Homeland Sec. and U.S. Dep’t of Labor, *Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites* (Dec. 7, 2011), https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf [<https://perma.cc/6QPK-CJG4>] [hereinafter “2011 DHS-DOL MOU”] (creating deconfliction process that generally restricts immigration enforcement in worksites under investigation by DOL).

17. *Id.*

18. See *infra* Part I, Section D (analyzing the limitations of the 2011 DHS-DOL MOU).

victim a pathway to applying for a U visa for certain crimes.¹⁹ Only some are eligible,²⁰ and the pathway generally requires the help of an attorney with a waiting period longer than ten years for full adjudication of the application.²¹

However, under a policy that was announced under the Biden administration, the answer to this essential question regarding workers' fears in reporting labor abuse became more clear. On January 13, 2023, Biden's Department of Homeland Security (DHS) announced a "streamlined process" to consider applications for deferred action, or temporary protection from deportation, for immigrant workers.²² That process hinged on a request from a labor agency with an open labor investigation to protect workers who were potential witnesses to labor violations by their employer.²³ Armed with this request, workers could then individually apply for the immigration protection as well as permission to work legally.²⁴ Importantly, these protections were proactive and prophylactic: workers could request and win deferred action before employer retaliation occurred with the goal of enabling broad participation during the full course of the labor investigation, including to monitor and ensure compliance of any order or settlement.²⁵

Rosario Ortiz is one of the brave worker leaders who led the national campaign calling for these protections. Rosario worked as a painter in the Las Vegas region for Unforgettable Coatings Inc., a multi-state commercial

19. *E.g.*, *U and T Visa Certifications*, U.S. DEP'T OF LABOR, Wage & Hour Div. (last visited Sept. 19, 2025), <https://www.dol.gov/agencies/whd/immigration/u-t-visa> [<https://perma.cc/7Q38-87ZT>] (explaining the conditions under which the Wage & Hour Division will consider certifying helpfulness to workers who are eligible to seek a U or T visa).

20. Only victims of certain qualifying criminal activity, listed in statute, are eligible for U visas. 8 U.S.C. § 1101(a)(15)(U)(iii). Eligibility for a T visa is even more restrictive: the petitioner must be a victim of labor trafficking (requiring a showing of fraud, force, or coercion), must generally remain in the U.S. continuously after suffering trafficking, and must show they would suffer extreme hardship if returned to their home country. 8 U.S.C. § 1101(a)(15)(T)(i).

21. As of 2022, there were 171,303 pending applications for U nonimmigrant status. *Number of Form I-918 Petitions for U Nonimmigrant Status by Fiscal Year, Quarter, and Case Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2022), https://www.uscis.gov/sites/default/files/document/data/I918u_visastatistics_fy2022_qtr4.pdf [<https://perma.cc/9VAP-28KE>]. By statute, the agency can only approve up to 10,000 applications per year. 8 U.S.C. § 1184(p)(2)(A) (providing that those "who may be issued visas or otherwise provided status as nonimmigrants . . . in any fiscal year shall not exceed 10,000").

22. *DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations*, DEP'T HOMELAND SEC. (Jan. 13, 2023), <https://www.dhs.gov/archive/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations> [<https://perma.cc/ATE7-KPWH>].

23. *DHS Support of the Enforcement of Labor and Employment Laws*, DEP'T HOMELAND SEC. (Jan. 6, 2025), <https://www.uscis.gov/archive/dhs-support-of-the-enforcement-of-labor-and-employment-laws> [<https://perma.cc/V9SR-SAND>] (last visited Sept. 19, 2025).

24. Deferred action "is a form of prosecutorial discretion to defer removal . . . for a certain period of time." *Id.* Though it "does not confer lawful status," a noncitizen with deferred action "is considered lawfully present . . . for certain limited purposes." *Id.*

25. *See, e.g.*, *U.S. Department of Labor's New Frequently Asked Questions Regarding Immigration-Related Prosecutorial Discretion: What You Need to Know*, NAT'L IMMIGR. LAW CTR., <https://media.nilc.org/wp-content/uploads/2022/07/Factsheet-on-DOL-FAQs-Deferred-Action-2022-07-07.pdf> [<https://perma.cc/7D7L-X9YX>] (last visited Sept. 19, 2025) (following the U.S. Dep't of Labor's guidance and listing a broad range of factors, including "how workers' fear of potential immigration-based retaliation or immigration enforcement is likely to scare workers from reporting violations or cooperating with DOL").

painting company owned by Cory Summerhays.²⁶ Ortiz and hundreds of other painters were not paid overtime wages and sometimes were required to work on the weekend for no pay.²⁷ Rosario recorded this wage theft over two years and joined with others workers to report the company's labor violations to the federal Department of Labor's Wage and Hour Division in 2019, supported by the International Union of Painters and Allied Trades as well as the Arriba Las Vegas Worker Center.²⁸ The Division sent investigators to work-sites to confidentially interview workers, who reported that Summerhays had warned them of immigration consequences for talking to strangers, a thinly veiled threat of possible deportation to deter workers from cooperating in the investigation.²⁹ Despite these terrifying threats, Rosario and other coworkers stepped forward and helped in the investigation.³⁰

Summerhays proved to be a recalcitrant and combative employer, and the Department of Labor filed suit in federal district court in March 2020, alleging wage theft, falsification of wage records, and intimidation of worker witnesses based on information provided by Rosario and other workers.³¹ The Department also sought and obtained a preliminary injunction ordering the company and its agents not to threaten or retaliate in any way against workers.³² But the company continued to resist, challenging this preliminary injunction and also refusing to turn over relevant records in discovery.³³ This was an early sign that the litigation would become protracted, meaning that the cooperation of witnesses in the coming months and years would be essential to the case.

But Rosario and his coworkers, who were at the center of the case, were vulnerable. They had come forward during a virulently anti-immigrant

26. Jannelle Calderon, *Immigrant Painters Who Say Employer Threatened Deportation Get Wage Theft Settlement*, NEV. INDEP. (Jan. 17, 2023), <https://thenevadaindependent.com/article/immigrant-painters-who-say-employer-threatened-deportation-get-wage-theft-settlement> [https://perma.cc/65ZR-BT9V].

27. *Id.*; Dana Gentry, *Biden Called on to Protect Immigrant Wage Theft Whistleblowers*, NEV. CURRENT (April 6, 2021), <https://nevadacurrent.com/2021/04/06/biden-called-on-to-protect-immigrant-wage-theft-whistleblowers/> [https://perma.cc/4CF2-SD9L].

28. Gentry, *supra* note 27; Ruben Rosalez, *A Few Brave Workers Spoke Up. Now Hundreds Are Receiving \$3.6 Million in Back Pay*, U.S. DEP'T OF LABOR BLOG (Feb. 8, 2023), <https://blog.dol.gov/2023/02/08/a-few-brave-workers-spoke-up-now-hundreds-are-receiving-36-million-in-back-pay> [https://perma.cc/VW2A-EYRY]; Sean Hemmersmeier, *Las Vegas Company Ordered to Pay \$3.6M Over Pay Practices*, LAS VEGAS REVIEW-JOURNAL (Feb. 3, 2023), <https://www.reviewjournal.com/business/las-vegas-company-ordered-to-pay-3-6m-over-pay-practices-2723167/> [https://perma.cc/6AYX-UH7C].

29. Calderon, *supra* note 26; *Federal Court Requires Las Vegas Paint, Specialty Coatings Contractor Who Intimidating Workers to Pay \$3.6M to 593 Employees in Four States*, U.S. DEP'T OF LABOR (Jan. 30, 2023), <https://www.dol.gov/newsroom/releases/whd/whd20230130-0> [https://perma.cc/5FQP-AY6U].

30. *Federal Court Requires*, U.S. DEP'T OF LABOR, *supra* note 29.

31. Complaint, *Scalia v. Unforgettable Coatings, Inc.*, No. 2:20-cv-510-KJD-BNW, ECF No. 1 (D. Nev. 2020).

32. Order on Preliminary Injunction, *Scalia v. Unforgettable Coatings, Inc.*, No. 2:20-cv-510-KJD-BNW (D. Nev. 2020).

33. Motion to Dissolve Preliminary Injunction, *Walsh v. Unforgettable Coatings, Inc.*, No. 2:20-cv-510-KJD-DJA (D. Nev. 2020); Order Granting Motions to Compel, *Scalia v. Unforgettable Coatings, Inc.*, No. 2:20-cv-510-KJD-BNW (D. Nev. 2021).

administration, amidst immigration threats from the boss, and provided essential information and evidence to help the Department of Labor build and prosecute the labor case. Rosario and his coworkers therefore went public with their demand for immigration protection just a few months after President Biden assumed office with a bold pro-worker platform.³⁴ Rosario organized his coworkers in Las Vegas via public rallies and also flew to Washington, D.C. to speak with Biden officials, including the Secretaries of Labor and Homeland Security.³⁵ Worker rights organizations, unions, and immigrant rights groups rallied in support. They pressured the Department of Labor to push for immigration protections for worker-witnesses and the Department of Homeland Security to set up a process to receive these requests and to grant them.³⁶ Rosario argued that his employer broke the law by stealing wages and also broke the law by threatening workers. He argued that the federal government was relying on him and other worker-witnesses to hold the company accountable and they therefore should receive immigration protections.³⁷ In Rosario's own words, "My coworkers and I have been fighting our case for more than three years, facing threats and intimidation on top of wage theft and health and safety risks as workers of Unforgettable Coatings Inc."³⁸

These efforts eventually were successful and the Department of Labor issued a letter requesting immigration protections for current and former employees of Unforgetting Coatings, one of the first such letters in the country. With this letter, Rosario and other worker leaders applied for deferred action protection from the immigration benefits agency, U.S. Citizenship and Immigration Services. In early 2022, these workers received some of the first approvals for deferred action based on labor enforcement under the Biden

34. Gentry, *supra* note 27.

35. *Following Release of DHS Worksite Memo, Immigrant Worker Blue Ribbon Commission Holds First Public Meeting*, NAT'L DAY LABORERS ORG. NETWORK (Oct. 19, 2021) <https://ndlon.org/following-release-of-dhs-worksite-memo-immigrant-worker-blue-ribbon-commission-holds-first-public-meeting/> [<https://perma.cc/QUW5-SWQJ>] ("... Rosario Ortiz ... who himself denounced workplace abuse and spoke on behalf of fellow workers in a meeting with Labor Secretary Marty Walsh."); *Immigrant Whistleblowers Call on Biden Administration for Renewable Protections in the Face of Workplace Abuse*, NAT'L DAY LABORERS ORG. NETWORK (Dec. 7, 2023), <https://ndlon.org/immigrant-whistleblowers-call-on-biden-administration-for-renewable-protections-in-the-face-of-workplace-abuse/> [<https://perma.cc/36KB-LQ7S>] ("... Rosario Ortiz ... met with Secretary Mayorkas in person in June 2022 to advocate for work authorization for workers who were participating in labor enforcement investigations."); Bliss Requa-Trautz et al., *Deferred Action Protections for Labor Enforcement: A Guide for Worker Advocates*, at 6, 25 (October 2023), https://media.niic.org/wp-content/uploads/2024/09/Deferred-Action-Protections-for-Labor-Enforcement_-_A-Guide-for-Worker-Advocates.pdf [<https://perma.cc/UL5J-8KHB>] (including an image of Rosario Ortiz meeting with Secretary Walsh and, later, depicting him speaking at a rally in front of the U.S. Department of Labor building in D.C.); Jennifer Solis, *Homeland Security Formalizes Process that Won Immigrant Workers a \$3 Million Settlement*, NEV. CURRENT (Jan. 18, 2023), <https://nevadacurrent.com/2023/01/18/homeland-security-formalizes-process-that-won-immigrant-workers-a-3-million-settlement/> [<https://perma.cc/88GP-EZYB>].

36. Gentry, *supra* note 27.

37. Martinez, *supra* note 15 (quoting Mr. Ortiz as speaking out in defense of labor rights for immigrant workers, saying, "President [Joe] Biden and Secretary [Alejandro] Mayorkas have the power to protect us. It's time for them to use it.").

38. Solis, *supra* note 35.

administration.³⁹ With the work permit that followed, Rosario finally had legal permission to live and work in the U.S., his home for past twenty years.⁴⁰ In the face of the immigration threats from his former boss, he could breathe a sigh of relief, with the reassurance that he was protected from deportation for at least the next two years.

Rosario's victory paved the way for immigrant workers across the country to seek protections, leading to the Department of Homeland Security (DHS) announcement of its streamlined process in January of 2023.⁴¹ The announcement memorialized and publicized the process through which Rosario and his coworkers won protections. First, a labor agency issues a statement of interest to explain that agency's enforcement interests in immigration protections for a group of workers.⁴² Then, second, immigration officials receive and adjudicate individual applications for deferred action from workers covered by the labor agency statement.⁴³ Advocates coined the process Deferred Action for Labor Enforcement, or DALE.⁴⁴ On the same day as this announcement, the Department of Labor announced a settlement with Unforgettable Coatings Inc. over their labor violations.⁴⁵ Unforgettable Coatings Inc. agreed to pay \$3.6 million in back wages and penalties to nearly six hundred workers in four states who had been victimized by its wage theft.⁴⁶

Rosario's victories, winning immigration protections as well as broad remediation for labor violations from a company that exploited immigrant workers, built on decades of advocacy to protect immigrant worker rights. The conflict between immigration and labor enforcement stretches back even further, to early conceptions of immigration regulation as the principal tool for labor protection. And even after Congress enacted federal statutes with labor protections, and courts interpreted the laws to also apply to immigrants, employers used immigration enforcement to retaliate against immigrant

39. *Id.*

40. Jennifer Solis, *With NV Workplace Injuries and Deaths Outpacing Nation, Activists Push for More Safety Measures*, NEV. CURRENT (May 3, 2022), <https://nevadacurrent.com/2022/05/03/with-nv-workplace-injuries-deaths-outpacing-nation-activists-push-for-more-safety-measures/> [<https://perma.cc/CU35-945V>].

41. Jennifer Solis, *Las Vegas Workers Facing Labor Abuse Get Renewed Federal Protections from Deportation*, NEV. CURRENT (Jan. 17, 2024), <https://nevadacurrent.com/2024/01/17/las-vegas-workers-facing-labor-abuse-get-renewed-federal-protections-from-deportation/> [<https://perma.cc/4P5L-VC48>] (“Workers in Las Vegas played a huge role in the push to establish the DALE program, said [Secretary] Su”); *see also* DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations, *supra* note 22.

42. *See* DHS Support of the Enforcement of Labor and Employment Laws, *supra* note 23.

43. *Id.*

44. *See infra* notes 336–41 and accompanying text.

45. Calderon, *supra* note 26; Order Granting Consent Judgment & Order, *Walsh v. Unforgettable Coatings, Inc.*, No. 2:20-cv-00510-KJD-DJA (D. Nev. Jan. 18, 2023); *Federal Court Requires Las Vegas Paint, Specialty Coatings Contractor Who Intimidating Workers to Pay \$3.6M to 593 Employees in Four States*, *supra* note 29.

46. Calderon, *supra* note 26; Order Granting Consent Judgment & Order, *Walsh v. Unforgettable Coatings, Inc.*, No. 2:20-cv-00510-KJD-DJA (D. Nev. Jan. 18, 2023) (approving back wages, penalties, and ongoing monitoring); *Federal Court Requires*, U.S. DEP'T OF LABOR, *supra* note 29.

workers seeking to organize, often with the acquiescence of federal immigration officials. From that dark history, and after Congress prohibited the employment of undocumented immigrants, labor agencies eventually shifted to agreements that sought limited neutrality from parts of immigration agencies to not interfere in active labor enforcement. But that claimed neutrality had its limits and failed to fully address the deep fears of immigrants who suffered labor violations. The announcement of DALE therefore broke new ground in, for the first time, using immigration protections to broadly facilitate labor enforcement rather than simply minimize immigration interference in labor investigations or narrowly protecting victims of certain crimes.

This article is the first scholarly analysis of the path to winning these labor-based immigration protections and their impact. This analysis builds on work by other scholars over the last several decades analyzing the increasingly important intersection of labor and immigration enforcement. Immigration scholars have long critiqued the “chronic imbalance of power between DHS and the DOL.”⁴⁷ Scholarship in this field ranges from historical and sociological critique of racial capitalism,⁴⁸ discussions of the challenge of immigration enforcement for labor enforcement,⁴⁹ and critical analysis of major Supreme Court precedent in this area.⁵⁰ Critiques of statutes, precedent and policy have resulted in a range of suggestions for reform, primarily through new legislation.⁵¹ Labor scholars have also analyzed the persistent

47. Jayesh M. Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, 53 ARIZ. L. REV. 1157, 1157 (2011); Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1092–94 (2011) (proposing labor agency monitoring of DHS to address “the persistent problem of asymmetric workplace regulation”).

48. E.g., Shirley Lung, *Criminalizing Work and Non-Work: the Disciplining of Immigrant and African American Workers*, 14 U. MASS. L. REV. 290, 287–96 (2019) (discussing the history of criminalization “as a mode of labor regulation and racial control,” and comparing employer sanctions for hiring undocumented workers to the history of exploitation from slavery and other state coercion against workers).

49. E.g., Kati L. Griffith, *Undocumented Workers: Crossing the Border of Immigration and Workplace Law*, 21 CORNELL J.L. & PUB. POL’Y 611, 612–13 (2012) (suggesting a research agenda for the burgeoning field of “immigration” law, “at the crossroads of immigration and employment policies” [hereinafter “*Undocumented Workers*”]).

50. The controversial decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* provoked both immediate and lasting scholarly criticism. Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227, 232–33 (2012) (examining “regulatory resistance” in the three federal labor agencies to the legal limits of immigrant workers’ rights); Michael H. LeRoy, *Remedies for Unlawful Alien Workers: One Law for the Native & for the Stranger Who Resides in Your Midst? An Empirical Perspective*, 28 GEO. IMMIGR. L.J. 623 (2015); Nhan T. Vu & Jeff Schwartz, *Workplace Rights & Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, Its Predecessors, & Its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1 (2008); Catherine L. Fisk, Lauren J. Cooper & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies*, in LABOR LAW STORIES 399–400 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

51. Stephen Lee, *Screening for Solidarity*, 80 U. CHI. L. REV. 225, 233–34 (2013); Lee, *supra* note 47, at 1125 (proposing that immigration officials be required to obtain affirmative consent from labor agencies before investigating a worksite); Kathleen Kim, *The Trafficked Worker As Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 1 U. CHI. LEGAL F. 247, 307–08 (2009) (calling for “a statutory immigration remedy for undocumented workers who sue their employers for workplace-related civil rights violations”); Jennifer Gordon, *Transnational Labor*

problem of workplace exploitation of immigrant workers from a variety of perspectives.⁵² Some have explored state and local approaches to these issues,⁵³ as well as lessons from innovative models of organizing and lawyering.⁵⁴ Many scholars who have focused on how to prevent human trafficking have noted the persistent barrier of immigration enforcement.⁵⁵ Finally, even beyond the intersection of labor and immigration, some scholars are turning to exploring public policy through immigration enforcement, with helpful insights on how the stakes of immigration policy extend beyond the border and beyond questions of humanitarian interests and belonging.⁵⁶

This article will proceed in three parts. The first part will review the deeply intertwined history of labor and immigration in the United States. This history begins with a focus on immigration restrictions as protection of labor markets, and then in fits and starts after federal workplace protections, eventually begins to acknowledge some protection of immigrant workers as critical to enforcing workplace standards. Building on this background, the second part tells the story of the final and successful push for affirmative immigration protections for workers under the Biden administration. This push included key immigrant worker leaders like Rosario Ortiz speaking out about high stakes labor violations and then demanding protection. This advocacy

Citizenship, 80 S. CAL. L. REV. 503, 565–71 (2007) (advocating for membership in transnational labor organizations as a pathway to labor migration that upholds labor standards through binational collaboration).

52. Jayesh M. Rathod, *Danger and Dignity: Immigrant Day Laborers & Occupational Risk*, 46 SETON HALL L. REV. 813 (2016); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303 (2010); Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers As a Centerpiece of Immigration Reform*, N.Y.U. J. LEGIS. & PUB. POL'Y 555 (2006–2007); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 740 (2003).

53. E.g., Kati L. Griffith, *The Power of a Presumption: California As a Laboratory for Unauthorized Immigrant Workers' Rights*, 50 U.C. DAVIS L. REV. 1279 (2017) (discussing California's authority to protect the right to organize for undocumented farmworkers).

54. E.g., Leticia Saucedo, *Everybody in the Tent: Lessons from the Grassroots About Labor Organizing, Immigrants, and Temporary Worker Policies*, 17 HARV. LATINO L. REV. 65 (2014); Ruth Milkman, *Immigrant Workers, Precarious Work, and the US Labor Movement*, 8 GLOBALIZATIONS 361 (2011); Caitlin C. Patler, *Alliance-Building and Organizing for Immigrant Rights: The Case of the Coalition for Humane Immigrant Rights of Los Angeles*, in WORKING FOR JUSTICE: THE LA MODEL OF ORGANIZING AND ADVOCACY 71, 76–79, 84–85 (Ruth Milkman, Joshua Bloom, & Victor Narro, eds. 2010); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, & the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428–33 (1995).

55. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2979 (2006); Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, & Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96 (2017).

56. Medha D. Makhoul & Patrick J. Glen, *Immigration Reforms As Health Policy*, 15 ST. LOUIS U. J. HEALTH L. & POL'Y 275 (2022) (discussing the consequences of immigration law for health policy); Sarah Hickman & Korok Ray, *Selling Immigration Visas: A Market-Based Approach to Boost American Innovation*, 17 J.L. ECON. & POL'Y 407 (2022) (arguing that U.S. immigration policy favors family reunification over labor market needs and presents an opportunity to raise revenue by selling high-skilled visas); Mambwe Mutanuka, *The Intersection of Health Policy and Immigration: Consequences of Immigrants' Fear of Arrests in U.S. Hospitals*, 30 ANNALS HEALTH L. ADVANCE DIRECTIVE 217, 222 (2021).

culminated in the January 2023 announcement of the DALE process. Following this announcement, and after some additional improvements, thousands of workers applied for and received protection before January 2025, when the second Trump administration moved to dismantle further DALE processing. Therefore, the third part will offer some preliminary reflections on what was accomplished through two years of DALE. Finally, the piece concludes that the announcement and implementation of this protection for two years has changed the landscape for immigrant workers, with implications for the advocates facing the current crackdown on immigration and future opportunities for immigration policy that serves a broader conception of the public interest and rule of law.

I. PAST TO PRESENT: A BRIEF HISTORY OF LABOR AND IMMIGRATION REGULATION

U.S. regulation of immigration and labor protection have long been deeply intertwined. This history begins with unrepentant extraction of labor from immigrants, facilitated by both the U.S. government and employers, with little recognition that workers had rights worthy of government protection. In this early era, immigration restrictions were seen as labor protection for U.S. workers, with race and country-based exclusion as a tool to reduce excess labor supply when economic needs changed. Later, through the New Deal and beyond, Congress began to legislate federal labor standards enforced through newly created federal labor agencies that held employers accountable for violating the individual or collective rights of their workers.

As U.S. immigration law began to directly regulate immigrant employment, employers increasingly manipulated enforcement efforts to target workers asserting labor rights. Only in the past few decades have immigration enforcement officials shifted to seeking neutrality and noninterference in labor disputes, with uneven progress. The further step of immigration protection for victims and witnesses to labor disputes emerged only in approximately the past decade.

Meanwhile, labor policymakers have increasingly embraced partnerships with worker witnesses and their organizations as critical to effective labor enforcement amid a crisis of lawlessness in workplaces. These new approaches to labor enforcement embrace a broader view of labor agency enforcement interests, and they set the stage for greater labor agency involvement in immigration protections for workers.

This historical context explains the deep-seated fears of immigrant workers and the slow recognition within immigration and labor agencies that these fears stand as a barrier to robust labor enforcement. This laid the groundwork for the breakthrough in announcing DALE, which for the first time established a clear process for immigration agencies to facilitate and support labor enforcement.

A. *Immigration Restriction as Labor Protection*

Immigration and labor policy have developed over the years in conversation with each other, with very little regulation in both areas in early U.S. history. From the founding era until the late nineteenth century, the immigration of laborers was essential to rapid growth and industrialization of the U.S. economy as well as the colonial push to expand its borders.⁵⁷ As preeminent scholar Mae Ngai has noted, immigration in this era was “virtually unfettered”⁵⁸: there were essentially no federal immigration restrictions, and states policed only economically unproductive immigrants, such as vagrants or dependents.⁵⁹ Large numbers of immigrants came to the U.S. through this regime, first from European countries and then, with the California Gold Rush and famine in China, Chinese immigrants as well.⁶⁰ But U.S. workers perceived Chinese immigrants as driving down wages, further fueling rampant racial animus against the Chinese that led to policies to specifically restrict immigration from Asia.⁶¹ The U.S. had no minimum wage or other significant labor protections in place and so the perceived solution to labor competition (and cultural and racial difference) was the regulation of immigration—a deflection that employers encouraged by blaming immigrant workers for depressing labor standards.⁶² The Chinese exclusion laws began a cycle that repeats throughout U.S. history of oscillating between permitting unrestricted immigration to resolve labor shortages, and then, in response to perceived labor competition, immigration restrictionism.⁶³

The first federal immigration legislation therefore prohibited the entry of Chinese and Asian laborers, through the Page Act of 1875⁶⁴ and the Chinese

57. CESAR CUAUHEMOC GARCIA HERNANDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* 21–24 (2019); MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS & THE MAKING OF MODERN AMERICA*, 132–33 (2004).

58. NGAI, *supra* note 57, at 17.

59. *Id.* at 18, 58 (describing the principle of deportation as deriving from English poor laws that ejected paupers from towns); Paulina Arnold, *How Immigration Detention Became Exceptional*, 75 STAN. L. REV. 261 (2023) (discussing the origins of immigration detention and the context of legal limits for civil confinement).

60. REECE JONES, *WHITE BORDERS: THE HISTORY OF RACE & IMMIGRATION IN THE UNITED STATES FROM CHINESE EXCLUSION TO THE BORDER WALL*, 18–19 (2021).

61. *Id.* at 19; NGAI, *supra* note 57, at 18. This animus also boiled over in a series of racist riots, including the Los Angeles Massacre of 1871 that killed 17 Chinese men. JONES, *supra* note 60, at 18–21.

62. Bill Ong Hing, *Immigration Policy: Thinking Outside the (Big) Box*, 39 CONN. L. REV. 1401, 1414 (2007) (“There is evidence that whenever labor began to organize over wages and working conditions, employers would rush to secure a new unorganized group of cheap migrant labor. Afterward, employers would join old labor’s lament that new immigrant labor depressed wages and working conditions.”)

63. Hiroshi Motomura, *The President’s Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASH. L.J. 1, 15 (2015) (explaining that the “quest for a steady supply of labor that was needed to work the fields and factories . . . would define immigration law through successive cycles of labor recruitment followed by exclusion”); Hing, *supra* note 62, at 1415; FRANK F. CHUMAN, *THE BAMBOO PEOPLE* 4 (1976).

64. Page Act of 1875, 18 Stat. 477.

Exclusion Act of 1882.⁶⁵ Soon after, Congress legislated that immigrants who might not work in the United States or were otherwise socially undesirable should be denied entry regardless of their country of origin in the Immigration Act of 1882.⁶⁶

The immigration bureaucracy that soon emerged to enforce these rules reflects the focus on regulating labor markets for the purpose of labor protection.⁶⁷ The Immigration Act of 1882 initially delegated enforcement to the Secretary of Treasury, followed in 1891 by further legislation that formally created a Bureau of Immigration within Treasury.⁶⁸ About a decade later, Congress moved immigration enforcement to the Department of Commerce and Labor.⁶⁹ Then, in 1913, that single agency was divided into two, and the immigration agencies were allocated to the newly created Department of Labor. Congress charged the Department of Labor to “promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”⁷⁰

Meanwhile, Congress passed the Immigration Act of 1924, instituting the infamous national origin quotas for European immigrants, prohibiting Japanese immigration, and creating for the first time border patrol directed to police land borders.⁷¹ The increasingly robust infrastructure for immigration enforcement remained in the Department of Labor until 1940, when immigration agencies were transferred to the Department of Justice.⁷² For more than fifty years, Congress thus built out an immigration enforcement bureaucracy with the goal of restricting perceived labor competition to protect U.S. workers.

65. Chinese Exclusion Act of 1882, 22 Stat. 58.

66. Immigration Act of 1882, 22 Stat. 214 (prohibiting the admission of any convict, lunatic, idiot, or any person unable to take care of him or herself without becoming a public charge); ROGER DANIELS & OTIS L. GRAHAM, *DEBATING AMERICAN IMMIGRATION 1882-PRESENT* 13 (2001); NGAI, *supra* note 57, at 59.

67. Jennifer S. Breen, *Labor, Law Enforcement, & “Normal Times”: The Origins of Immigration’s Home Within the Department of Justice & The Evolution of Attorney General Control Over Immigration Adjudications*, 42 U. HAW. L. REV. 1, 5 (2020) (“The chief function of immigration enforcement was to ensure that the labor market was properly regulated.”).

68. Breen, *supra* note 67, at 4; JONES, *supra* note 60, at 67; *Overview of INS History*, USCIS HISTORY OFFICE & LIBRARY, <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf> [<https://perma.cc/J5RG-T8S5>] (last visited Sept. 19, 2025).

69. Breen, *supra* note 67, at 4–5; Milkman, *Immigrant Workers*, *supra* note 54, at 361–62.

70. Act of Mar. 4, 1913, Pub. L. No. 62-425, ch. 141, 37 Stat. 736 (1913) (creating the Department of Labor); Breen, *supra* note 67, at 4–5.

71. NGAI, *supra* note 57, at 22–23; Bill Ong Hing, *Border Patrol Abuse: Evaluating Complaint Procedures Available to Victims*, 9 GEO. IMMIGR. L.J. 757, 760–61 (1995).

72. Breen, *supra* note 67, at 5–6 (describing the decision to move immigration agencies to Justice as “reflect[ing] Roosevelt’s growing preoccupation with war in Europe and worries about subversives and saboteur at home . . . [and] a vision of a strong executive branch and law enforcement with a diminished role for civil liberties”); Reed Abrahamson, *“The Ideal of Administrative Justice”: Reforming Deportation at the Department of Labor, 1938–1940*, 29 GEO. IMMIGR. L.J. 321 (2015) (chronicling efforts to improve procedural protections in deportation under Secretary of Labor Frances Perkins before immigration agencies were abruptly reallocated to Justice).

B. *The Dawn of Labor Protections and Continued Exploitation of Immigrant Workers*

Immigration restrictions may have placated anti-Chinese sentiment, but they did not meaningfully improve conditions for workers in the U.S. And while the country-of-origin based restrictions restricted the racial make-up of new immigrants, these laws did not stop immigration. The U.S. government continued to permit the immigration of new non-Asian laborers and U.S. employers continued to hire them. Continued European immigration fueled rapid industrialization and the expansion of manufacturing around the turn of the century, with enormous economic outputs, and Mexican immigrant workers further developed agricultural production.⁷³

But industrialization also meant the concentration of both immigrant and U.S. workers in cities and factories laboring in horrendous workplace conditions. Workplace fatalities skyrocketed because of industrial dangers, and workers, including young children, also faced workplace-related disease and alarming hazards on the job.⁷⁴ In response to public outcry and increased union organizing, states and Congress passed various labor protections, many of which were struck down by a conservative Supreme Court that harshly scrutinized government regulation of commerce in the *Lochner* era.⁷⁵ Nevertheless, public pressure continued to build in favor of government-enforced worker protections.⁷⁶ In 1905, Upton Sinclair published *The Jungle*, a novel and exposé on the meatpacking industry that vividly illustrated the underbelly of industrial capitalism: dangerous and unclean working conditions.⁷⁷ The creation of a separate Labor Department in 1913, with its general charge to improve working conditions, emerged as a response to this pressure.⁷⁸

Concrete labor protections eventually followed. As labor unions grew, workers exercised their increased power through militant strikes as well as demands for pro-worker legislation. At the time, this meant federal labor and employment protections for workers, part of President Roosevelt's New Deal, as well as additional immigration restrictions because of perceived job competition.⁷⁹ In 1935, Congress passed the Wagner Act, the foundational law to protect workers' rights to organize, join a union, and collectively

73. Hing, *supra* note 62, at 1418–19.

74. CYBELLE FOX, *THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL* 28–30 (2012).

75. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that state law setting maximum hours for bakeries violates the Due Process Clause of the Fourteenth Amendment); Jasmine Payne-Patterson & Adewale A. Maye, *A History of the Federal Minimum Wage: 85 Years Later, the Minimum Wage Is Far From Equitable*, *ECON. POL'Y INST.* (Aug. 31, 2023), <https://www.epi.org/blog/a-history-of-the-federal-minimum-wage-85-years-later-the-minimum-wage-is-far-from-equitable/> [<https://perma.cc/X3EQ-67UX>].

76. Payne-Patterson & Maye, *supra* note 75.

77. UPTON SINCLAIR, *THE JUNGLE* (1905).

78. Act of Mar. 4, 1913, Pub. L. No. 62-425, ch. 141, 37 Stat. 736 (1913).

79. Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, *MONTHLY LAB. REV.* (Dec. 2000), <https://www.bls.gov/opub/mlr/2000/12/art3full.pdf>.

bargain with their employer over the terms and conditions of employment.⁸⁰ The *Lochner* era had begun to recede, and so the Supreme Court under political pressure upheld the legislation.⁸¹ The Wagner Act also created the National Labor Relations Board to enforce the new labor protections, with the authority to investigate and prosecute violations of the Act through agency adjudications reviewable in federal court. Three years later, in 1938, Congress passed the Fair Labor Standards Act creating the federal minimum wage as well as time-and-a-half overtime pay, with some restrictions on child labor.⁸² The Act further created the Wage and Hour Division within the Labor Department with the authority to investigate violations and sue offending employers in federal court.⁸³ President Roosevelt named it “the most far-reaching, far-sighted program for the benefit of workers here or in any other country” after his signature achievement, the Social Security Act.⁸⁴

Immigration restrictions also increased during this period, both to limit labor competition and respond to perceived political threats. However, as a result of advocacy by U.S. employers, Mexican immigrants were largely exempt from these restrictions to ensure continued access to cheap labor that was viewed as essential to the U.S. economy.⁸⁵ Employers, unions, and the general public viewed Mexican immigrant workers as inherently temporary, and therefore ideal to provide an elastic supply of labor for difficult and poorly paid work in unorganizable industries.⁸⁶ This political alignment produced various policies that reinforced this labor extraction model: the immigration of Mexican workers was tolerated when it was needed but followed by their deportation when it was not, with no regard for their labor or civil rights.⁸⁷

This push and pull then culminated in a formal temporary worker program for Mexican immigrants that tied their status in the United States to jobs with private employers in agriculture: a treaty between the U.S. and Mexico created Labor Importation Program, colloquially known as the Bracero program,

80. National Labor Relations Act, Pub. L. No. 74-198 (1935) (codified at 29 U.S.C. §§ 151-169).

81. See *Nat'l Lab. Rel. Bd. v. Jones & Laughlin Steel*, 301 U.S. 1, 49 (1937).

82. Fair Labor Standards Act of 1938, Pub. L. No. 75-718 (codified at 29 U.S.C. §§ 201-219.); see LOUIS WEINER, *FEDERAL WAGE AND HOUR LAW* (1977); Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607 (1972). Notably, industries that had predominantly Black workers were exempted from these protections. Payne-Patterson & Maye, *supra* note 75.

83. Fair Labor Standards Act of 1938, Pub. L. No. 75-718 (codified at 29 U.S.C. §§ 203-219).

84. Nathaniel Ruby & Ross Eisenbrey, *Celebrating 75 Years of the Fair Labor Standards Act*, ECON. POL'Y INST. (June 25, 2013), <https://www.epi.org/blog/celebrating-75-years-fair-labor-standards/>.

85. Hing, *supra* note 62, at 1418, 1421.

86. Hing, *supra* note 62, at 1420-21 (“[T]he American Federation of Labor barred Mexicans from its membership because it claimed Mexican competition was at the source of ongoing wage depression[.]”).

87. Hing, *supra* note 62, at 1420-21; NGAI, *supra* note 57, at 67-70 (describing how “[r]acial presumptions about Mexican laborers . . . dictated the procedures at the Mexican border” and the “the formation of the Border Patrol raised the border”). The labor movement during this period began a slow evolution on immigration and “gradually rejected the restrictive immigration policies it had championed so vociferously in the Progressive Era.” Janice Fine & Daniel J. Tichenor, *Solidarities & Restrictions: Labor & Immigration Policy in the United States*, 10 THE FORUM: LAB. IN AM. POL. 1, 4 (2012).

which ran from 1942 to 1964.⁸⁸ With the advent of federal labor protections and through negotiations with Mexico, with a vested interest in protecting its citizens, the new seasonal worker program ostensibly included minimum labor standards for workers regarding transportation, wages, working conditions, and housing.⁸⁹ The U.S. government administered the program, including actively recruiting Mexican workers for U.S. employers, but did practically nothing to monitor labor abuse.⁹⁰ Mexican workers hired through the program were completely at the mercy of their employers, who violated the labor protections with impunity and wielded the threat of deportation to prevent formal complaints.⁹¹ But workers in the program grew to comprise a quarter of agricultural workers in several Southwestern states, and with essentially no enforcement of the program's labor protections, a program administrator described the men as a "captive labor force . . . unnatural in our free competitive economy."⁹² Critics of the program blamed the government's administrative failures to regulate the flow of workers and enforce the program's labor protections as adversely affecting U.S. workers, which was a hesitant, early recognition that perhaps government policies rather than immigrants themselves drive down labor standards.⁹³

Parallel to this history, the civil rights movement mobilized against racial discrimination throughout society and eventually achieved unprecedented federal anti-discrimination legislation. Among other achievements, this resulted in the Civil Rights Act of 1964, which in Title VII prohibited employment discrimination on the basis of race, color, religion, sex, and national origin.⁹⁴ The Act also created the Equal Employment Opportunity Commission (EEOC) to both investigate discrimination and hold employers accountable for violations.⁹⁵ Building on earlier models in the USDOL and NLRB, this again expanded federal authority to investigate and enforce labor protections through administrative agencies, while also authorizing private litigation.⁹⁶ Six years later, Congress passed the Occupational Safety and Health Act of 1970, requiring employers to provide a workplace free of serious

88. Hing, *supra* note 62, at 1422.

89. *Id.*

90. *Id.* at 1423.

91. *Id.* at 1424; Kayla E. Dantona, *The Bracero Program & the Exploitability of Migrant Workers* 855–56 (2023) (M.A. thesis, CUNY ACADEMIC WORKS), https://academicworks.cuny.edu/gc_etds/5176/.

92. Hing, *supra* note 62, at 1424–25 (quoting Fred H. Schmidt, *After the Bracero, An Inquiry Into the Problem of Farm Labor Recruitment*, INST. OF INDUS. RELS. (Dec. 1964) at 15); Marjorie S. Zatz, *Using and Abusing Mexican Farmworkers: the Bracero Program and the INS*, 27 LAW & SOC'Y REV. 851 (1993).

93. Hing, *supra* note 62, at 1423.

94. Civil Rights Act of 1964, Pub. L. 88-352 Stat 241 (codified at 42 U.S.C. §§ 2000e et seq.).

95. *Id.*

96. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 321–22 (2005) (describing the post-New Deal expansion of "a regulatory model of minimum standards enforceable mainly by administrative agencies and a rights model of judicially enforceable individual rights"); Brett McDonnell & Matthew Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 MD. L. REV. 887 (2022) (summarizing the "dizzying array of responsibilities on employers with respect to their employees").

hazards.⁹⁷ The Act created the Occupational Safety and Health Administration (OSHA) as a sub-agency within USDOL to both promulgate health and safety standards and enforce them.⁹⁸

Thus, by 1970, the federal government had three separate administrative agencies enforcing several statutes providing labor protections in U.S. workplaces: the right to organize on the job, the right to minimum wages, the right to be free of employment discrimination, and the right to a safe workplace. These statutes created protections to improve working conditions through regulating employers, rather than through regulating the labor market—a major shift in labor policy.

But the new labor bureaucracy also faced inevitable limits. Though each agency's procedures and jurisdiction were different, every labor statute set up enforcement to be a largely reactive "bottom-up system," responding to worker complaints of violations rather than via other procedures such as periodic auditing by government regulators.⁹⁹ This meant that labor agencies fundamentally required the participation of workers as complainants, witnesses, and monitors to effectively enforce labor protections through identifying, documenting, and prosecuting violations.¹⁰⁰ And significant reliance on workers was inevitable in any system that sought to monitor labor standards in millions of workplaces across the country, where workers had intimate knowledge of labor conditions and employer practices while regulators did not.¹⁰¹ With so many dispersed sites to regulate, workplace monitoring is only as effective as the information it relies upon, meaning that worker involvement and empowerment is essential.¹⁰² But this reality meant that in workplaces where workers feared filing complaints or assisting labor agencies, employers could essentially violate all manner of labor protections with impunity. Anything that deterred complaints—mistrust of government, employer threats, or immigration enforcement—would therefore obstruct labor enforcement and enable labor violations.

97. Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678).

98. *Id.*

99. Charlotte S. Alexander & Arthi Prasad, *Bottom-up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1071 (2014) ("The parties with the most information about violations and the greatest incentive to correct them—the workers—drive the enforcement process.").

100. David Weil, *Crafting a Progressive Workplace Regulatory Policy*, 28 COMP. LAB. L. & POL'Y J. 125 (2007).

101. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1153-56 (2012) (describing the informational advantages of private litigants over public regulatory bodies that are "generally distant geographically from sites of harm," which "reduces their ability to even know that such harm occurred in the first place"); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LABOR LAW & POL'Y J. 58, 62 (2005) (arguing "the role of workers under workplace policies takes on great importance" because resource limitations make government inspections extraordinarily rare).

102. See, e.g., JILL ESHENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* (2004) (analyzing private and public workplace monitoring and arguing that worker involvement is essential to effective labor enforcement).

Separately, immigration enforcement shifted during this period to the Justice Department and out of the Labor Department, but it fundamentally continued to serve U.S. economic interests.¹⁰³ Employers, labor unions, and the general public tolerated the extraction of labor from immigrant workers with little regard for their rights and with only minimal recognition that exploitation of immigrant workers threatened U.S. workers too. Against the backdrop of a new labor bureaucracy focused on protecting workers, this set the stage for coming conflicts between immigration and labor enforcement.

C. *Immigration Policing of Workplaces and Limits to Labor Remedies*

The decades that followed, from the mid-1970s to early 2000s, were characterized by two simultaneous trends. First, immigrant workers sought to invoke broad federal labor protections, leading courts to consider whether immigrants count as employees under the various statutes. Second, the federal government for the first time prohibited the employment of unauthorized workers, increasing immigration policing of workplaces and supercharging employer power to exploit immigrant workers.

Notwithstanding the general hostility of national labor union leadership to immigration, immigrant workers during this period started to join labor unions across the country alongside U.S. workers.¹⁰⁴ The National Labor Relations Act, like every other federal labor protection statute, created rights for certain employees, with jurisdiction defined by industry and sometimes employer but with no reference to immigration status.¹⁰⁵ However, an employer's fight to bust a union drive in a small Chicago leather shop with immigrant workers brought the legal question of whether immigrant workers enjoyed labor rights to the U.S. Supreme Court.

The facts of the case, *Sure-Tan*, reveal the vulnerabilities of immigrant workers and brutal suppression of those vulnerabilities by an employer desperate to exploit any advantage.¹⁰⁶ In 1976, a labor union organized the workers at the leather shop, who then voted for the union in an NLRB-supervised election.¹⁰⁷ Two hours after the results of the election were announced, the boss spoke to the workers, cursing them for supporting the union and then asking them about their immigration status.¹⁰⁸ When several responded that they did not have lawful immigration status, the company objected to the election.¹⁰⁹ The Board investigated, determining that the boss had known

103. See Breen, *supra* note 67, at 14–21 (describing the push for reorganization as motivated in part by political attacks on Secretary of Labor Francis Perkins for her handling of immigration matters, including the controversy around noncitizen labor organizer Harry Bridges).

104. Fine & Tichenor, *supra* note 87.

105. See 29 U.S.C. § 152(3) (defining employee to include “any employee” with several exceptions by industry or employer such as for “agricultural laborer,” those “in domestic service,” or those “employed by his parent or spouse”).

106. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984).

107. *Id.* at 886.

108. *Id.* at 886–87.

109. *Id.* at 887.

about the workers' lawful status well before the union election, and overruled the objection about a month later, certifying the union.¹¹⁰ The very next day, the boss wrote to federal immigration agents to instigate enforcement against the workers.¹¹¹ A month later, immigration agents came to the plant, interrogated all Spanish-speaking workers, and determined that five had no lawful status.¹¹² The agents arrested the undocumented workers and "by the end of the day, all five employees were on a bus ultimately bound for Mexico."¹¹³ The Board determined that this was retaliatory and violated the National Labor Relations Act, so the employer sought judicial review, arguing that undocumented workers are not employees protected by the NLRA and that the Board could not compel the employer to pay backpay or offer reinstatement to the deported workers.¹¹⁴

In this case, the Court considered for the first time whether federal labor protections for "any employee" includes immigrant workers.¹¹⁵ Looking to the Board's own analysis, the Act's text, and its congressional purpose, the Supreme Court held that "any employee" truly meant any employee, regardless of their immigration status.¹¹⁶ The Court opined that the Act's exemptions for certain industries or independent contractors were exhaustive, and that Congress's failure to exclude immigrant workers meant that the "striking" "breadth" of the Act extended to them.¹¹⁷

Interestingly, the Court also recognized that protecting the labor rights of immigrant workers furthers the congressional purpose of encouraging collective bargaining. Citing to an earlier opinion that had upheld a state scheme to sanction employers for hiring undocumented workers, the Court wrote that "[A]cceptance 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 the effectiveness of labor unions."¹¹⁸ This importantly recognized that employer exploitation of immigrant workers rather than the mere presence of immigrants themselves drives down labor standards in workplaces, a perspective that was also gaining traction among labor agencies and politicians, leading to targeted labor enforcement

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* Workplace raids by immigration agents were common: A 1977 workplace raid by federal immigration agents of a potato processing plant led to another high-profile case, where the Court declared that the Fourth Amendment and the exclusionary rule prohibiting the use of unlawfully obtained evidence had limited application in immigration proceedings. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

114. *Sure-Tan, Inc.*, 467 U.S. at 889–90.

115. *Id.* at 891; *see also* *NLRB v. Apollo Tire Co.*, 604 F.2d 1180, 1183 (9th Cir. 1979) (noting that if undocumented workers were held exempt from NLRA, "[t]he result would be more work for illegal aliens and violations of the immigration laws would be encouraged").

116. *Sure-Tan, Inc.*, 467 U.S. at 891–92.

117. *Id.*

118. *Id.* at 892 (quoting *DeCanas v. Bica*, 424 U.S. 351, 356–57 (1976)).

initiatives.¹¹⁹ But this framing also focused on how protections for immigrant workers served the interests of U.S. citizen workers, an example of critical race theory's interest convergence dilemma—where minority groups are most likely to gain benefits from policies that also benefit the dominant group.¹²⁰

While the Court did not consider immigration law to bar unauthorized workers from labor protections, it held that their lack of status sharply curtailed the available remedies. To reconcile labor law with federal immigration law, which aimed to deter unauthorized entry to the U.S., the Court held that the traditional labor remedies for retaliatory discharge, reinstatement to the job and compensation for lost wages, should be contingent on the workers' future lawful re-entry to the U.S. because they were unavailable to work until they lawfully re-entered.¹²¹ This meant that the workers would likely receive no direct remedy for the labor violation and, as the Court acknowledged, the employer would face “no financial disincentive against the repetition of similar discriminatory acts in the future.”¹²² But the Court nevertheless held that it was bound by the general thrust of immigration laws regulating entry to the U.S.¹²³

This decision had far-reaching implications, since other federal legislation also extended labor protections to employees generally and presented similar questions.¹²⁴ In general, following *Sure-Tan*, courts held that immigrant workers were employees and therefore entitled to the same labor rights regardless of their status.¹²⁵ Interpretations of available remedies for labor violations against immigrant workers were more mixed, with some courts finding the *Sure-Tan* holding specific to immigrants outside the U.S. and

119. See Richard E. Blum, Note, *Labor Standards & the Results of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, & Patel*, 63 N.Y.U. L. REV. 1342, 1362 (1988) (discussing efforts under the Carter administration to target wage and hour enforcement on industries with undocumented workers to protect these workers and to enforce labor law because workers could fear complaining to authorities).

120. See, e.g., Shefali Milczarek-Desi, *Opening the Pandemic Portal to Re-Imagine Paid Sick Leave for Immigrant Workers*, 111 CAL. L. REV. 1171, 1179, 1213 (2024) (citing Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980)). As Bell points out, the benefit to minority groups through policies that serve converging interests is always less secure, because the remedy will be restricted if it threatens the dominant group. *Id.* (citing KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 447-48 (2019)).

121. *Sure-Tan, Inc.*, 467 U.S. at 902–03.

122. *Id.* at 904.

123. *Id.*

124. See, e.g., 29 U.S.C. § 652(6) (defining “employee” as “an employee of an employer who is employed in the business of his employer which affects commerce” for the purposes of the Occupational Safety and Health Act); 42 U.S.C. § 2000e(f) (defining “employee” as “an individual employed by an employer,” with exceptions for certain state employees, for the purposes of Title VII protections); 29 U.S.C. § 203(e) (defining “employee” as “any individual employed by an employer,” with exceptions for certain federal and state employees, for the purposes of FLSA protections).

125. E.g., *In re Reyes*, 814 F.2d 168 (5th Cir. 1987) (FLSA); see generally Blum, *supra* note 119, at 1356 (“Three decisions following *Sure-Tan* have addressed the extent of FLSA protections available to undocumented aliens before and after IRCA: . . . All three have upheld the right of undocumented workers to the full protection of wage and hour laws.”).

therefore to still permit back pay, reinstatement, or other labor remedies to those in the U.S., with or without status.¹²⁶

As courts and agencies wrestled with these consequential questions, new federal immigration legislation brought a sea change to workplaces: after years of public debate, Congress passed the Immigration Reform and Control Act of 1986 (IRCA), for the first time penalizing employers for hiring unauthorized immigrants.¹²⁷ This meant that certain eligible immigrants, generally those with status, could apply for and receive work permits from the federal immigration agency, and employers were required to review documents from any new worker to ensure that they were authorized to work in the U.S.¹²⁸ Employers caught with unauthorized workers faced civil fines,¹²⁹ and if they engaged in a pattern or practice of violations, potentially criminal penalties.¹³⁰ In the debate leading up to the federal employer sanctions scheme, immigrant rights groups interestingly aligned with business interests in opposing government regulation in this area, while labor unions and some civil rights advocates pushed in favor of employer sanctions to protect domestic labor markets, and specifically low-wage workers, from perceived competition with immigrant workers.¹³¹

But regardless of the initial employer opposition, the law made employers private enforcers of immigration law in screening their workers for immigration status.¹³² Though the law penalizes only employers for hiring unauthorized workers rather than immigrant workers for seeking employment,¹³³ its sparse enforcement supercharged employers with power over immigrant workers: employers could easily report troublesome workers, with the stark consequence of deportation, while workers had no reciprocal mechanism to report

126. Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U.L. REV. 1361, 1369 (2009) (“Somewhat surprisingly, unauthorized workers’ rights remained relatively unchanged for the first two decades following Sure-Tan and the IRCA. With few exceptions, courts continued to hold that unauthorized immigrants could recover backpay and other remedies for workplace violations.”); Blum, *supra* note 119, at 1369 n.46 (collecting cases).

127. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359. The bill also offered broad amnesty to many immigrants who had come to the U.S. before 1984. Title II—Legalization.

128. *Id.* § 101 (codified at 8 U.S.C. § 1324a).

129. 8 U.S.C. § 1324a(e) (providing for civil monetary penalties as part of authorized compliance measures).

130. 8 U.S.C. § 1324a(f) (providing for criminal penalties for pattern or practice violations).

131. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 499 (2004).

132. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1105 (2009); see also Lee, *Screening for Solidarity*, *supra* note 51 (suggesting labor agency review of immigration enforcement in workplaces); Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 137 (2003) (“Through . . . employer sanctions for hiring undocumented workers, the State effectively makes employers parties to enforcement of the immigration laws affecting the labor market. Employers themselves become the primary method of screening the labor pool for employees that the State has not authorized to work.”).

133. 8 U.S.C. § 1324a(e) & (f) (describing compliance measures and criminal penalties against employers).

employers.¹³⁴ The inclusion of labor enforcement funding,¹³⁵ and congressional intent that employer sanctions not “be used to undermine or diminish in any way labor protections”¹³⁶ did little to change that reality.¹³⁷ As scholar Stephen Lee noted, the law meant that “employers and employers alone decide which unauthorized immigrants in the workplace can remain, and which will be reported for removal.”¹³⁸ Scholar Kathleen Kim describes this as creating pervasive coercion of undocumented workers who face the intractable choice: “comply with exploitation or object and risk deportation.”¹³⁹

In addition to further empowering employers, IRCA gave renewed focus to workplaces as a site for immigration enforcement.¹⁴⁰ The Immigration and Naturalization Service (INS), the immigration enforcement agency, had long used workplace raids to locate and arrest undocumented immigrants,¹⁴¹ but employer sanctions meant a congressional mandate and funding for worksite enforcement of immigration laws.¹⁴² The audits and raids that followed targeted only a very small fraction of employers, with fewer than 10,000 workplaces investigated each year.¹⁴³ Investigations often involved collaboration between immigration agents and employers to arrest, detain, and deport the unauthorized workers.¹⁴⁴ Immigration agents focused on a few dramatic,

134. Lee, *Private Immigration Screening*, *supra* note 132, at 1106–07.

135. IRCA, § 111(d), 100 Stat. 3359 (authorizing additional appropriations for labor enforcement “to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens”).

136. H.R. Rep. No. 99-682, pt. 1, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662.

137. “To date, however, the INS and ICE have largely ignored the unambiguous congressional intent underlying enact of the ‘employer sanctions’ provisions.” Wishnie, *Emerging Issues for Undocumented Workers*, *supra* note 131, at 517; *see also* Lee, *Monitoring*, *supra* note 47, at 1097–98 (“Congress envisioned this strategy to be jointly implemented by immigration agencies and labor agencies. In practice, however, immigration agencies . . . have been able to dictate the terms of this interagency relationship.”); *Undocumented Workers*, *supra* note 49, at 630 (“Restrictive aspects of immigration law may be in tension with the incentives that Congress intended workplace law to promote and thereby have negative effects on employee protections.”).

138. Lee, *Private Immigration Screening in the Workplace*, *supra* note 132, at 1106–07.

139. Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1574 (2015).

140. Saucedo, *Immigration Enforcement versus Employment Law Enforcement*, *supra* note 52, at 306 (noting after 1986, “the workplace became a site and focus of immigration regulation and enforcement”).

141. *E.g.*, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (reviewing legal challenges by immigrants arrested during workplace raids and holding the Fourth Amendment and the exclusionary rule prohibiting the use of unlawfully obtained evidence have limited application in immigration proceedings).

142. 8 U.S.C. §§ 1324a(e)–1324a(f) (enforcement provisions); IRCA, § 111(d), 100 Stat. 3359 (1986) (providing increased appropriations for immigration enforcement agencies).

143. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL’Y INST. (Sept. 1, 2005), <https://www.migrationpolicy.org/article/declining-enforcement-employer-sanctions> [<https://perma.cc/2MZW-NFZ6>].

144. Lee, *Private Immigration Screening in the Workplace*, *supra* note 132, at 1121, 1126–27; Saucedo, *Immigration Enforcement versus Employment Law Enforcement: the Case for Integrated Protections in the Immigrant Workplace*, *supra* note 52, at 307–08; Brownell, *supra* note 143 (“In fact, the only numerical goals the INS set for workplace enforcement in the post-IRCA period involved goals for arresting aliens. INS/ICE has never set performance targets for numbers of employers to be audited or numbers of fines to be issued.”); Jason Juffras, *Impact of the IRCA and the Enforcement Mission of the Immigration and Naturalization Service*, in *THE PAPER CURTAIN: EMPLOYER SANCTIONS’ IMPLEMENTATION, IMPACT, AND REFORM* 33, 40 (Michael Fix ed., 1991).

high-profile raids, while the vast majority of employers faced no fear of enforcement.¹⁴⁵ And even a few high-profile cases had the effect of terrifying workers, who saw that immigration enforcement took precedence over their labor rights.¹⁴⁶

The result was a perfect storm that enabled employer exploitation of immigrant workers, with immigration enforcement used as a cudgel to retaliate against any worker who dared to defy the boss. The federal Department of Labor contributed to these fears by, in the aftermath of IRCA, reporting immigration irregularities in payroll records to INS when detected in the course of minimum wage and overtime investigations.¹⁴⁷ This effectively deterred immigrant workers from complaining to DOL of labor violations, lest the investigation trigger a worksite raid.¹⁴⁸

In other instances, employers fed information to immigration agents to purge immigrant worker organizers from their workforce and undermine unionization efforts. In one such case in 1992, an employer's attorney tipped off immigration agents to retaliate against garment workers organizing a union.¹⁴⁹ Though immigration agents eventually realized the tip originated from the employer, they proceeded to raid the factory anyway, arresting ten workers and seeking their deportation.¹⁵⁰ One of the workers, Gloria Esperanza Montero, moved to suppress her statements during the raid, and appealed the issue all the way to the Second Circuit Court of Appeals. But the Second Circuit permitted this evidence and upheld her deportation, saying that the evidence obtained through the retaliatory employer tip was not "inherently unfair" and the labor dispute did not "make that evidence any less reliable."¹⁵¹ This case was far from an aberration: a senior immigration

145. Lee, *Private Immigration Screening in the Workplace*, *supra* note 132, at 1127.

146. Saucedo, *Immigration Enforcement versus Employment Law Enforcement: the Case for Integrated Protections in the Immigrant Workplace*, *supra* note 52, at 310; Griffith, *Undocumented Workers*, *supra* note 49, at 632–633.

147. *Memorandum of Understanding Between the Immigration & Naturalization Service Dep't of Justice and the Employment Standards Administration Dep't of Labor*, reprinted in 69 Interpreter Releases 829 (June 11, 1992) ("ESA will be responsible for the prompt referral to INS of all suspected substantive hiring violations, i.e., violations of the provisions against knowingly hiring or continuing to employ unauthorized workers . . .").

148. Elizabeth Ruddick, *Silencing Undocumented Workers: U.S. Agency Policies Undermine Labor Rights and Standards*, 23 NLG IMMIGRATION NEWSLETTER 3 (June 1996) (reporting on interviews with labor and immigration advocates, and concluding that the MOU permitting INS referral deterred immigrant workers from filing complaints with DOL); Jennifer Gordon, *We Make the Road By Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, *supra* note 54, at 422 (discussing worker center movement and experience of The Workplace Project in Hempstead, New York); Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2182 (1994) (describing that immigrant workers' fear of deportation deters reporting of sweatshop conditions).

149. *Montero v. I.N.S.*, 124 F.3d 381, 382 (2nd Cir. 1997).

150. *Id.* at 382–83.

151. *Id.* at 386. The broad vulnerability of millions of immigrants to deportation, with limited legal protection, means that prosecutorial discretion of the immigration agencies has severe implications for labor protection. Lori Nessell, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protections*, 36 HARV. C.R.-C.L. L. REV. 345, 384, 386–87 (2001) ("As *Montero* illustrates, agency discretion is necessary to avoid nullifying labor law protections. Absent formal agency recognition of the need to reconcile overlapping statutes and the importance of vigorous labor law enforcement, such

official acknowledged in 2000 that worksite raids were rare “unless the employer turns a worker in, and employers usually do that only to break a union or prevent a strike or that kind of stuff.”¹⁵² Employers preferred the minor civil penalties under IRCA to tolerating a labor union, and immigration law in essence gave employers that choice.

Under pressure, federal immigration officials eventually adopted internal guidance that directed agents to screen tips for employer retaliation, consult labor and employment agencies, and seek supervisor approval before raiding a worksite based on a retaliatory tip.¹⁵³ But even after the guidance, raids continued to focus on worksites where labor agencies were investigating labor violations. Professor Michael Wishnie obtained data from nearly 200 INS raids over two and a half years, from 1997 to 1999, and found that over half of the raided businesses were under investigation by a state or federal labor agency.¹⁵⁴

Meanwhile, the question of available remedies for undocumented workers returned to the Supreme Court after a percolating circuit split in the aftermath of *Sure-Tan*.¹⁵⁵ The Court considered in *Hoffman Plastics* whether immigration law limited the availability of backpay as one of the traditional remedies for retaliatory discharge for undocumented workers.¹⁵⁶ This time, labor unions, immigrant rights groups, and even some employers supported full labor remedies to immigrant workers regardless of status.¹⁵⁷ But the Court was unconvinced and held that backpay to undocumented workers “would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.”¹⁵⁸ The Court therefore ruled that the Board had no authority to award backpay for undocumented workers, leaving

discretion rests solely with the initial officer who decides whether to apprehend the undocumented worker.”). Because of this longstanding dilemma, Professor Nessel called for the use of prosecutorial discretion in general, and deferred action specifically, for immigrant workers seeking to vindicate their labor rights early on.

152. Louis Uchitelle, *INS is Looking the Other Way as Immigrants Fill Jobs*, N.Y. TIMES, Mar. 9, 2000, at C1.

153. INS Operations Instructions 287.3a, reprinted in 74 INTERPRETER RELEASES 199 (1997), redesignated as § 33.14(h) of the INS Special Agent Field Manual (April 28, 2000) (restricting INS raids on work sites engaged in labor disputes). At the same time, there was general pressure to reform worksite enforcement, resulting in a 1996 memorandum about operations. David A. Martin, *Consistency in Law Enforcement: Best Practices*, U. Cal.-Davis Workshop on Santiago Summit of the Americas Declaration (April 27–28, 2000), https://migration.ucdavis.edu/cf/more.php?id=87_0_2_0 [<https://perma.cc/9FNY-RKA2>]; Wishnie, *Emerging Issues for Undocumented Workers*, supra note 130, at 520–21 (discussing the history of the adoption of OI 287.3a in 1996 and suggesting this is a first step to “implement Congress’s 1986 intent that immigration officials not use employer sanctions to under or diminish ‘in any way’ labor protections for immigrant workers”).

154. Michael J. Wishnie, *Introduction: The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 390–91 (2004).

155. *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, 122 S.Ct. 1275, 1285 (2002) (discussing circuit split between *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.3d 1115, 1118–21 (7th Cir. 1992) and the decision below in *Hoffman Plastics*, 237 F.3d 639, 642–46 (D.C. Cir. 2001)).

156. *Id.*

157. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, supra note 131, at 499; Catherine L. Fisk & Michael J. Wishnie, *Hoffman Plastics Compounds, Inc. v. NLRB: The Rules of the Workplace for Undocumented Immigrants*, in IMMIGRATION STORIES, 311, 324–25 (David A. Martin & Peter H. Schuck, eds., 2005). Interestingly, the U.S. Chamber of Conference took no position on the case. *Id.* at 325.

158. *Hoffman Plastics*, 535 U.S. at 152.

only the remaining remedies for the retaliatory discharge in the case: a cease and desist order—potentially enforceable through civil contempt proceedings—and notice posting to employees of their labor rights.¹⁵⁹ As Justice Breyer remarked in dissent, this meant that “employers could conclude that they can violate labor laws at least once with impunity.”¹⁶⁰ As scholars Catherine Fisk and Michael Wishnie noted, the Court chose to read the labor and immigration laws as contradictory, rather than complimentary, perhaps believing that labor law was simply less important than immigration law.¹⁶¹ Labor agencies rushed to respond, issuing statements reiterating that immigrants are “employees” who enjoy full labor rights and emphasizing remaining remedies unaffected by the ruling, such as backpay for work already performed.¹⁶²

With the courts interpreting labor laws broadly to include immigrant workers but narrowly to preclude robust legal remedies to enforce them, immigration workplace policing by employers and federal agents ruled the day. But immigrant workers nevertheless persisted in labor organizing and the intense repression also sparked resistance: both from parts of the labor movement, realigned to firmly support immigrant workers as current or potential members, and from emerging worker centers across the country.¹⁶³ Combined with immigrant rights advocates, these forces pushed back against the predominance of immigration enforcement and called for increased labor enforcement free from immigration interference.

D. *Toward Purported Neutrality: Deconfliction of Labor Enforcement and Worksite Immigration Enforcement*

The increasing convergence of immigration and labor enforcement presented an existential threat to labor rights in U.S. workplaces, and advocates

159. *Id.* at 151–52.

160. *Id.* at 154 (Breyer, J., dissenting).

161. Fisk & Wishnie, *supra* note 157, at 330–31. This decision was also challenged through international labor mechanisms, including the International Labor Organization and the Inter-American Court of Human Rights, both of whom found the prohibition of backpay to undocumented workers to violate international human rights law. *Id.* at 334–35; see also Elaine Dewhurst, *Models of Protection of the Right of Irregular Immigrants to Back Pay: The Impact of the Interconnection Between Immigration Law & Labor Law*, 35 COMP. LAB. L. & POL’Y J. 217 (2014) (analyzing back pay of irregular immigrants as a labor right under national and international legal systems).

162. Fisk & Wishnie, *supra* note 157, at 333 (summarizing EEOC, USDOL, & NLRB response); Nancy Montwieler, *EEOC Limits Undocumented Workers’ Relief Based on Recent Supreme Court Decision*, 126 DAILY LAB. REP. (BNA) A-2 (July 1, 2022); U.S. Dep’t of Labor, *Fact Sheet #48, Application of US Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division* (Revised July 2008) <https://www.dol.gov/agencies/whd/factsheets/48-hoffman-plastics> [<https://perma.cc/NYF9-5LED>]; *In Re Tuv Taam Corp.*, 340 NLRB No. 86, at n.4, 2003 WL 22295361 (2003).

163. Jessica Garrick, *Repurposing American Labor Law: Immigrant Workers, Worker Centers, & the National Labor Relations Act*, 42 POLITICS & SOCIETY 4 (2014), <https://journals.sagepub.com/doi/abs/10.1177/0032329214547352> [<https://perma.cc/9BXN-CM95>]; Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417 (2005–2006); Jennifer Lee, *Outsiders Looking In: Advancing the Immigrant Worker Movement through Strategic Mainstreaming*, 5 UTAH L. REV. 1063 (2014); Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, & the Struggle for Social Change*, *supra* note 54 (describing worker center approaches to immigrant worker organizing).

set their sights on documenting the pervasive chilling effect that they argued was driving down labor standards across the board, for both immigrant and U.S. workers. Because of the history of immigration enforcement targeting workers who exercised their labor rights, much of this advocacy sought neutrality first and foremost: essentially, “a firewall between immigration enforcement and the workplace.”¹⁶⁴ But also during this period, from the late 1990s to 2010s, advocates began to suggest that immigration agencies should go beyond neutrality to play a helpful role in labor enforcement by protecting worker witnesses.

The first major push focused on ending Department of Labor review of immigration records and referral to INS during wage and hour investigations.¹⁶⁵ This referral process had rendered DOL essentially off limits to immigrant workers, who would not knowingly risk an immigration raid to report labor violations.¹⁶⁶ Interestingly, a coalition of unions, immigrant rights, and labor groups challenged this policy through labor rights complaints to national labor regulators in Mexico and Canada, utilizing a complaint mechanism created in the labor-side agreement to the North American Free Trade Agreement (NAFTA).¹⁶⁷ The complaints, filed in September of 1998, and an accompanying community report¹⁶⁸ received some media attention focusing on the collaboration between employers and immigration enforcement as enabling labor abuses.¹⁶⁹ This effort soon enjoyed an early win: after the Mexican monitor accepted the complaint later that year, and a sympathetic administrator joined the White House staff, the INS and DOL reversed course, mutually agreeing that DOL would not inspect immigration records or make referrals to INS in the course of its complaint-driven investigations.¹⁷⁰ This was an important victory, with the agencies describing their

164. Jennifer Gordon, *Tensions in Rhetoric & Reality at the Intersection of Work & Immigration*, 2 U.C. IRVINE L. REV. 125, 131 (2012).

165. Nearly all of these developments happened in administrative guidance rather than in courts or even agency adjudications. As Professor Chen has noted: “To fully understand the develop of rights, it is important to penetrate the institutions, broadly defined to include agencies, that produce rights.” Chen, *supra* note 50, at 296. Immigrants’ rights scholarship therefore must “recognize[] the central place of guidance in negotiating a contested legal terrain.” *Id.*

166. Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, & the Struggle for Social Change*, *supra* note 54, at 419–20.

167. Petition on Labor Law Matters Arising in the United States, Mexico NAO No. 9804, (NAO of Mexico, Sept. 17, 1998); Canada NAO No. 9802 (1998). For more on this history, and the advocacy that led to ending this policy, see generally Michael Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 547–51 (2002).

168. National INS Raid Task Force, PORTRAIT OF INJUSTICE: THE IMPACT OF IMMIGRATION RAIDS ON FAMILIES, WORKERS, AND COMMUNITIES (1998).

169. Kevin McCoy, *Suit Blasts Feds on Sweatshops*, N.Y. DAILY NEWS (Sept. 18, 1998), <https://www.nydailynews.com/2002/02/06/sweatshops-take-legal-hit-judge-workers-can-sue-for-pay/> [<https://perma.cc/V6VX-5S4T>] (describing the petition as an “unusual lawsuit” filed to challenge “federal government policy that protects sweatshop operators”); *Immigrant Rights Group Voices Concern About Link Between INS Raids, Sweatshops*, Daily Lab. Rep. (BNA) No. 199, at A-7 (Oct. 15, 1998) (describing petition under the NAFTA labor side agreement).

170. *Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration*, Dep’t of Lab., Nov. 23, 1998, reprinted in Daily Lab. Rep. (BNA) No. 227, at E-1, E-3 (Nov. 25, 1998) [hereinafter “1998 DOL

goal as “to allay fears in the immigrant community that prevent complaints about labor abuses by unscrupulous employers from being filed.”¹⁷¹ But the victory was partial, and tension remained: the INS had recently restated in its own internal procedure that the purpose of its worksite enforcement remained “to deter the employment” of immigrant workers¹⁷²—a goal fundamentally at odds with labor standards enforcement. Ending immigration referrals in complaint-driven inspections represented some progress but not real protection for immigrant worker witnesses.¹⁷³

International advocacy continued, with a petition filed with the Inter-American Court on Human Rights that culminated in a session to address the human rights of migrant workers in the United States.¹⁷⁴ A series of studies further documented high rates of labor violations in workplaces with immigrants.¹⁷⁵ Advocates argued that labor agencies could not address these violations without participation of immigrant workers in reporting and cooperating

MOU”]; see also Deborah Billings, Complaint-Driven Workplace Inspections No Longer Will Include Immigration Checks, Daily Lab. Rep. (BNA) No. 227, at AA-1-AA-2 (Nov. 25, 1998) (highlighting policy goals of the agreements and changes); Press Release, U.S. Dep’t of Lab., *Labor Department and INS Sign Memorandum of Understanding to Enhance Labor Standards Enforcement to Aid U.S. Worker* (Nov. 23, 1998), <https://www.dol.gov/newsroom/releases/esa/esa19981123-0> [<https://perma.cc/8WH5-MTB6>]; Wishnie, *Immigrant Workers*, *supra* note 167, at 550–51; Mexican NAO Submission 9804 (Yale/INS) (1998), <https://www.dol.gov/agencies/ilab/mexico-nao-submission-9804-yaleins> [<https://perma.cc/5PPU-FUW5>]. This came on the heels of efforts within INS to modernize and standardize enforcement practices, leading specifically to a working group focusing on worksite enforcement formed in the early 1998 that culminated in the May 1998 Pearson memorandum. Martin, *supra* note 153.

171. Press Release, U.S. DEP’T OF LAB., *supra* note 169.

172. Michael Pearson, *Immediate Action Directive for Worksite Enforcement Operations*, IMMIGR. & NATURALIZATION SERV. (May 22, 1998), <https://www.aila.org/library/ins-on-worksite-enforcement-operations> [<https://perma.cc/F9Z3-L7ZJ>]; Martin, *supra* note 152.

173. Even with a new limitation on referrals to immigration authorities for complaint-driven investigations, worker advocates reported that immigrant workers remained afraid to report to the U.S. DOL because of uneven practices across regional offices and lingering questions about whether immigration information would be shared in other agency investigations. Nat’l Employment Law Project, *Just Pay: Improving Wage & Hour Enforcement at the U.S. Department of Labor* 10–11 (2010), <https://www.nelp.org/app/uploads/2015/03/JustPayReport2010.pdf> [<https://perma.cc/WS98-ZH3X>] (criticizing the limits of the MOU).

174. The RFK Memorial Center for Human Rights and AU Washington College of Law’s International Human Rights Clinic filed the petition. *IACHR Public Hearings & Other Public Events: Rights of Migrants and Their Families*, ORG. OF AM. STATES (last visited Sept. 19, 2025), <https://www.oas.org/es/cidh/audiencias/topicslist.aspx?lang=en&topic=20> [<https://perma.cc/BX4A-AN49>] (listing “Session 122” on “Situation of Migrant Workers in the United States” for March 3, 2005); see also Advisory Opinion OC-18/03, Inter-American Court of Human Rights (Sept. 17, 2003) (ruling that principles of nondiscrimination require affording undocumented workers labor rights, in response to request from Mexico); Sarah Cleveland, *Legal Status & Rights of Undocumented Workers*; Advisory Opinion OC-18/03, 99 AM. J. INT’L L. 460, 461 (2005) (drawing attention to the opinion’s emphasis on “effective judicial remedies” as a likely response to the *Hoffman Plastics* decision).

175. Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 676–79 (2003) (summarizing available research as showing that even with “little empirical data” there is “widespread consensus among law enforcement officials, lawyers, lay advocates, and immigrants themselves that noncitizens tend to underreport illegal activity, due in part to fear of deportation”); Chirag Mehta, et al., *Chicago’s Undocumented Immigrants: An Analysis of Wages, Working Conditions, & Economic Contributions*, CTR. FOR URB. ECON. DEV., U. OF ILL. CHICAGO, 27 (2002). The Ninth Circuit recognized these fears in the context of worker-initiated employment litigation, ruling that a protective order for employee immigration status was warranted because the “chilling effect such discovery could have on the bringing of civil rights actions unacceptably burdens the public interest.” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064–1065 (9th Cir. 2004).

in investigations, but they were deterred from participation by the fear of deportation.¹⁷⁶

Then, in a shocking raid several years later, immigrant agents—now housed within Immigration & Customs Enforcement under the Department of Homeland Security—impersonated Occupational Safety and Health Administration (OSHA) officials to lure nearly 50 undocumented workers to a fake “safety meeting” for the purposes of interrogating and arresting them.¹⁷⁷ The very day of the raid, the Department of Labor issued a rare public rebuke of the ruse, while ICE initially defended the tactic.¹⁷⁸ Criticism from unions, public health advocates, and immigrant rights groups mounted, with President Bush’s Secretary of Labor Elaine Chao eventually going on record in opposition to the tactic.¹⁷⁹ Months later, ICE eventually acknowledged the OSHA ruse was a mistake but refused to rule out similar tactics in the future if OSHA would approve it.¹⁸⁰ And even that limitation was an oral promise, with no public guidance to bind the agency to its position.¹⁸¹ The raid vividly illustrated to labor agency officials why workers were afraid to come forward to them, and the successful pushback helped advocacy for neutrality gain steam.

In the remaining years of President Bush’s administration, ICE increasingly staged large worksite raids, including two massive operations that

176. Dina Francesca Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 257 (2004) (“A lack of viable and legal migration options leads people into trafficking; fear of deportation keeps them there.”); Lance Compa, *Unfair Advantage: Workers’ Freedom of Association in the U.S. under International Human Rights Standards*, 42 HUM. RTS. WATCH (2000) (discussing undocumented workers’ fear of exercising their labor rights for fear of their employers challenging their immigration statuses); Foo, *supra* note 148, at 2184 (explaining how the risk of deportation deters immigrants from reporting labor violations).

177. Steven Greenhouse, *Immigration Sting Puts 2 U.S. Agencies at Odds*, N.Y. TIMES (July 16, 2005), [nytimes.com/2005/07/16/politics/immigration-sting-puts-2-us-agencies-at-odds.html](https://www.nytimes.com/2005/07/16/politics/immigration-sting-puts-2-us-agencies-at-odds.html); Katherine Torres, *Immigration Agency Say It Will Put OSHA Ruses on Ice*, EHS TODAY (Mar. 27, 2006), <https://www.ehstoday.com/archive/article/21913305/immigration-agency-say-it-will-put-osha-ruses-on-ice> [<https://perma.cc/6STW-8EKE>]; Josh Cable, *ICE: OSHA Ruse Was a ‘Mistake’*, EHS TODAY (Feb. 26, 2006), <https://www.ehstoday.com/archive/article/21909009/ice-osha-ruse-was-a-mistake> [<https://perma.cc/56CG-PGUR>]; see generally Min K. Kam, *ICE Ruses: From Deception to Deportation*, 122 COL. L. REV. 125, 165–66 (2022), <https://www.ehstoday.com/archive/article/21913305/immigration-agency-say-it-will-put-osha-ruses-on-ice> [<https://perma.cc/HY3A-P4VK>].

178. Greenhouse, *Immigration Sting*, *supra* note 177.

179. Labor unions, state labor officials, and public health advocates condemned the move as endangering the trust and credibility of all health and safety officials. *Id.*; Am. Public Health Ass’n, *Occupational Health and Safety Protections for Immigrant Workers* (Dec. 14, 2005), <https://www.apha.org/policy-and-advocacy/public-health-policy-briefs/policy-database/2014/07/09/15/19/occupational-health-and-safety-protections-for-immigrant-workers> [<https://perma.cc/UV6K-RERX>] (relaying that APHA “strongly condemned [the July 2005 raid] as creating yet another barrier to the promotion of occupational safety and health among immigrant workers”); Torres, *supra* note 177 (describing opposition from the American Industrial Hygiene Association as well as the Secretary of Labor and OSHA’s Assistant Secretary); see generally Jayesh M. Rathod, *Beyond the “Chilling Effect”: Immigrant Behavior and the Regulation of Occupational Safety and Health*, 14 EMPLOYEE RTS. & EMP. POL’Y J. 267 (2010) (describing the shocking 2005 raid and calling for nuanced analysis of the chilling effect and worker behavior).

180. Cable, *supra* note 177.

181. *Id.*

arrested hundreds of immigrant workers in Iowa and Mississippi—the latter the largest worksite raid in U.S. history at the time.¹⁸² The high profile raids sparked investigative reporting that uncovered rampant labor violations at the raided workplaces, which was elevated by a more developed immigrant worker advocacy community.¹⁸³ Even in instances of extreme labor exploitation that rose to the level of labor trafficking (which DHS was supposed to investigate and prosecute), advocates revealed that DHS prioritized immigration enforcement against immigrant workers who were victims, including in facilitating employer retaliation, rather than prioritizing protecting workers.¹⁸⁴ A slew of advocacy reports and even a congressional hearing¹⁸⁵ followed, documenting through the vivid stories of immigrant workers how immigration enforcement was systematically undermining labor standards enforcement.¹⁸⁶ And this chorus of criticism coalesced around the shared demand to keep immigration enforcement from interfering with labor enforcement and calling for immigration protections for workers exercising

182. Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case & the Immigration Crisis*, 2 DEPAUL J. SOC. JUSTICE 1, 1–2 (2008) (describing the arrest of nearly 400 workers in Iowa and felony charges of identity theft as “an unprecedented criminalization of migrant workers”). Media reported that a union member had called in the tip against undocumented coworkers at the Mississippi plant. *Feds. Detain Nearly 600 in Mississippi Plant Raid*, NBC NEWS (Aug. 26, 2008), <https://www.nbcnews.com/id/wbna26410407> [<https://perma.cc/B4SA-HRHY>]. This showed that despite the realignment of most labor leaders to support immigrant rights, at least some union members still viewed immigrant workers as competitors rather than as allies in the struggle for labor rights against their bosses. See Ruth Milkman, *Immigrants Didn't Kill Your Union*, DISSENT (Spring 2019), <https://www.dissentmagazine.org/article/immigrants-didnt-kill-your-union/> [<https://perma.cc/5DJ9-UJN4>] (discussing pockets of anti-immigrant sentiment among unions).

183. Julia Preston, *After Iowa Raid, Immigrants Fuel Labor Inquiries*, N.Y. TIMES (July 27, 2008); Kari Lydersen, *An Unfolding Crisis in the Wake of Mississippi ICE Raid*, IN THESE TIMES (Sept 19, 2008), <https://www.nytimes.com/2008/07/27/us/27immig.html> [<https://perma.cc/23W6-F85M>].

184. Chacón, *Misery*, *supra* note 55, at 3022 (arguing that the TVPRA offers limited protection to workers without status unless they are viewed as innocent); Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES (Feb. 2, 2010) (quoting ICE as telling employer accused of exploiting workers: “Don’t give them any advance notice. Take them all out of the line on the way to work; get their personal belongings; get them in a van, and get their tickets, and get them to the airport, and send them back to India.”).

185. *Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses*, COMM. ON EDUCATION & LABOR, U.S. H.R., June 19, 2008.

186. Rebecca Smith, Ana Avendaño & Julie Martínez Ortega, *ICED OUT: How Immigration Enforcement Has Interfered with Workers' Rights*, 5–7, 32–35, NAT’L EMPLOYMENT LAW PROJECT (2009), https://www.nelp.org/app/uploads/2015/03/ICED_OUT.pdf [<https://perma.cc/8RE8-N5Z8>]; Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT’L EMPLOYMENT LAW PROJECT (Sept. 21, 2009), <https://www.nelp.org/insights-research/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/> [<https://perma.cc/4L3N-TDCJ>]; *Over-Raided, Under Siege: U.S. Immigration Laws and Enforcement Destroy the Rights of Immigrants*, NAT’L NETWORK FOR IMMIGRANT AND REFUGEE RTS., 1–46 (Jan. 2008), https://nnirr.org/downloads/undersiege_web.pdf [<https://perma.cc/7UWA-56R8>]; Nat’l Employment Law Project, *From Anti-Immigrant to Pro-Worker: What States and Cities Can Do About Immigration and Workers' Rights* (Dec. 2007), <https://www.nelp.org/app/uploads/2015/03/FromAnti-ImmigranttoPro-workerFinal.pdf> [<https://perma.cc/GKE5-A3JY>]; Nat’l Employment Law Project, *Just Pay*, *supra* note 178. Scholars also echoed this call. See, e.g., Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC’Y 552, 555 (2010); Wishnie, *Immigrants and the Right to Petition*, *supra* note 175.

their labor rights.¹⁸⁷ Though worker rights advocates drafted and introduced legislation to protect immigrant workers in labor disputes from deportation and create a pathway to permanent immigration status, the bill did not advance.¹⁸⁸ This meant that all attention was on the executive to act.

Facing the mounting public criticism, the Department of Homeland Security agreed to reforms in 2011 to restrain its worksite enforcement through a negotiated agreement with the Department of Labor.¹⁸⁹ Through the agreement, ICE agreed to not engage in worksite immigration enforcement in workplaces under DOL investigation absent high-level ICE leadership approval.¹⁹⁰ To accomplish this, DOL agreed to share information about their enforcement activity, a process named “deconfliction.”¹⁹¹ ICE also committed to assess tips it received to determine if an employer is trying to use immigration enforcement to retaliate against workers and to no longer impersonate DOL officials without DOL consent, memorializing ICE’s backtracking from the infamous OSHA ruse.¹⁹² Finally, ICE agreed to “consider” DOL requests for temporary immigration protection (parole or deferred action) for witnesses needed for investigation.¹⁹³ At the same time, DHS under Obama was also shifting away from worksite raids in general, as ineffective at enforcing the policy goals of employer sanctions.¹⁹⁴

187. See Smith, *supra* note 186, at 32–34 (calling for further measures to separate immigration and labor enforcement, and that immigration authorities should “expedite work authorization and access to ‘T’ and ‘U’ visas for victims of trafficking and other immigration relief in cooperation with other state and federal agencies and NGOs); Bernhardt, *supra* note 186, at 53–54 (recommending immigration reform and “status-blind enforcement of employment and labor laws by maintaining a strong firewall between workplace and immigration inspections”); NAT’L NETWORK FOR IMMIGRANT AND REFUGEE RTS., *supra* note 185, at ix (advocating for the end of immigration raids and robust enforcement of labor laws, as well as legislation “to strengthen worker rights, expand civil rights, provide options and access to citizenship and legal permanent residency”).

188. Protecting Our Workers from Exploitation and Retaliation Act, S. 3207, 111th Cong. (2010). The POWER Act adds labor violations as qualifying activity for a U visa, meaning that workers could apply for and receive non-immigrant status for themselves and certain immediate family, with a pathway to apply for residency and citizenship. *Id.* The bill has been introduced in almost every Congress since, with minor amendments, and its core provisions were included in the bipartisan comprehensive reform bill that the Senate passed in 2014. See Elie Peltz, Note, *Giving Voice to the Silenced: The POWER Act As a Legislative Remedy to the Fears Facing Undocumented Employees Exercising Their Workplace Rights*, 54 COLUM. J.L. & SOC. PROBS. 503, 537–58 (2021). But it has no immediately foreseeable political path forward. *Id.*

189. 2011 DHS-DOL MOU, *supra* note 16. The agreement replaced the 1998 MOU. See *supra* notes 169–72 and accompanying text. The 2011 agreement was signed in March, but minor updates were made in December. Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, *supra* note 47, at 1166.

190. 2011 DHS-DOL MOU, *supra* note 16, at (IV)(A) & (C).

191. *Id.* at (IV)(A) & (B).

192. *Id.* at (IV)(B) & (G).

193. *Id.* at (IV)(F). This provision also contains further limitations, such as that such temporary protection “will ordinarily terminate upon the completion of DOL’s investigation” and that DOL will periodically update ICE on whether a witness granted parole or deferred action is still needed and “to assist ICE in . . . any monitoring or supervision.” *Id.* ICE also agreed to facilitate DOL interviews of any detained immigrant so long as the interview does not “interfere with or delay removal proceedings” beyond requesting temporary immigration protection. *Id.* at (IV)(D).

194. *Undocumented Workers*, *supra* note 49, at 620–21 (describing enforcement of employer sanctions as shifting toward focusing on employers rather than workers, in part because then-Secretary of

This deconfliction process was a signature achievement of the push to disentangle immigration policing from labor standards enforcement, a necessary first step to credible efforts at labor enforcement in industries with immigrant workers.¹⁹⁵ The memo acknowledged that both labor and immigration enforcement should be insulated from “inappropriate manipulation by other parties”—a vague illusion to the rampant employer retaliation.¹⁹⁶ And in responding to the specific problem of employer manipulation of DHS worksite enforcement, deconfliction made important strides: the agreement offered a path to restrain worksite raids from interfering in labor investigations, when none had previously existed. The deconfliction process, if working correctly, therefore should prevent shocking and blatant employer abuses of the system like in *Montero*.

But the memo was also limited, both in its constrained framing and in inadequate protection for worker witnesses essential to labor enforcement. The memo was carefully drafted to describe the DOL and DHS missions as reciprocal and their commitments as mutually beneficial—to not conflict with the other agency’s enforcement efforts.¹⁹⁷ This also meant affirming each agency’s mission, including that DHS’s immigration enforcement “is essential to protect the employment rights of lawful U.S. workers”—a factually dubious assertion to many labor advocates, who argued that immigration enforcement itself was undermining labor rights of all workers.¹⁹⁸ The agreement therefore failed to recognize the historic and ongoing chilling effect of immigration enforcement on the exercise of labor rights, for which there is no corollary in the other direction; labor agencies have no history of impersonating ICE officials, removing witnesses in the midst of immigration investigations, or chilling reports to immigration agencies. No worker is afraid to reach out to any immigration official because of a risk of labor enforcement.

Further, the memo offered only an internal and procedural constraint on DHS worksite enforcement, a far cry from concrete protection for an immigrant worker weighing the risks in coming forward to report labor violations. The memo restrains only a part of immigration enforcement (DHS civil

Homeland Security Napolitano assessed that worksite raids “make no sense” as a strategy for immigration enforcement).

195. Lee, *Screening for Solidarity*, *supra* note 51, at 1103, 1106. Immigration policing and labor standards enforcement have become problematically intertwined through a collaborative relationship between DHS and employers. Chen, *supra* note 54, at 147 & 151 (describing deconfliction policies as strategic effort by agency to manage conflicts and protect workers, albeit with noted limitations and skepticism about its full impact).

196. 2011 DHS-DOL MOU, *supra* note 16, at (I).

197. *Id.* (“In entering this MOU, both Departments recognize the importance of enforcing labor and immigration laws relating to the worksite.”). This introduction acknowledges that there are conflicts in the enforcement of immigration law and labor protections. Chen, *supra* note 50, at 147 (“Although similar in spirit to the 1998 MOU, the 2011 MOU is more explicit about its strategy of ‘deconfliction between agency enforcement activities.’”).

198. 2011 DHS-DOL MOU, *supra* note 14, at (I); *see, e.g., Undocumented Workers*, *supra* note 49, at 630 (“Recent case law and scholarship, however, illustrate that all too often immigration policies have had a negative effect on employees’ workplace protections and collective activity in practice.”).

worksite enforcement) and only in limited instances (where an employer directly tips DHS off, or the labor agencies are aware of a labor dispute).¹⁹⁹ Its provisions are procedural rather than substantive, requiring high-level review but retaining the authority for ICE worksite enforcement during a labor dispute if justified by national security concerns.²⁰⁰ The memo provides no clear protection from deportation for immigrant workers in labor disputes in general, and the provisions cannot be invoked as a defense by an individual worker facing deportation.²⁰¹ In the case of an arrested worker witness, DHS agrees to allow a DOL interview before deportation and to consider requests for forbearance, with no clear standard in adjudications and with full DHS discretion to deny such requests.²⁰² Therefore, apart from some consultation required under the memo, DOL and DHS essentially retained their respective authorities over labor and immigration, meaning that DHS continued to hold the disproportionate power to detain and deport immigrant worker witnesses. As an attempted “cure” for the “asymmetric allocation of regulatory power” that consistently favored DHS,²⁰³ the memo was an analgesic delivered to a cancer patient: it certainly offered some relief, but it did not change, nor even truly acknowledge, the long history of immigration enforcement abetting labor exploitation of immigrants.

199. Because of exceptions that permit senior DHS officials to green-light DHS worksite enforcement even with an ongoing labor dispute, 2011 DHS-DOL MOU, *supra* note 16, at (IV)(C), it is not entirely accurate that the MOU grants DOL “the power” “to displace DHS in the course of investigating a workplace.” Lee, *Screening for Solidarity*, *supra* note 51, at 230. It is also not guaranteed that “an active DOL investigation has the effect of shielding that workplace against DHS intervention,” *id.*, both because of the exceptions, 2011 DHS-DOL MOU, *supra* note 16, at (IV)(C), and because the MOU only restrains “civil worksite enforcement activities,” *id.* at (IV)(A) & (B). This means that Immigration & Customs Enforcement street-level policing of immigrants are not clearly constrained by the MOU’s text. *See id.* at (III)(B) (defining “worksite enforcement activities” as “civil authorities of ICE to inspect Form I-9, to investigate, to search, to fine, and to make civil arrests for violations of the immigration laws relating to the employment of [immigrants] without work authorization,” explicitly excluding “ICE’s criminal authorities”).

200. 2011 DHS-DOL MOU, *supra* note 16, at (IV)(C) & (V)(D) (“Nothing in this MOU or its implementation is intended to restrict the legal authority of ICE or the relevant DOL components in any way.”).

201. *See* Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. 93, 131–32 (2018) (describing an inconsistent political commitment to deconfliction even while the MOU remains formally in place, as well as the practice of ICE agents appearing at worker interviews scheduled with California state labor officials); *see also* Kim, *The Trafficked Worker*, *supra* note 51, at 272–73 (critiquing a prior agreement between DHS and DOL as having discretionary implementation that “does not prohibit immigration enforcement in cases where there are labor disputes in progress”). Even if robustly enforced, the MOU is only able to provisionally shield workplaces where a federal labor agency has identified a labor dispute, which itself is limited by agency resources. *See* Note, *Counteracting the Bias: The Department of Labor’s Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012, 1022–1025 (2013) (identifying that “any reliance on DOL enforcement actions must take into account the insufficient number of workplace inspectors”); Julie Braker, Note, *Navigating the Relationship Between the DHS and the DOL: The Need for Federal Legislation to Protect Immigrant Workers’ Rights*, 46 COLUM. J.L. & SOC. PROBS. 329, 347–48 (2013) (critiquing the MOU’s “tentative and limited nature” as “a weak tool for protecting unauthorized workers”).

202. 2011 DHS-DOL MOU, *supra* note 16, at (IV)(D) & (F).

203. Lee, *Private Immigration Screening*, *supra* note 132, at 1103, 1106, 1120, 1143 (detailing the problem of asymmetric and disproportionate power wielded by DHS over immigrant worker witnesses, and the resulting suppression of labor rights).

Beyond the memo, the Obama administration made small further steps on labor rights, to focus enforcement more on employers and less on immigrant workers. In the same year as the DOL-DHS agreement, DHS issued a memo calling for immigration agents to exercise discretion in immigration enforcement against victims, witnesses, and plaintiffs, “[t]o avoid deterring individuals . . . from pursuing actions to protect their civil rights.”²⁰⁴ The memo specifically instructs that agents pay particular attention to, among others, individuals engaged in protected activity like union organizing who are engaged in a non-frivolous dispute with an employer.²⁰⁵ The memo was not operationalized on a large scale,²⁰⁶ but it rhetorically galvanized efforts to push beyond the 2011 MOU and for affirmative immigration protections for workers exercising their labor rights as the next step to enable effective labor enforcement.

A few years later, in 2014, President Obama further created an interagency working group, composed of the three federal labor agencies (DOL, EEOC, and NLRB) with the Department of Homeland Security and Department of Justice to coordinate implementation of the MOU.²⁰⁷ In establishing the group, the agencies recognized that often “protections available to [immigrant] workers are unclear,” and that employers “exploit immigration status to deter employees from asserting their rights.”²⁰⁸ But the frame of the group, as reflected in both its name and its objectives, was to ensure “consistent enforcement of labor, employment, and immigration laws,” treading delicately in describing potential changes to immigration enforcement as consistency rather than restraint.²⁰⁹ The working group promised to “strengthen processes” for protection from deportation “and providing temporary work

204. John Morton, Director, U.S. Immigr. & Customs Enf’t, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs 2* (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf> [<https://perma.cc/3RQE-NSC2>]. This memo has purportedly been rescinded by Trump administration officials, although no official public guidance confirming this action is currently available.

205. *Id.*

206. Separate guidance also directed immigration agents to exercise prosecutorial discretion for DREAMers who came to the U.S. as children and other low priority groups, but implementation of all of these guidelines was erratic, with some ICE officers engaged in outright resistance to these directives. Motomura, *supra* note 63, at 6, 22–24.

207. *Fact Sheet: Establishment of Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited Sept. 19, 2025) [hereinafter “Fact Sheet”], <https://www.eeoc.gov/fact-sheet-establishment-interagency-working-group-consistent-enforcement-federal-labor-employment> [<https://perma.cc/9YHB-E7EH>]; *Modification of the 2011 DOL DHS Deconfliction MOU to Include NLRB & EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (May 2016), <https://www.eeoc.gov/interagency-working-group-consistent-enforcement-federal-labor-employment-and-immigration-laws-2> [<https://perma.cc/AB7C-NSYT>] (recounting that the interagency working group was announced on November 20, 2014) [hereinafter “Modification”]; William A. Kandel et al., *The President’s Immigration Accountability Executive Action of November 20, 2014: Overview & Issues*, CONG. RSCH. SERV. (Feb. 24, 2015), <https://sgp.fas.org/crs/homsec/R43852.pdf> [<https://perma.cc/E6S8-RXY5>] (describing President Obama’s Immigration Accountability Executive Action initiatives).

208. *Fact Sheet*, *supra* note 207.

209. *Id.*

authorization for” immigrant workers involved in labor disputes.²¹⁰ This was a crucial acknowledgement that immigration protections for workers involved in labor disputes was important to labor enforcement, and that the work of interagency coordination that began in the 2011 MOU was not complete. But at the time, beyond the vague mention in the 2011 MOU, no such processes existed. Advocates hoped the creation of the working group signaled a plan to provide protection from deportation and work permits.²¹¹

Six months later, the working group announced an action plan that reiterated its objectives and committed to producing resources on the intersection of immigration and worker rights, including clear instructions on how to access temporary immigration protection (including “parole, deferred action, and other exercises of prosecutorial discretion”) as well as work authorization.²¹² Advocates called the plan “[p]rogress toward an unmet goal,”²¹³ and also pushed for “access to deferred action” to enable immigrant workers to report labor violations without the fear of deportation.²¹⁴ Months later, the working group issued one progress report, with no action taken on temporary protection through prosecutorial discretion.²¹⁵ Finally, the labor agencies and ICE announced a pilot to coordinate enforcement conflicts, expanding the deconfliction between Labor and ICE in 2011 to include both the NLRB and EEOC.²¹⁶

The following year, in 2016, the labor agencies and ICE memorialized that coordination on enforcement across all three labor agencies and ICE in an amended MOU, now signed by EEOC and NLRB in addition to ICE and

210. *Id.*

211. Laboni Hoq & Jennifer J. Rosenbaum, *Helping All Workers Win*, THE HILL (Apr. 6, 2015, 3:00PM), <https://thehill.com/blogs/congress-blog/labor/237892-helping-all-workers-win/> [<https://perma.cc/M87C-JLER>].

212. *Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws Action Plan*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (May 8, 2015), <https://www.eeoc.gov/interagency-working-group-consistent-enforcement-federal-labor-employment-and-immigration-laws-0> [<https://perma.cc/B7NK-QUZ5>].

213. *Progress Toward Unmet Goal in Safeguarding Labor Rights for All*, JOBS WITH JUSTICE (Dec. 14, 2015), https://www.jwj.org/press_release-post/progress-toward-unmet-goal-in-safeguarding-labor-rights-for-all [<https://perma.cc/DUB5-5U6V>].

214. *Farmworker Justice Update 6/12/2015*, FARMWORKER JUSTICE (June 12, 2015), <https://www.farmworkerjustice.org/blog-post/farmworker-justice-update-6-12-2015/> [<https://perma.cc/E5ZD-VCNE>].

215. *Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws Action Plan Update*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 2015), <https://www.eeoc.gov/interagency-working-group-consistent-enforcement-federal-labor-employment-and-immigration-laws-1> [<https://perma.cc/T8LG-H69T>] [hereinafter “Plan Update”]. The labor agencies also released a fact sheet making clear that retaliation for exercising workplace rights is unlawful. *Id.* The working group’s only further public update concerned an expanded MOU. See *Modification*, *supra* note 207. There have been no public pronouncements from working group since then, though a 2022 report from the National Labor Relations Board briefly references ongoing participation. *NLRB Performance & Accountability Report FY2022*, NAT’L LABOR RELATIONS BD. 155 (Feb. 18, 2023), <https://www.nlr.gov/sites/default/files/attachments/pages/node-130/nlr-fy2022-par-508.pdf> [<https://perma.cc/7UUD-5P2D>] (“The Agency continued to partner with DHS, DOL, OSC, DOJ, and EEOC in an Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment, and Immigration Laws.”).

216. *Plan Update*, *supra* note 215.

DOL.²¹⁷ The primary purpose of the Addendum MOU is described as facilitating and coordinating immigration enforcement and ensuring that labor agency efforts do not conflict with immigration enforcement.²¹⁸ Beyond incorporating the EEOC and NLRB, the new MOU also made a few small changes to coordination between the agencies. Amendments eliminated the authority for the Secretary of Labor or their designate to request DHS engage in civil worksite enforcement.²¹⁹ Amendments also weakened the provision that allowed DOL to interview witnesses in ICE custody, adding “to the extent practical” to modify ICE’s agreement to make detained immigrants available for DOL interviews.²²⁰ The remainder of the agreement is functionally the same as the 2011 MOU; the agreement contemplated that the labor agencies could seek temporary immigration protection for witnesses, but did not establish any process for worker witnesses to apply or elucidate the legal standard for adjudicating the requests.²²¹ Shortly thereafter, DHS updated its instructions to its agents that engage in worksite immigration enforcement to reflect the agency’s commitments under the MOU with the federal labor agencies.²²² Those instructions require immigration agents to look for indications that immigration enforcement may be used to suppress the exercise of labor rights.²²³

Despite this flurry of guidance—all seeking to limit immigration interference in labor enforcement—immigrant workers still feared grave risks for reporting labor violations. All of the guidance instructed agency officials but created no individual rights or protections for workers. Coming after decades or even a century of history of immigration enforcement and employer retaliation against complaining immigrant workers, the new policies essentially asked immigrant workers to trust that U.S. policy had changed and that the agencies would protect them from blatant employer retaliation in most instances. Through trust or unwavering bravery, some immigrant workers

217. *Modification, supra* note 207; *Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites*, U.S. DEP’T OF LABOR (May 6, 2016), https://www.dol.gov/sites/dolgov/files/OASP/MOU-Addendum_4.19.18.pdf [<https://perma.cc/ZA7K-HQLK>] [hereinafter “2016 Addendum to DHS-DOL MOU”].

218. 2016 Addendum to DHS-DOL MOU, *supra* note 217 at (I)(C) (“The purpose of this Addendum is to set forth ways in which the EEOC and the NLRB will work together with DOL and DHS/ICE . . . to ensure that the civil worksite enforcement activities of the EEOC and the NLRB do not conflict with ICE’s workforce enforcement activities, and to advance the respective missions of each agency.”).

219. *Id.* at (III)(B) (modifying Section (IV)(C) of the 2011 DHS-DOL MOU to eliminate the exception that permitted “enforcement activity” during a labor dispute if “requested by the Secretary of Labor, the Solicitor of Labor, or another Department of Labor official designated by the Secretary of Labor”).

220. *Id.* at (III)(C) (modifying Section (IV)(D) of the 2011 DHS-DOL MOU).

221. *Id.* at (III)(A).

222. These instructions were referred to as Operating Instruction 287.3(a) when first published in 1996 and then later designated as ICE Special Agent’s Field Manual (SAFM) 33.14(h). Peter T. Edge, *Guidance on Civil Inspections of the Employment Eligibility Verification Form (Form I-9) During Labor Disputes*, U.S. IMMIGR. & CUSTOMS ENFT (May 10, 2016), <https://www.nilc.org/wp-content/uploads/2016/11/ICE-Guidance-on-I-9-Audits-During-Labor-Disputes-2016-05-10.pdf> [<https://perma.cc/YKE5-96GC>].

223. *Id.*

came forward, but fears and doubts in the community remained. Though the inter-agency working group had sought to create a pathway to protect complaining immigrant workers from deportation, it made no meaningful progress, leaving only the vague mentions in the 2011 MOU and 2016 Addendum. These ambiguities did little to quell the fear of immigrant workers. For the vast majority facing the question of reporting labor violations, the danger of deportation was real and devastating, and not worth the risk to file a labor complaint, where the outcome and benefit was highly uncertain.²²⁴

In a small handful of pathbreaking cases, labor agencies requested and DHS conferred temporary protection for workers participating in labor investigations—for example, protecting tortilla factory workers²²⁵ and construction worker unionists.²²⁶ But unlike most other immigration protections, DHS had no website detailing application requirements, where to apply, or who is eligible. In the sprawling immigration bureaucracy, no adjudicator was trained to process these applications or even receive them.²²⁷ Therefore, only a handful of immigrant workers accessed protections, and only when supported by organizations that had both the legal expertise to navigate the process and political power to reach above bureaucrats to political appointees.²²⁸ This included major labor unions like the International Union of Painters and Allied Trades, as well as worker centers focused on organizing immigrant workers like the National Day Laborer Organizing Network (a network of local worker centers) and Jobs with Justice (a network of labor

224. See Weil & Pyles, *supra* note 101, at 63–65 (“The willingness of an employee to exercise his or her right to complain and thereby initiate enforcement action can be expected to depend on the perceived benefits versus costs of exercising that right from the perspective of an individual worker.”); Elizabeth Kristen, Blanca Banuelos, & Daniela Urban, *Workplace Violence & Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LABOR L. 169, 186–89 (2015) (describing legitimate fears of retaliation and deportation by immigrant worker clients and reporting “several cases where an employer or employer’s attorney has informed . . . ICE of the plaintiff’s immigration status,” sometimes resulting in deportation).

225. Emily Bond, *Update: Detained Employees to Testify Against La Espiga de Oro Tortilla Factory*, EATER: HOUSTON (Aug. 4, 2015), <https://houston.eater.com/2015/8/4/9095507/ice-raid-on-la-espiga-de-oro-tortilla-factory-in-the-heights> [<https://perma.cc/2NQF-APRG>] (“Palmore told the Houston Chronicle, the immigration agency granted employment authorization to remain working in the U.S. for one year legally to seven of the 10 detained workers, because they are ‘material witnesses.’”).

226. Natalie Patrick-Knox, *Victory for the Tito’s Workers! An Eight-Year Fight Ends in a Momentous & Triumphant Win for Immigrant Workers*, JOBS WITH JUSTICE (Nov. 19, 2021), <https://www.jwj.org/victory-for-the-titos-workers-an-eight-year-fight-ends-in-a-momentous-and-triumphant-win-for-immigrant-workers> [<https://perma.cc/7AT8-5LRK>] (“As the case unfolded, the NLRB sought special work visas for the workers known as U-visas . . . But backlogs at USCIS left the workers in limbo. Just five months ago, the USCIS office announced its policy shift, granting the stop-gap protections for people waiting on U-visas—including the Tito’s workers.”).

227. Applications for deferred action submitted to local USCIS field offices in approximately 2015 were never acknowledged with a receipt notice.

228. See *supra* notes 225–226; UNITE HERE, “Fed Up”: An Immigrant Workforce Fights ICE Raids, FACEBOOK (Nov. 18, 2015), <https://www.facebook.com/unitehere/videos/fed-up-an-immigrant-workforce-fights-ice-raids/10153331491197875/> [<https://perma.cc/5AC5-GFJT>] (explaining union and community resistance to an ICE enforcement action in the midst of union contract negotiations); Natalie Patrick-Knox, *These Whistleblower Are Standing Up to Retaliation & Deportation Threats*, JOBS WITH JUSTICE (Nov. 6, 2015), <https://www.jwj.org/these-whistleblowers-are-standing-up-to-retaliation-and-deportation-threats> [<https://perma.cc/W74N-U2YW>] (recounting how immigrant workers threatened with deportation after filing a labor complaint lobbied for whistleblower protections).

coalitions).²²⁹ Dozens of other applications for deferred action based on labor exploitation were never acted upon, and at least one request from a labor agency to DHS related to a worker witness was denied.²³⁰ Further, this narrow pathway, which relied on supportive labor agencies, was only possible during an administration that was sympathetic to the plight of immigrant workers and willing to extend protections.

But once President Trump came into power in 2017, his administration pursued full-throated immigration enforcement that laid bare the real limits of purported neutrality and internal agency guidance alone.²³¹ First, ICE returned to large, dramatic worksite raids that arrested hundreds of immigrant workers. The worst of these was the 2019 worksite raid of Mississippi poultry plants, where nearly 700 poultry workers were arrested and the majority were quickly deported.²³² Shockingly, the raids targeted poultry plants where workers had reported sexual harassment to the EEOC, sparking a years-long, high-profile lawsuit that they had successfully settled in 2018.²³³ At the time of the massive worksite raid, the EEOC was still actively monitoring compliance with a settlement agreement to redress the sexual harassment.²³⁴ But the raids went ahead anyway, possibly because the 2011 MOU and 2016 Addendum are specific to a labor agency “investigation and any related proceeding,” with ambiguity as to compliance efforts.²³⁵ This pattern repeated in other worksite raids where workers had complained of labor violations or even reported to labor agencies, but there appeared to be no current open investigations.²³⁶

The Trump administration also made clear that DHS worksite enforcement was not the only danger to immigrant workers exercising their labor rights. In a number of closely watched cases, ICE agents engaged in street policing arrested workers who had complained of labor rights violations in suspicious circumstances.²³⁷ The highest profile arrest occurred just a month after the

229. See *supra* notes 225–26.

230. Case records are on file with author.

231. Jennifer Lee, *Redefining the Legality of Undocumented Work*, 106 CAL. L. REV. 1617, 1619 (2018) (exploring local resistance because “the Trump administration’s pro-enforcement stance . . . creates a climate that will likely exacerbate mistreatment in the workplace by making the threat of deportation more visceral”) (citing Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html> [<https://perma.cc/J6ZB-5QKQ>]).

232. Richard Fausset, *After ICE Raids, a Reckoning in Mississippi’s Chicken Country*, N.Y. TIMES (Dec. 28, 2019) <https://www.nytimes.com/2019/12/28/us/mississippi-ice-raids-poultry-plants.html> [<https://perma.cc/FS5H-AGRQ>] (describing the 2019 Mississippi poultry raids as “believed to be the largest statewide immigration crackdown in recent history.”).

233. Zack Ford, *ICE Raids Followed a Massive Sexual Harassment Settlement at Mississippi Plants*, THINKPROGRESS (Aug. 8, 2019), <https://archive.thinkprogress.org/ice-raids-follow-massive-sexual-harassment-settlement-mississippi-plant-koch-foods-d95eb2720f67/> [<https://perma.cc/D32A-56W5>].

234. *Id.*

235. 2011 DHS-DOL MOU, *supra* note 16, at (IV)(A); 2016 Addendum to DHS-DOL MOU, *supra* note 217, at (III)(A).

236. Ford, *supra* note 233.

237. Beth Fertig, *Undocumented Restaurant Worker Is Arrested by ICE During Deposition Against His Employer*, WNYC (Aug. 16, 2019) <https://www.wnyc.org/story/undocumented-restaurant-worker-arrested-ice-during-deposition-against-his-employer/> [<https://perma.cc/5Q43-ERD5>]; Deepa Fernandes, *Undocumented Workers Fight for Wages Under the Threat of Deportation*, THE WORLD (Mar. 20, 2018),

devastating Mississippi poultry plant raids. Federal immigration agents arrested and detained an immigrant worker days after he survived the Hard Rock Hotel collapse in New Orleans, a tragedy in which three workers perished.²³⁸ The worker had complained of unsafe conditions to his supervisor on multiple occasions before the collapse.²³⁹ But then Border Patrol agents called by federal fish and wildlife police arrested and detained him after they encountered him fishing in a remote area, purportedly after he failed to produce identification separate from his fishing license.²⁴⁰ Though the spirit of the MOU certainly would have counseled against his arrest, its letter did not plainly prohibit it: the 2011 MOU and 2016 Addendum only restrained work-site enforcement during labor disputes and required screening tips for employer retaliation, and so, without silver bullet evidence that employer retaliation sparked his arrest, he was not protected.²⁴¹ Following the MOU, ICE permitted OSHA agents to interview him while in detention regarding his complaints of unsafe conditions and then deported him, despite reports that he was a “crucial witness” to the wide-ranging investigations into the building’s collapse.²⁴² Even a former director of ICE spoke out against the deportation as enabling exploitation of immigrants, including labor trafficking.²⁴³

This and similar enforcement actions terrified workers and exposed the inadequacy of the efforts to restrain immigration enforcement chilling of labor rights through internal agency guidance.²⁴⁴ It is telling that President

<https://theworld.org/stories/2018/03/20/wage-theft> [<https://perma.cc/P8QM-EBWB>]; Eric Levitz, *Are Employers Using Trump’s ICE Agents To Intimidate Workers?*, N.Y. MAG. (Aug. 4, 2017), <https://nymag.com/intelligencer/2017/08/are-employers-using-trumps-ice-to-intimidate-workers.html> [<https://perma.cc/SUZL-UCRJ>] (reporting two cases in which ICE attended California labor dispute proceedings and apprehended undocumented workers); Shannon Dooling, *Man Arrested by ICE Following Workers’ Comp Meeting Is Released from Custody*, WBUR (June 5, 2017), <https://www.wbur.org/news/2017/06/05/ice-arrest-flores-release> [<https://perma.cc/DEA8-6FEW>]. For more on the history of immigration crackdowns as fueling labor exploitation through making victims less likely to seek assistance, see generally Jennifer Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 PENN. L. REV. 1609, 1637–42 (2010).

238. Adeel Hassan, *Witness in Hard Rock Hotel Collapse Is Deported*, N.Y. TIMES (Nov. 29, 2019), <https://www.nytimes.com/2019/11/29/us/hard-rock-hotel-worker-immigration.html> [<https://perma.cc/8LLU-JX4A>]; Derek Hawkins & Kim Bellware, *ICE Departs ‘Crucial Witness’ in Hard Rock Hotel Collapse*, WASHINGTON POST (Nov. 30, 2019), <https://www.washingtonpost.com/nation/2019/11/30/ice-deports-worker-considered-crucial-witness-hard-rock-hotel-collapse/> [<https://perma.cc/EDY5-B5FM>].

239. Eli Rosenberg, *How a Worker Who Survived a Catastrophic Building Collapse Ended Up in ICE Detention*, WASHINGTON POST (Nov. 25, 2019), <https://www.washingtonpost.com/business/2019/11/25/how-worker-who-survived-catastrophic-building-collapse-ended-up-ice-detention/> [<https://perma.cc/6Q83-46FT>].

240. *Id.*

241. See 2011 DHS-DOL MOU, *supra* note 16, at (IV)(A); 2016 Addendum to DHS-DOL MOU, *supra* note 216, at (III)(A).

242. Hawkins & Bellware, *supra* note 238.

243. Rosenberg, *supra* note 239 (quoting former ICE director John Sandweg, “This is why traffickers, domestic-violence abusers and gangs can prey on immigrant communities. If the perception is that ICE is going to arrest people based solely on immigration status, then it enables those groups,” . . . “If you’re not careful about it, even if you don’t intend to do it — you end up helping out guys who are breaking other laws.”).

244. However, in one rare case with especially blatant retaliation, ICE agreed to release a worker that its officers had arrested upon leaving a meeting with his employer about a workers’ compensation

Trump revoked none of the guidance protecting immigrant workers in his first term—not the MOUs, the Morton memo protecting victims and witnesses, nor the internal operating procedures. There was a brief internal effort to modify the MOU between the Department of Labor and DHS to facilitate more information sharing about workers and reduce the limitations on immigration enforcement in worksites under labor disputes. However, that effort went nowhere in the first part of Trump’s term, under Secretary Acosta. Then, the effort made some progress under Secretary Scalia before ultimately running out of time near the end of Trump’s term as the COVID-19 the pandemic overwhelmed capacity.²⁴⁵ But the survival of the guidance also signaled that the Trump administration did not need to revoke them to accomplish their goals of increased immigration enforcement: the narrow limits of the labor rights guidance were easy to skirt or undermine, and none created any enforceable protections for workers. Without modifying the agreements, the Trump USDOL still “unofficially ceded leverage to ICE.”²⁴⁶ This left labor agencies with limited tools to reach increasingly scared immigrant workers and demonstrated to advocates the dire need for real protections at the earliest political opportunity.

E. *Labor Agency Enforcement Challenges and Labor Lawlessness*

While the immigration agencies slowly progressed toward purported neutrality to labor disputes, labor agencies were on their own related journey, beginning in the early 2000s as they reacted to the *Hoffman Plastics* decision. That journey began with seeking to separate labor agencies from immigration enforcement, progressed to specific outreach toward immigrant workers and attempts to address their fears, and then has culminated in deeper engagement with immigrant worker organizations. This laid the groundwork for labor agencies supporting immigration protections for workers more recently.

Labor agencies sought to implement a status-blind approach to law enforcement.²⁴⁷ This is the labor agency analogue of immigration neutrality, with labor agencies working to separate questions of immigration status from labor law enforcement in its entirety. While maintaining this status-blind approach, the agencies also increased outreach to immigrant workers and their organizations as they grappled with the epidemic of workplace violations, including widespread noncompliance in the specific industries that tend to employ immigrant workers. These initiatives built relationships and increased the agencies’ focus on vulnerable workers, including immigrants.

claim. Dooling, *supra* note 237. Even after the release, local organizers feared that the message of the arrest would deter others from coming forward. *Id.*

245. Penn, *Inside Biden’s Push*, *supra* note 15.

246. *Id.*

247. Chen, *supra* note 50, at 234.

But those efforts encountered real limits in responding to workers' fears of immigration enforcement.

Though *Hoffman Plastics*, and to some extent *Sure-Tan* before it, made immigration status relevant to the remedies labor agencies could seek for labor violations, all federal labor agencies sought to "blunt" the impact of these decisions.²⁴⁸ The labor agencies' resulting guidance emphasized that all workers regardless of status remained entitled to federal labor protections and set out their agency's practice to not inquire into immigration status during labor investigations.²⁴⁹ This "Don't Ask, Don't Tell" policy was designed to maximize the agencies' labor enforcement: without immigration status information, the agency could award full labor remedies unless and until an employer objected.²⁵⁰ The agencies also likely understood that workers would interpret questions about their immigration status as raising the threat of referral to immigration agents, as the Department of Labor had done for many years up until 1998.²⁵¹ Through these policies, the labor agencies sought to treat immigrants as any other workers, with agency protocol and officials' professionalism as key tools to continue to vindicate labor rights.²⁵²

Some federal agencies also went further, in their own ways. The Department of Labor successfully argued that *Hoffman Plastics* did not preclude backpay awards for work already performed to workers without immigration status, permitting full remedies in most enforcement of wage and hour protections.²⁵³ The National Labor Relations Board issued several detailed memos and instructed agents to consult with its headquarters on immigration-related questions, specifically seeking to take on immigration-related employer retaliation that may violate labor law.²⁵⁴

248. *Id.* at 240.

249. *Id.* ("While the specific exercise of discretion varied across agencies, each agency read *Hoffman* narrowly, reaffirmed that immigration status is not relevant to the labor and employment rights they protect, and emphasized that the agency practice is not to inquire into immigration status in the course of investigations.").

250. *Id.* at 240, 258 (citing Memorandum from Arthur F. Rosenfeld, Gen. Couns., NLRB, to All Reg'l Dir.'s, Officers-in-Charge and Resident Officers, NLRB (July 19, 2002) ("Procedures and Remedies for Discriminatees Who May be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.*")).

251. See 1998 DOL MOU, *supra* note 170, at 1715, 1720-21.

252. Chen, *supra* note 50, at 266, 277 (describing the NLRB's approach as "professionalism trumped politics" in serving the agency's mission and the DOL's approach as constrained by "organizational and professional values"); see also Shannon Gleeson, *Means to an End: An Assessment of the Status-blind Approach to Protecting Undocumented Worker Rights*, 57 SOCIOLOGICAL PERSP. 301, 302 (2014) (finding that bureaucrats in two major cities "cite mundane institutional rationales as motivations for their behavior" rather than particular sympathy for immigrant workers).

253. Chen, *supra* note 50, at 269-70 (citing *Fact Sheet No. 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastic decision on laws enforced by the Wage and Hour Division*, U.S. DEP'T OF LAB. (2002), <http://www.dol.gov/whd/regs/compliance/whdfs48.htm> [<https://perma.cc/Z82Q-5NAB>] (last updated July 2008)).

254. Memorandum from Richard Siegel, Assoc. Gen. Couns., NLRB to All Reg'l Dir.'s, Officers-in-Charge and Resident Officers, NLRB, at 1-2, 4 (June 7, 2011) ("Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings"); Memorandum from Anne Purcell,

Despite agency efforts, scholars and experts documented a growing “workplace enforcement crisis.”²⁵⁵ A landmark survey of thousands of workers in low-wage industries in three major cities in 2008 found that 45 percent of workers had experienced at least one pay-related labor violation in the preceding year and over a quarter had been paid less than minimum wage in the week before being interviewed.²⁵⁶ Studies of labor violations in specific industries essentially confirmed widespread noncompliance with labor protections.²⁵⁷ A 2017 report found that, focusing on wage theft alone, losses to approximately 2.4 million workers in ten states amount to \$8 billion annually.²⁵⁸ Additional reports demonstrated that industries with more foreign-born workers have higher rates of labor violations,²⁵⁹ that immigrant workers suffer high rates of sexual harassment and assault,²⁶⁰ and that immigrant workers disproportionately suffer workplace accidents and death on the job.²⁶¹

Scholars Janice Fine and Jennifer Gordon, among others, argued that labor standards enforcement was no longer working in low-wage industries because of the shift from manufacturing to service, the proliferation of small

Assoc. Gen. Couns., NLRB, to All Reg’l Dir.’s, Officers-in-Charge and Resident Officers, NLRB, at 1–3 (May 4, 2012).

255. Ruth Milkman, Ana Luz González, & Victor Narro, *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment & Labor Law for Low-Wage Workers*, UCLA LAB. CTR., 2010, at 1, <https://www.labor.ucla.edu/publication/wage-theft-and-workplace-violations-in-los-angeles/> [<https://perma.cc/463S-U27U>].

256. Bernhardt, *supra* note 186, at 21, 23; *see also* Elizabeth J. Kennedy, *Wage Theft as Public Larceny*, 81 BROOK. L. REV. 517, 534–36 (2016); Corie J. Tarara, *The FLSA: The Law that Almost Every Employer Is Violating*, 60 FED. LAW. 15, 15–16 (2013); Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 325, 327 (2016). Economists long have noted that employers engage in cost-benefit analysis in their labor practices, and low rates of enforcement mean that there are fewer benefits to compliance. Orley Ashenfelter & Robert S. Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333, 333–38 (1979).

257. Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 384 (2012); Abigail S. Rosenfeld, Note, *Consider the Caregivers: Reimagining Labor & Immigration Law to Benefit Home Care Workers & Their Clients*, 62 B.C. L. REV. 315, 315 (2021); Nicole Taykhan, Note, *Defying Silence: Immigrant Women Workers, Wage Theft, & Anti-Retaliation Policy in the States*, 32 COLUM. J. GENDER & L. 96, 96–99 (2016) (discussing responses to widespread labor violations in nail salons); U.S. Gen. Acct. Off., GAO/HEHS-95-29, *Garment Industry: Efforts to Address the Prevalence and Conditions of Sweatshops*, at 8 (1994), <https://www.gao.gov/products/hehs-95-29> [<https://perma.cc/Q6D4-U8H8>] (noting a higher incidence of labor violations in areas with large populations of undocumented immigrants).

258. David Cooper & Theresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year*, ECON. POL’Y INST., May 10, 2017, at 1, <http://www.epi.org/files/pdf/125116.pdf> [<https://perma.cc/DC6U-5M5N>].

259. *See, e.g.*, Susan Ferriss & Joe Yerardi, *Wage Theft Hits Immigrants – Hard*, Center for Public Integrity (Oct. 14, 2021), <https://publicintegrity.org/inequality-poverty-opportunity/garment-immigrant-workers-wage-theft/> [<https://perma.cc/CEP2-XGBB>].

260. *See Human Rights Watch, Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence & Sexual Harassment* (May 15, 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and> [<https://perma.cc/NK5R-ZXHK>]; Elizabeth Kristin, Blanca Banuelos, & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 173 (2015).

261. Jayesh Rathod, *Immigrant Labor and the Occupational Safety & Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 482 (2009); *see also* Rathod, *Beyond the ‘Chilling Effect,’ : Immigrant Behavior and the Regulation of Occupational Safety and Health*, *supra* note 179; Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, *supra* note 47.

firms and labor subcontracting, and the high percentage of immigrant workers who feared reporting in these industries.²⁶² This meant that the labor agencies had to enforce labor laws in more workplaces with the same limited resources, with more jobs in “the hardest-to-police sectors and among the hardest-to-protect workers.”²⁶³ Professor David Weil studied the same phenomenon, labeling it the “fissuring” of workplaces—into smaller, more fragmented, and more informal workplaces, where labor standards are difficult to enforce.²⁶⁴ Facing the same limited resources, labor agencies could not keep up.²⁶⁵ This meant that the traditional complaint-driven, or “bottom-up,” approach to labor law enforcement was failing: empirical analysis repeatedly demonstrated that workers in the most noncompliant industries were least likely to complain, and perhaps relatedly, most likely to face employer retaliation.²⁶⁶ Because of these realities, as well as the more recent the growth of the gig economy, it has become a common refrain among scholars that workplace law is “in crisis,”²⁶⁷ “failing,”²⁶⁸ or “broken.”²⁶⁹

Labor agencies tried various initiatives to address this crisis and reach vulnerable immigrant workers. Starting in 2004, the Department of Labor established formal partnerships with consulates, seeking assistance from consular officials in outreach.²⁷⁰ Agencies also increasingly established specific outreach roles, charged with contacting community groups to spread awareness

262. Fine & Gordon, *Strengthening Labor Standards*, *supra* note 186, at 553–55.

263. *Id.* at 554; *see also* Weil, *Crafting a Progressive Workplace*, *supra* note 100, at 132–35 (discussing scarce resources and other barriers to effective labor enforcement while urging a shift toward underregulated service and retail sectors).

264. *See generally* DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 16 (Harvard Univ. Press 2014).

265. Weil, *Crafting a Progressive Workplace*, *supra* note 100, at 136 (“Many pieces of federal workplace regulation depend on worker complaints as a trigger for enforcement activity. This is not particularly surprising given that an agency like the Wage and Hour Division has fewer than 1500 enforcement officers to oversee six and a half million private sector establishments. As a result, about 75% of Wage and Hour inspections arise from employee complaints. Under OSHA, about 30-40% of all inspections arise from workers’ complaints.”).

266. Fine & Gordon, *supra* note 186, at 556 (discussing complaint-driven reporting) (citing to Weil & Pyles, *supra* note 101); *see also* Alexander & Prasad, *supra* note 99, at 1073 (analyzing employer retaliation); Weil & Pyles, *supra* note 101, at 79 (economists estimate that on average, OSHA pursues one complaint per 120 injuries).

267. Guy Davidov & Brian Langille, *Introduction*, in *THE IDEA OF LABOUR LAW* 1 (Guy Davidov & Brian Langille eds., Oxford Univ. Press 2011); *see also* Matthew W. Finkin, *The Death and Transfiguration of Labor Law*, 33 *COMP. LAB. L. & POL’Y J.* 171 (2011) (summarizing the analysis of the books’ contributors as portraying “the house of labor law in ruin, a vacant lot” and “a discipline in crisis”).

268. Kate Andrias, *The New Labor Law*, 126 *YALE L. J.* 2, 2 (2016).

269. Michael M. Oswalt & César F. Rosado Marzán, *Organizing the State: The “New Labor Law” Seen from the Bottom-Up*, 39 *BERKELEY J. EMP. & LAB. L.* 415, 415 (2018).

270. Bureau of Int’l Labor Affairs, U.S. Dep’t of Labor, *U.S. Response to Mexico’s Request for Migrant Worker Outreach* (n.d.), <https://www.dol.gov/agencies/ilab/trade/preference-programs/US-Mexico> [<https://perma.cc/7PSY-4LHA>] (last visited Sept. 19, 2025) (describing Department’s Consular Partnership Program to expand outreach to Mexican migrant workers in the U.S.); Priscilla Garcia-Ocampo, *Building a Bridge to Immigrant & Migrant Workers*, U.S. DEP’T OF LABOR BLOG (Aug. 14, 2024), <https://blog.dol.gov/2024/08/14/building-a-bridge-to-immigrant-and-migrant-workers> [<https://perma.cc/XD3B-HCWR>] (highlighting the Department’s 20 year collaboration with Latin American consulates to educate migrant workers about U.S. labor protections).

of the agency's work.²⁷¹ The labor agencies further adopted language access plans, moved to hire more bilingual and bicultural investigators, and shared materials with immigrant and other civil society groups.²⁷² But a huge barrier to immigrant involvement remained outside of labor agency control: the fear of immigration enforcement, and specifically, the fear of deportation.

Labor agencies gained a small, and initially promising, tool to address this fear once Congress created and DHS implemented a program conferring immigration status to noncitizen victims of certain crimes. This program, known as the U visa, allows up to 10,000 crime victims a year to receive immigration status if they can show they suffered certain crimes that seriously harmed them and they can prove they helped law enforcement in detecting, investigating, or prosecuting those crimes through a certification form.²⁷³ The federal labor agencies had a limited role in facilitating applications for immigrant workers who qualified: once DHS finally published an interim rule setting up the application process in September of 2007, their regulations recognized that federal and state labor agencies may encounter immigrant victims of these crimes and therefore can serve as certifying agencies.²⁷⁴

However, by the time the DOL's Wage and Hour Division and the NLRB announced they would issue these certifications in 2011,²⁷⁵ the backlog in U visa applications was already growing, with more than 10,000 applications

271. Nat'l Labor Relations Bd., Office of the Gen. Counsel, Memorandum OM 06-66, Outreach to Promote a Broader Awareness of the Act (May 11, 2006), <https://www.nlr.gov/guidance/memos-research/operations-management-memos> [<https://perma.cc/6FC5-FC22>] (designating two outreach coordinators tasked with contacting "local groups assisting underserved or minority populations, such as legal aid clinics and immigrant advocacy centers"); Nat'l Labor Relations Bd., Office of the Gen. Counsel, Memorandum OM 09-19, Outreach Program (Dec. 16, 2008), <https://www.nlr.gov/guidance/memos-research/operations-management-memos> [<https://perma.cc/2KQS-EXC5>] (reporting that the Board had presented to workers' centers and immigrant welcome centers, conducted outreach to Spanish language media, and prepared a bilingual English/Spanish video about the NLRB).

272. E.g., U.S. Dep't of Lab., Civil Rights Cr., Office of the Assistant Sec'y for Admin. & Mgmt., *Plan for Improving Access to Services for Persons with Limited English Proficiency* (July 2011), <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/external/limited-english-proficient/plan-for-improving-services/version-2> [<https://perma.cc/762C-UWFL>] (noting nearly 300 bilingual new-hires and the release of the first Limited English Proficiency Plan in 2001); U.S. Dep't of Labor, *Migrantworker.gov*, <https://www.dol.gov/general/migrantworker> [<https://perma.cc/9BNW-QRJ5>] (last visited Sept. 19, 2025) (a single coordinated website for immigrant workers).

273. 8 U.S.C.A. § 1101(a)(15)(U) (describing requirements for nonimmigrant status for certain victims of qualifying criminal activity); 8 U.S.C.A. § 1184(p)(2) (providing that only 10,000 principal petitioners may be provided with U status or visas).

274. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53014-15 (Sept. 17, 2007) (interim rule); *see also* 8 U.S.C.A. § 1184(p)(1) (requiring certification from an investigating agency).

275. U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bulletin No. 2011-1, Certification of Supplement B Forms of U Nonimmigrant Visa Applications (Apr. 28, 2011), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2011_1.pdf [<https://perma.cc/32QH-YJ3F>]; Nat'l Labor Relations Bd., Office of the Gen. Counsel, Memorandum OM 11-62, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings (June 7, 2011), https://niwaplibrary.wcl.american.edu/wp-content/uploads/OM-11_62-Updated-Procedures-in-Addressing-Immigration-Status_-_updated.doc.pdf [<https://perma.cc/7K4B-9C2G>].

received in the year.²⁷⁶ Nevertheless, some advocates creatively used this pathway to effectively protect workers, seeking labor agency certification for workers who had suffered certain crimes like labor trafficking, witness tampering, and involuntary servitude.²⁷⁷ The qualifying crime of witness tampering in particular meant that egregious employer retaliation against workers who reported labor violations to federal agencies sometimes opened a pathway to permanent immigration status.²⁷⁸

But the U visa's limitations have prevented widespread protection. Only those who suffered certain crimes are eligible, and so not all victims of or witnesses to labor violations can apply. Further, U visa applicants have to show they suffered substantial abuse from the crime,²⁷⁹ and they usually need lawyers to prepare the application.²⁸⁰ Most significantly, the backlog has grown exponentially: new applicants are likely to wait twenty or more years to receive a final decision,²⁸¹ though the agency also is working to grant deferred action to those waiting with bona fide applications.²⁸² The labor agencies shared information about their U certification programs in response to concerns of immigrant workers and their advocates, but they were powerless or unaware of the growing limitations since labor agency involvement in the U visa process generally ended with the signing of the U certification. More labor agencies adopted U certification policies, but a U certification offered less and less—a chance at status for some who fit the criteria two

276. *Number of Form I-918 Petitions for U Nonimmigrant Status By Fiscal year, Quarter, & Case Status, Fiscal Years 2009–2024*, U.S. CITIZENSHIP & IMMIGR. SRVS. (2024), https://www.uscis.gov/sites/default/files/document/data/i918u_visastatistics_fy2024_q4.xlsx [<https://perma.cc/97LG-8YZN>] (showing 14,647 petitions received in FY2011 and 10,250 petitions pending).

277. See, e.g., Michelle Chen, *She Came to the U.S., Was Forced Into Indentured Servitude, and Now Faces Deportation*, NATION (Oct. 21, 2015), <https://www.thenation.com/article/archive/she-came-to-the-us-was-forced-into-indentured-servitude-and-now-faces-deportation/> [<https://perma.cc/MUV6-LU3N>]; see generally Leticia Saucedo, *A New “U”: Organizing Victims & Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891 (2008) (examining how the U status could serve to protect victims of labor exploitation); Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1 (2013) (proposing that immigration relief in the form of U visas can help undocumented workers participate in wage and hour collective actions).

278. 18 U.S.C. § 1512(b) (defining witness tampering); Saucedo, *A New “U”*, *supra* note 277, at 931 (arguing that workplace retaliation may constitute witness tampering or other qualifying U crimes).

279. See Chen, *She Came to the U.S.*, *supra* note 277.

280. Adam Serwer, *24-hour Shifts and Deportation Threats: The World of US Guest Workers*, MOTHER JONES (Apr. 25, 2013), <https://www.motherjones.com/politics/2013/04/guest-worker-immigration-visa-gang-eight/> [<https://perma.cc/Y5JU-SFXU>]; Declaration of Ursula Price at 7, *New Orleans Workers' Ctr. for Racial Just. v. Dep't of Lab., dismissed per stipulation*, No. 1:20-cv-1825 (D.D.C. Dec. 8, 2020), ECF No. 14-2; Josh Eidelson, *Walmart Strikes Spread to More States*, SALON (Oct. 9, 2012), https://www.salon.com/2012/10/09/walmart_strikes_spread_to_more_states/ [<https://perma.cc/DA6T-BHYW>].

281. U.S. CITIZENSHIP & IMMIGR. SRVS., *supra* note 275 (showing backlog of over 200,000 U petitions pending as of September 2024).

282. Bona Fide Determination Process, Policy Manual, Vol. 3, Part C, Chap. 5, U.S. CITIZENSHIP & IMMIGR. SRVS. (last updated Sept. 26, 2025). As of this writing, the agency reports processing times of over 30 months to determine if the petition is bona fide. Check Case Processing Times, U.S. CITIZENSHIP & IMMIGR. SRVS., <https://egov.uscis.gov/processing-times/> [<https://perma.cc/5EPS-M6JB>] (last accessed Oct. 6, 2025).

decades later, but uncertain protection in the midst of the labor dispute when workers needed it.²⁸³

This left labor agencies facing continued widespread noncompliance with labor standards and a need for new ideas to meet the moment. Scholars proposed two related approaches to adapt labor standards enforcement. First, economist David Weil suggested “strategic enforcement” to focus the limited labor agency resources on high-noncompliance industries—“to act on webs or networks of employers” rather than a single company—to overcome the “fissuring” of workplaces.²⁸⁴ Weil also challenged metrics of success for labor enforcement, calling for labor agencies to see their goal as concretely raising labor standards through deterrence rather than, for example, increasing the dollar value of back wages recovered through investigations.²⁸⁵ As Weil wrote, “Enforcement that only cleans up past noncompliance but does not alter behavior puts investigators on a hamster wheel: running very fast and working very hard, but not advancing the larger aim of protecting and enhancing the welfare of the Nation’s workforce.”²⁸⁶ Labor agencies can accomplish this, he argued, by targeting enforcement efforts up the supply chain, focusing on lead firms, and using agency leverage to address the market incentives to skirt compliance, all aimed to instead push lead firms to require labor standards enforcement throughout the supply chain.²⁸⁷ Agencies could also transform their complaint investigations from a customer service model to a strategic approach, drawing on complaints to collectively locate and analyze systemic labor violations and inform agency priorities.²⁸⁸ Since this approach still relied upon significant cooperation from vulnerable workers, Weil also proposed partnership with worker organizations to reach vulnerable workers and, importantly, protect workers from retaliation to further enforcement.²⁸⁹

283. U.S. EQUAL EMP. COMM’N, EEOC PROCEDURES: REQUESTING EEOC CERTIFICATION FOR U NONIMMIGRANT CLASSIFICATION (U VISA) PETITIONS IN EEOC CASES, (2025), <https://www.eeoc.gov/eeoc-procedures-requesting-eeoc-certification-u-nonimmigrant-classification-u-visa-petitions-eeoc> [<https://perma.cc/G66G-MW6B>]; *Readout: U.S. Department of Labor Expands OSHA’s Ability to Protect All Workers by Certifying Special Visa Applications to Ensure Effective Enforcement*, U.S. DEP’T LABOR (Feb. 13, 2023), <https://www.dol.gov/newsroom/releases/osha/osha20230213-1> [<https://perma.cc/RU6S-QZAV>]; see U.S. CITIZENSHIP & IMMIGR. SRVS., *supra* note 275 (showing 238,892 U petitions pending as of September 2024).

284. David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage & Hour Division 26* (2010), https://www.academia.edu/11593668/Improving_workplace_conditions_through_strategic_enforcement [<https://perma.cc/X5QP-QM9A>]. Professor Weil later served as Wage and Hour Administrator from 2014 to 2017. *David Weil*, INST. FOR NEW ECON. THINKING, <https://www.ineteconomics.org/research/experts/dweil> [<https://perma.cc/7F4L-TYSR>] (last visited Sept. 19, 2025).

285. *Id.* at 3.

286. *Id.* at 13.

287. *Id.* at 36–37.

288. *Id.* at 85.

289. *Id.* at 3; Fine & Gordon, *supra* note 186, at 558–59; Weil & Pyles, *supra* note 101; see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSFORMING THE DEREGULATION DEBATE*, 57–59 (1992) (proposing “tripartism,” or regulatory policy that encourages the participation of public interest groups by giving them access to information available to the regulator, a seat at the table in negotiations with the regulated firm, and power to prosecute as a private attorney general).

Drawing on the strategic enforcement framing, labor scholars Janice Fine and Jennifer Gordon further called for labor regulators to tap the expertise and trust of worker organizations to advance labor standards in high-noncompliance industries. They argued that worker organizations already had community trust and credibility, as well as cultural and language competencies critical to organizing hard-to-reach workers.²⁹⁰ Because of this, both unions and worker centers often receive real-time reports of labor violations directly from workers.²⁹¹ And so, they suggested, labor agencies should develop formal, sustained, and vigorous partnerships to integrate these advantages into labor enforcement—rather than keeping worker organizations at “arms-length” as merely stakeholders to occasionally consult or seeing workers themselves as “passive victims.”²⁹² Fine, a thought-leader in this strategy, coined this approach “coenforcement.”²⁹³

It is worth noting that much of the coenforcement strategy is designed to counteract the profound chilling effect of immigration enforcement and other sources of mistrust of government regulators.²⁹⁴ Worker organizations receive real-time reports of labor violations precisely because workers understand that their organizations will never share information with immigration authorities and that, in fact, channeling labor complaints through these organizations may offer anonymity and insulation from distrusted federal officials.²⁹⁵ Coenforcement proponents credit worker organizations for their proximity to workers’ experiences and communities (racial, linguistic, geographic, cultural, and political) and their respect for “the will of the workers” as creating trust that enables effective enforcement.²⁹⁶

Coenforcement proponents recognized that for effective labor enforcement, labor agencies should care deeply about building multiple levels of trust: trust with workers, of course, but also trust with worker organizations and equally workers’ trust in worker organizations.²⁹⁷ To build that trust, for example, labor agencies should share information with worker organizations

290. Fine & Gordon, *supra* note 186, at 561.

291. *Id.*

292. *Id.* at 561; Janice Fine, *New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward*, U. CHI. LEGAL F. 143, 145 (2018).

293. Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC’Y 327, 327 (2017); *Id.*, at 145–47; see also DEUTSCH & GERSTEIN, *supra* note 11, at 5–6. Fine took as inspiration the work of development scholar Elinor Ostrom who suggested that state regulators draw on civil society under “conditions of weak state capacity” as model for overcoming regulatory limitations. Fine, *New Approaches*, *supra* note 292, at 147 (citing to Elinor Ostrom, *Crossing the Great Divide: Co-Enforcement, Synergy and Development*, 24 WORLD DEV. 1073, 1073 (1996)).

294. Janice Fine, Mark Engler, & Paul Engler, *A Grassroots Government*, BOSTON REVIEW (Nov. 2, 2023), <https://www.bostonreview.net/articles/a-grassroots-government/> [<https://perma.cc/W52D-EQRR>].

295. Fine & Gordon, *supra* note 186, at 561.

296. Fine, *New Approaches to Enforcing Labor Standards: How Co-enforcement Partnerships between Government and Civil Society Are Showing the Way Forward*, *supra* note 292, at 152.

297. *Id.* at 152, 154, 155.

about ongoing labor investigations to encourage more complaints and build up the organization's credibility with its members.²⁹⁸ Labor agencies should also recognize power imbalances between government and civil society groups and invest in building honest and accountable relationships.²⁹⁹ Coenforcement, through emphasizing these deep relationships with worker groups, therefore presents an alternative "theory of governance," proposing that agencies should be fair but not completely neutral, given their legislative mandates, and rejecting that agencies should aspire to administration of the law separate from politics and ideology, which overlooks root causes.³⁰⁰

Labor agencies have been increasingly receptive to the strategic enforcement and coenforcement models, though many resist the more provocative call to abandon bureaucratic neutrality. Professor Weil was confirmed as the head of the Wage and Hour Division during the Obama Administration, which offered an opportunity to steer the agency toward strategic enforcement for several years.³⁰¹ Progressive state labor agencies have led the way in deep collaboration with worker organizations, including significant resources behind coenforcement initiatives in Chicago, New York, Seattle, and others.³⁰² Then-California Labor Commissioner Julie Su spoke publicly about discounting the "myth of neutrality" in agencies charged with enforcing worker rights and endorsing coenforcement and later served as Acting Secretary of Labor during the Biden administration.³⁰³ Though the federal labor agencies in general do not use the coenforcement label and have worried about "jeopardiz[ing] perceptions of them as neutral parties,"³⁰⁴ they still

298. *Id.* at 154.

299. *Id.* at 155, 158.

300. Fine, Engler, & Engler, *supra* note 294.

301. Terri Gerstein & Jane Flanagan, *State and Local Labor Standards Enforcement During COVID-19: Protecting Workers' Health & Economic Security During a Pandemic*, ECON. POL'Y INST. (Apr. 28, 2020), <https://www.epi.org/publication/state-and-local-labor-standards-enforcement-during-covid-19/> [<https://perma.cc/FK66-AG6G>] (describing a "broad consensus" in favor of strategic enforcement and the Wage and Hour Division's implementation of this model under Weil's leadership).

302. Fine, Engler, & Engler, *supra* note 294.

303. Julie A. Su, *Enforcing Labor Laws: Wage Theft, the Myth of Neutrality, and Agency Transformation*, 37 BERKELEY J. EMP. & LAB. L. 149 (2016), <https://www.jstor.org/stable/26356861> [<https://perma.cc/5CAG-FLZP>].

304. Fine, *New Approaches*, *supra* note 292, at 172. Fine also discusses the key features of successful coenforcement efforts: "Deep collaboration and trust have been instrumental to the success of co-enforcement efforts, and ongoing public relationships between worker organizations and government bodies are the center Agency leaders and investigators find that access to workers and their willingness to come forward greatly increased when they were in relationship with organizations the workers trusted. Likewise, when they felt they could trust organizations, government officials articulated strong advantages to working closely with them." *Id.* at 171–72. President Biden seemed to endorse this approach through creating the White House Taskforce on Worker Organizing and Empowerment to identify how government agencies could encourage collective bargaining. *See, e.g., The White House Task Force on Worker Organizing and Empowerment: Update on Implementation of Approved Actions*, THE WHITE HOUSE, (Mar. 17, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/03/17/the-white-house-task-force-on-worker-organizing-and-empowermentupdate-on-implementation-of-approved-actions/> [<https://perma.cc/3JHN-CZE4>].

have increasingly turned to collaboration with worker organizations in Democratic administrations.³⁰⁵

In tandem with these new theories of labor governance, labor union federations moved to align themselves with immigrant workers.³⁰⁶ In addition to the post-*Sure Tan* realignment to seeing immigration enforcement as a specific threat to union organizing goals, many labor unions in the United States also grew to see immigration broadly as a labor issue. As early as 2000, the executive council of the AFL-CIO voted to support a path to citizenship for undocumented immigrants³⁰⁷ and to reverse its stance on employer sanctions, calling for their repeal.³⁰⁸ This reflected that immigrant workers were increasingly union members, especially as service sector unions experienced exponential growth in part through successful organizing of immigrant workers.³⁰⁹ The share of immigrant workers in unions grew even as overall unionization rates declined in the United States.³¹⁰ This meant that labor unions, a powerful constituency and partner in labor enforcement efforts, were for the most part increasingly invested in effective labor enforcement in low-wage industries and counteracting the threat of immigration enforcement to those efforts.³¹¹

Importantly, the realignment of labor unions and growth of coenforcement and strategic enforcement laid the groundwork for labor agencies to approach immigration fears and immigrant workers differently. Labor agencies had to see immigration enforcement as a threat to their core mission, which is more evident if their mission is seen as raising labor standards and achieving compliance with statutory labor protections across industries. To seek more than immigration neutrality, labor agencies had to first move beyond labor neutrality—to shift from bureaucratization to seeing their core charge as protecting

305. Weil, *Improving Workplace Conditions*, *supra* note 284, at 86 (“The WHD experimented with outreach to [worker centers, community organizations, and similar organizations] in the 1990s and has recently moved towards reengaging those communities.”).

306. See Robin Jacobson & Kim Geron, *Unions and the Politics of Immigration*, 22 *SOCIALISM & DEMOCRACY* 105, 105–07 (2008).

307. Don Gonyea, *How the Labor Movement Did a 180 on Immigration*, NPR (Feb. 5, 2013), <https://www.npr.org/2013/02/05/171175054/how-the-labor-movement-did-a-180-on-immigration> [<https://perma.cc/78J4-276F>].

308. Jacobson & Geron, *supra* note 306, at 105.

309. Gonyea, *supra* note 307.

310. Elizabeth Grieco, *Immigrant Union Members: Numbers & Trends*, MIGRATION POL’Y INST. (May 2004), https://www.migrationpolicy.org/sites/default/files/publications/7_immigrant_union_membership.pdf [<https://perma.cc/5PL6-6ALU>].

311. Power at Work Blogcast #65, *Building Bridges: The Intersection of Immigration & the U.S. Labor Movement*, *Power at Work*, at 23:55, (Oct. 22, 2024), <https://poweratwork.us/immigration-and-the-us-labor-movement-podcast> [<https://perma.cc/F4ZZ-36S9>] (featuring Shannon Lederer of the AFL-CIO saying, “[O]ne in five workers in our country wasn’t born here. That percentage is increasing. And that means that every affiliate of the AFL-CIO in every community in this country represents immigrant workers with every type of status. . . . [A]t it’s crux, our policy agenda is about ensuring that immigration status doesn’t serve as a barrier to worker organizing and empowerment and that all workers have equal and enforceable rights on the job.”). Despite this progress, some unions and large numbers of union members—especially in the building trades—remain nativist, often blaming immigrants for falling labor standards. Milkman, *Immigrants Didn’t Kill Your Union*, *supra* note 182; Jacobson & Geron, *supra* note 306, at 117 (“The battle over immigrant belonging is thus still being waged.”).

worker rights rather than simply responding to complaints or doing inspections. And further, labor agencies had to see workers and worker organizations as partners rather than mere witnesses, or worse, tools. The shift toward deeper partnerships with worker organizations brought labor agencies into closer proximity with immigrant workers and their concerns, and this exposed the inherent limitations of the neutrality approach. As labor agencies sought to build trust with workers, with worker organizations, and between workers and their organizations, agencies continued to face the ever-present fears of immigration.

These efforts pushed labor agencies to see the stakes for their enforcement in answering the all-important questions from immigrant workers: What happens if I complain about my employer and then immigration finds me? Will I be deported? In the Biden administration, worker and immigrant rights advocates pushed the labor agencies for more satisfying answers to these questions. In response, the labor agencies worked with the Department of Homeland Security, which eventually announced the DALE process. At last, a path to immigration protection.

II. DESDE ABAJO: THE PATH TO IMMIGRATION PROTECTIONS AS LABOR ENFORCEMENT

The results of the 2020 election presented a new and exciting political opportunity for immigrant worker advocates to push for protections beyond neutrality. The election of President Biden meant political victory for a more humane approach to immigration and, equally importantly, for unions and worker rights. President Biden positioned himself, both during the campaign and after election, as the most pro-labor president in history.³¹² His large team of transition advisors featured numerous progressive labor leaders supportive of immigrant rights.³¹³ This meant that immigrant worker advocates had the chance to not only push back on the excesses of Trump's immigration enforcement—massive worksite raids, the end of prosecutorial discretion, and deportation of labor witnesses—but also to go further, seeking affirmative immigration protections to facilitate labor enforcement.

As advocates drew up a detailed policy memo on how immigration protections for workers in labor disputes would promote worker rights and strengthen inter-agency cooperation, the Biden administration focused in its early days in trying to turn around the ship of the behemoth federal

312. Abigail Johnson Hess, *Biden Promises to Be the "Most Pro-Union President"—and Union Members in Congress Are Optimistic*, CNBC (Dec. 2, 2020), <https://www.cnbc.com/2020/12/01/biden-promises-to-be-the-most-pro-union-president-and-rep.html> [<https://perma.cc/RL23-74HX>]; Alyssa Fowers, *Biden Talks Like the Most Pro-Union President Since the New Deal*, WASH. POST (Apr. 30, 2021), <https://www.washingtonpost.com/business/interactive/2021/biden-on-unions/> [<https://perma.cc/HUQ6-UEU6>].

313. Agency Review Teams, BIDEN-HARRIS TRANSITION (last visited Sept. 19, 2025), <https://wgetsnap.github.io/biden-harris-transition-teams/index.html> [<https://perma.cc/S37X-QMFL>] (including, for example, Nadia Marin Molina of NDLO).

immigration agencies. President Biden announced significant immigration changes on his first day in office, including repealing a Trump enforcement memo and announcing a temporary moratorium on deportations.³¹⁴ These changes to enforcement practices were essential to the broader effort to lessen the chilling effect of immigration enforcement, but they signaled no quick action on specifically protecting workers. And like most executive announcements on immigration enforcement that followed, they faced immediate challenge, with a federal court enjoining the deportation moratorium quickly.³¹⁵ Aside from including statutory protections for workers in proposed immigration legislation, the U.S. Citizenship Act, President Biden took no immediate action on this issue.³¹⁶ However, he appointed progressive-leaning officials across the immigration and labor agencies, who respectively viewed the exercise of discretion as an essential tool and the protection of immigrant workers as core to labor standards work.³¹⁷ Seizing the opportunity, the Arriba Las Vegas Worker Center requested that the U.S. Department of Labor ask immigration officials for protections for Mr. Ortiz and his coworkers at Unforgettable Coatings, Inc., the painting company under investigation for egregious wage theft.³¹⁸ This pushed

314. David Pekoske, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [<https://perma.cc/DT6N-9TUP>].

315. *Texas v. United States*, No. 6:21-cv-00003, ECF No. 85 (Feb. 24, 2021 S.D. Texas) (mem. op. & order) (granting preliminary injunction of 100-day moratorium on deportations).

316. *Fact Sheet: President Biden Sends Immigr. Bill to Cong. As Part of his Commitment to Modern Immigr. Sys.*, BIDEN-HARRIS TRANSITION (Jan. 20, 2021), <https://www.aiala.org/files/o-files/view-file/3F8161D9-DA68-4026-A370-F93619CB5753> [<https://perma.cc/M62D-GR68>]; U.S. Citizenship Act, H.R. 1177, 117th Cong. (2021-2022), <https://www.congress.gov/bill/117th-congress/house-bill/1177#:~:text=This%20bill%20establishes%20a%20path,and%20addresses%20other%20related%20issues> [<https://perma.cc/YW9Z-LQWW>].

317. *Farmworker Justice Supports the U.S. President-Elect's Nomination of Marty Walsh as Department of Labor Secretary*, FARMWORKER JUSTICE (last visited Mar. 5, 2025), https://stage.farmworkerjustice.org/news_article_type/latest-news/ [<https://perma.cc/KKH5-8FPM>]; *National Immigration Law Center & Immigrant Justice Fund Statement on Appointment of Immigration Expert Kamal Essaheb*, NAT'L IMMIGR. L. CTR. (Mar. 29, 2021), <https://www.nilc.org/2021/03/29/nilc-and-ijf-statement-on-appointment-of-immigration-expert-kamal-essaheb/> [<https://perma.cc/N2SD-JAC2>]; *President Biden Announces Key Nomination on Jobs Team*, WHITE HOUSE (Feb. 17, 2021), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/02/17/president-biden-announces-key-nomination-on-jobs-team/> [<https://perma.cc/UHK6-6KCK>] (nominating Jennifer Abruzzo as General Counsel of the National Labor Relations Board); Andrew Kreighbaum, *NLRB Cracks Down on Immigrant Worker Intimidation*, ABRUZZO SAYS, BLOOMBERG LAW (Nov. 8, 2021), <https://news.bloomberglaw.com/daily-labor-report/nlrp-cracks-down-on-immigrant-worker-intimidation-abruzzo-says> [<https://perma.cc/YWG8-T6W3>] (quoting Abruzzo as saying "I am resolved to hold fully accountable those entities that, by targeting immigrant workers and their workplaces, undermine the policies of the NLRA and the nation's immigration laws" in a statement).

318. Penn, *Inside Biden's Push*, *supra* note 15; *Immigrant Workers & Advocates Call for Federal Whistleblower Protections to Address Employer Retaliation*, NAT'L DAY LABORER ORG. NETWORK (Apr. 5, 2021), <https://ndlon.org/immigrant-workers-and-advocates-call-for-federal-whistleblower-protections/> [<https://perma.cc/455J-BBHY>]; *NDLON Calls on Announced Secretary Nominee Mayor Walsh to Reimagine & Rebuild Labor Department*, NAT'L DAY LABORER ORG. NETWORK (Jan. 7, 2021), <https://ndlon.org/ndlon-calls-on-announced-labor-secretary-nominee-mayor-walsh-to-reimagine-and-rebuild-labor-department/> [<https://perma.cc/8CAN-LSUY>]; Gentry, *Biden Called on*, *supra* note 27.

the conversation forward but, again, did not result in any immediate action.³¹⁹

Then, an early workplace tragedy shined a spotlight on the danger of immigration interference in labor investigations, demonstrating urgent need for immigration protections. About a week after Biden's inauguration, a nitrogen leak at a poultry plant in Gainesville, Georgia killed six workers.³²⁰ Two of those killed were Mexican citizens, and many witnesses were undocumented.³²¹ Because the incident was an industrial chemical accident involving fatalities, both the Chemical Safety Board³²² and Occupational Safety and Health Administration responded to the scene to launch investigations. Local organizers with Georgia Familias Unidas, a community group of current and former poultry workers based in Gainesville, warned that worker witnesses feared coming forward in the investigation because the plant's managers had interrogated them about their immigration status in the aftermath of the accident.³²³ In internal deliberations at the Chemical Safety Board over whether or how to provide assurances to allay fears of immigration enforcement, it came to light that a holdover Trump appointee on the Board official had directly communicated with ICE. The official further "was aware that plainclothes immigration officers could be monitoring" the investigation, including "witness interviews held at local hotels."³²⁴ Other Chemical Board officials described this as "highly unusual," acknowledging that the involvement with ICE threatened to derail the investigation.³²⁵ This breach prompted "an internal uproar" among investigators who felt betrayed and undermined in their mission of conducting a thorough investigation and protecting witnesses who came forward.³²⁶ And news of the breach supercharged demands from Georgia Familias Unidas for protection for workers and their families from immigration enforcement throughout the investigation.³²⁷ After the same plant

319. Penn, *Inside Biden's Push*, *supra* note 15 (sharing that, as of October 2021, "bureaucratic complications have kept the requests in limbo").

320. Jaclyn Diaz, *6 Killed in Liquid Nitrogen Leak at Georgia Poultry Plant*, NPR (Jan. 29, 2021), <https://www.npr.org/2021/01/29/961923732/6-killed-after-liquid-nitrogen-leak-at-georgia-poultry-plant> [https://perma.cc/LK8K-DE9M].

321. *Id.*; Jeff Amy, *\$1M in Fines After Nitrogen Kills 6 at Georgia Poultry Plant*, ASSOCIATED PRESS (July 23, 2021), <https://apnews.com/article/business-georgia-immigration-20bf8ebbd440341118078a6ba873d1b> [https://perma.cc/CBA3-PXAZ].

322. *CSB Deploying to Fatal Incident at Poultry Plant*, U.S. CHEMICAL SAFETY & HAZARD INVESTIGATION BD. (Jan. 28, 2021), <https://www.csb.gov/csb-deploying-to-fatal-incident-at-poultry-plant/> [https://perma.cc/L78L-J479]; Nick Schwellenbach & Emma Stodder, *Specter of ICE Looms Over Investigation of Fatal Poultry Plant Disaster*, PROJECT ON GOV'T. OVERSIGHT (Feb. 17, 2021), <https://www.pogo.org/investigates/specter-of-ice-looms-over-investigation-of-fatal-poultry-plant-disaster> [https://perma.cc/RE6A-6T5G].

323. Luis Feliz Leon, *Threats of Deportation Prevent Workers from Speaking Out Against Workplace Conditions*, PRISM REPORTS (Feb. 11, 2021), <https://prismreports.org/2021/02/11/threats-of-deportation-prevent-workers-from-speaking-out-against-workplace-conditions/> [https://perma.cc/98GE-Q5JL].

324. Schwellenbach & Stodder, *supra* note 322.

325. *Id.*

326. *Id.*

327. Feliz Leon, *supra* note 323.

experienced another chemical accident, releasing ammonia, organizers complained to OSHA that the plant presented an imminent danger to workers.³²⁸ Approximately a month later, local workers and their supporters formally requested that the Department of Labor support immigration protections for worker witnesses as they held a vigil for the six workers who had died on Workers' Memorial Day.³²⁹

The requests, first from Vegas and then from Georgia, presented the concrete stakes behind the push for immigration protections. In both cases, the labor enforcement interests were weighty, with egregious wage theft in Vegas and multiple workplace fatalities in Georgia. And in both cases, the investigating components of the Department of Labor needed the help of worker witnesses, who were deeply afraid of immigration enforcement.³³⁰ But after early Biden administration restraints on immigration enforcement were successfully challenged in court, the agencies proceeded cautiously, with direct talks between DOL Secretary Walsh and DHS Secretary Mayorkas on the path forward.³³¹ Concern for labor enforcement was increasingly interweaved in further immigration guidance, including considerations for discretion from prosecutors in immigration court that defined law enforcement to include labor enforcement,³³² instructions for seeking faster processing of immigration applications,³³³ as well as, later, directions for immigration enforcement in the interior of the country.³³⁴ But months passed without agency action on the request for immigration protections for worker witnesses.³³⁵

328. Debbie Berkowitz (@DebbieBerkowitz), *X* (Mar. 29, 2021, 11:33 AM), <https://x.com/DebbieBerkowitz/status/1376558170122944512> [<https://perma.cc/Z8ZL-PWSF>].

329. Penn, *Inside Biden's Push*, *supra* note 15.

330. *Id.* (describing Mr. Rosario Ortiz's efforts to seek protection and the difficulty of recruiting co-workers to speak to investigators because of fear and also his own doubts about testifying against his employer without protection against deportation).

331. *Id.*

332. Memorandum from John D. Trasviña, Principal Legal Advisor, Immigr. & Customs Enf't, to All OPLA Attorneys, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Procedures* (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf [<https://perma.cc/BLB9-A9KD>]. The memo expressly noted that cases "will merit dismissal in the absence of serious aggravating factors" where "a noncitizen is a cooperating witness or confidential informant or is otherwise significantly assisting state or federal law enforcement." The memo defined "law enforcement" to include "enforcement of labor and civil rights laws." This memo was suspended after an injunction of the interim prosecutorial discretion priorities on August 19, 2021. *See* State of Texas v. United States, No. 6:21-cv-00016, 2021 WL 3171958, at *4 (S.D. Tex. Aug. 19, 2021).

333. U.S. CITIZENSHIP & IMMIGR. SERVS., *Policy Alert: USCIS Expedite Criteria & Circumstances* (June 9, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-ExpediteCriteria.pdf> [<https://perma.cc/NB2R-WY7K>].

334. Alejandro N. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law*, U.S. DEP'T OF HOMELAND SEC. (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [<https://perma.cc/C65Y-5ECM>]. This guidance was also challenged and vacated by a district court in Texas, *Texas v. United States*, 606 F.Supp.3d 437, 502 (S.D. Tex. June 10, 2022), then reinstated once the Supreme Court found the plaintiff states to lack standing, *United States v. Texas*, 599 U.S. 670, 686 (2023).

335. Penn, *supra* note 15.

Immigrant worker advocates continued to organize around the demand, with increasingly public calls for immediate action. Building on the worker organizing in Vegas and Georgia, Arriba Las Vegas Worker Center, worked closely with the National Day Laborer Organizing Network to launch a national campaign.³³⁶ Joining this early push was also the Mississippi-based Immigrant Alliance for Justice and Equity, whose members had endured the mass worksite raids at poultry plants and sought immigration protections as a remedial measure.³³⁷ In the summer of 2021, these workers and others from across the country gathered in D.C. to strategize about pushing for immigration protections. They rallied outside the U.S. Department of Labor headquarters in D.C., urging support for immigration protections.³³⁸ They also planned a series of public actions in Mississippi³³⁹ and the Los Angeles region.³⁴⁰ This national effort was named “DALE,” a Spanish expression translating roughly to “come on!” or “go for it!” a familiar phrase encouraging action such as, in this context, workers stepping forward to report labor violations. DALE also became the English acronym for their demand: Deferred Action for Labor Enforcement.³⁴¹

A broad range of groups further elevated this demand, including robust leadership from labor unions (principally the AFL-CIO and its members, as well as Service Employees International Union³⁴²), alt labor groups like

336. Salvador G. Sarmiento, *Background About the DALE Campaign*, NAT'L DAY LABORER ORGANIZING NETWORK (Jan. 6, 2023), <https://ndlon.org/background-about-the-dale-campaign/> [https://perma.cc/C7L3-V5PY]; Jeniffer Solis, *Labor Organizers Seek Deferred Action to Stem Abuse of Undocumented Workers*, NEV. CURRENT (July 8, 2021), <https://nevadacurrent.com/2021/07/08/labor-organizers-seek-deferred-action-to-stem-abuse-of-undocumented-workers/> [https://perma.cc/4DVM-6VZ2]; Gentry, *supra* note 27.

337. NAT'L DAY LABORER ORGANIZING NETWORK, *Immigrant Workers Deliver Petition to Biden's Labor Officials in Mississippi: Work Authorization for Workers Targeted by Trump Raids* (Apr. 8, 2021), <https://ndlon.org/immigrant-workers-deliver-petition-to-bidens-labor-officials-in-mississippi-work-authorization-for-workers-targeted-by-trump-raids/> [https://perma.cc/3C74-QG79].

338. Radio Jornalera, Title, Facebook (July 12, 2021), https://www.facebook.com/RadioJornalera/videos/523595618793395/?vh=e&mibextid=QwDbR1&rdid=1Z2WOyaEi5b0lhae&share_url=https%3A%2F%2Fwww.facebook.com%2Fshare%2Fv%2FzJ764bmMtzWb7n8%2F%3Fmibextid%3DQwDbR1# [https://perma.cc/6LTS-MEKU] (“[A]mong the attendees will be workers from Jackson, MS, Las Vegas, NV, and Gainesville, GA, who are calling for labor whistleblower protections for immigrant workers that have filed labor violation complaints. #DALE”); Solis, *Labor Organizers Seek Deferred Action*, *supra* note 336.

339. NAT'L DAY LABORER ORGANIZING NETWORK, *On Anniversary of ICE Raids, Workers Deliver Request for Deferred Action to U.S. Labor Dept in Mississippi* (Aug. 9, 2021), <https://ndlon.org/workers-deliver-request-for-deferred-action-to-us-labor-dept-in-mississippi/> [https://perma.cc/GB8T-DEAA].

340. NAT'L DAY LABORER ORGANIZING NETWORK, *Pomona Day Laborers March 12 Miles to Demand Respect for Workers* (Apr. 28, 2021), <https://ndlon.org/pomona-day-laborers-march-12-miles-to-demand-respect-for-workers/> [https://perma.cc/NP2K-Y9KZ].

341. Cal Soto of the National Day Laborer Organizing Network referred to organizing that supported workers reporting labor violations as “Desde Abajo Labor Enforcement,” meaning labor enforcement from below, and with the acronym DALE. As the advocacy further developed with a focus on deferred action protections, Bliss Requa-Trautz of Arriba Las Vegas Worker Center popularized the same acronym to mean “Deferred Action for Labor Enforcement.”

342. SEIU later rejoined the AFL-CIO. Press Release, American Federation of Labor-Congress of Industrial Organizations, *SEIU Joins AFL-CIO to Build Unprecedented Worker Power, Win Unions for All Workers* (Jan. 8, 2025), <https://aflcio.org/press/releases/seiu-joins-afl-cio-build-unprecedented-worker-power-win-unions-all-workers> [https://perma.cc/A8YZ-YZ42].

worker center networks (e.g. National Domestic Worker Alliance) and labor-oriented advocates (e.g. National Employment Law Project and Jobs with Justice), and transnational labor organizations (e.g. Centro de los Derechos del Migrante and Global Labor Justice).³⁴³ While a few traditional immigrant rights organizations were also involved, including the National Immigration Law Center, it is notable that most of the supporters were labor organizations pushing for protections through the lens of enforcing labor rights.³⁴⁴ These advocates drafted a detailed policy memorandum on the dire need for immigration protections to facilitate both civil rights and labor enforcement and how to set up such protections.³⁴⁵

These organizing and advocacy efforts early in the Biden administration soon bore fruit, as Secretary Mayorkas issued a memo in October 2021 addressing worksite immigration enforcement, which focused on the problem of “unscrupulous employers” and laid the groundwork for immigration protections for workers speaking out.³⁴⁶ Through this short memo, Mayorkas for the first time articulated that the Department of Homeland Security should “adopt immigration enforcement policies to facilitate the important work of the Department of Labor and other government agencies” in enforcing labor standards.³⁴⁷ While Mayorkas reiterated the familiar Department goal to “Reduce the demand for illegal employment,” he narrowed the means to achieving that goal as “delivering more severe consequences to exploitative employers and their agents”—which in context seems to mean supporting labor enforcement rather than enforcing employer sanctions.³⁴⁸ The memo then called for a broad review of immigration policies that impact labor enforcement, including developing a plan to mitigate fear of victims and

343. Memorandum from American Federation of Labor-Congress of Industrial Organizations, et al. to Hon. Alejandro Mayorkas, Sec’y of Homeland Sec. & Hon. Martin J. Walsh, Sec’y of Lab., *Federal Agencies Should Provide a Clear Process for Workers Involved in Labor & Civil Rights Disputes to Request Immigration Protection* (Sept. 29, 2021), <https://assets.law360news.com/1509000/1509372/sept.%20letter.pdf> [<https://perma.cc/JY35-74VA>]; see also Daniel J. Galvin, *Alt-Labor’s Turn Toward Politics & Public Policy to Combat the Exploitation of Low-Wage Workers: Building Power & Punching Above Their Weight*, ECON. POL’Y INST. (Nov. 4, 2021), <https://www.epi.org/unequalpower/publications/alt-labors-turn-toward-politics-and-public-policy-to-combat-the-exploitation-of-low-wage-workers-building-power-and-punching-above-their-weight/> [<https://perma.cc/BP7H-QQMJ>].

344. Memorandum from American Federation of Labor-Congress of Industrial Organizations, et al., *supra* note 341.

345. *Id.*; Emily Brill, *DOL Releases Guidance for Immigrants in Labor Disputes*, LAW360 (July 7, 2022), <https://www.law360.com/employment-authority/articles/1509372/dol-releases-guidance-for-immigrants-in-labor-disputes> [<https://perma.cc/5G7Q-QGLX>] (referring to efforts by a coalition of unions, worker centers, and advocacy groups to ask for guidance on immigration protections for workers reporting labor violations).

346. Memorandum from Alejandro N. Mayorkas, Sec’y of U.S. Dep’t of Homeland Sec., to Tae D. Johnson, Acting Director of U.S. Immigr. & Customs Enf’t, Ur M. Jaddou, Director of U.S. Citizenship & Immigr. Servs., Troy A. Miller, Acting Comm’r of U.S. Customs & Border Prot., *Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual* (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf [<https://perma.cc/3QCZ-AE6P>]. This also built on earlier enforcement priorities. Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law*, *supra* note 334.

347. *Id.* at 2.

348. *Id.*

witnesses that “should . . . provide for . . . deferred action . . . for noncitizens who are witnesses to, or victims of, abusive and exploitative labor practices.”³⁴⁹ Mayorkas also issued immediate guidance instructing the Department’s components to cease mass worksite raids and, importantly, to consider “on a case-by-case basis” requests for prosecutorial discretion by worker victims or witnesses that are supported by the Department of Labor.³⁵⁰ For these prosecutorial discretion requests, Mayorkas further provided that “the legitimate enforcement interests of a federal government agency should be weighed against any derogatory information to determine whether a favorable exercise of discretion is merited.”³⁵¹ This meant that the labor enforcement interests should be weighed in favor of each request, presenting a thumb on the scale that should only be outweighed by significant negative equities.

While most of the language of this memo squarely focused on exploitative employers, it also signaled a repudiation of Trump era immigration enforcement and, significantly, acknowledged for the first time that immigration enforcement by government officials deters the exercise of worker rights and enables retaliation. Buried at the bottom of the final page, Mayorkas wrote that mass raids that arrest hundreds of workers were “not focused” on exploitative employers and instead “misallocated enforcement resources while chilling, and even serving as a tool of retaliation for, worker cooperation in workplace standards investigations.”³⁵² Though only briefly, Mayorkas thus acknowledged for the first time that past Department guidance was not enough to protect workers from retaliation and that in fact government officials and policies were also at least in part responsible for immigrant worker fears of reporting labor violations.³⁵³

And though Mayorkas never named the past enforcement operations from which he was distancing himself in the memo, the context was clear and highlighted in media reports. Most articles covering the announcement focused on the reversal in stopping mass worksite raids and discussed the mass raids during the Trump administration—especially the Mississippi raids of seven poultry plants that had resulted in arrest of over 600 workers.³⁵⁴ In-depth coverage of the memo’s announcement also led with a photograph of the Hard Rock Hotel, with the caption relaying the tragic deportation of the

349. *Id.*

350. *Id.* at 3.

351. *Id.*

352. *Id.*

353. *Id.*

354. Nick Miroff, *Biden Administration Orders Halt to ICE Raids at Worksites*, WASH. POST (Oct. 12, 2021), https://www.washingtonpost.com/national/biden-administration-halts-ice-raids/2021/10/12/631dc86e-2b70-11ec-92bd-d2ffe8570c7d_story.html [<https://perma.cc/JLZ7-QNNC>]; Bill Chappell, *Homeland Security Secretary Orders ICE to Stop Mass Raids on Immigrants’ Workplaces*, NPR (Oct. 12, 2021), <https://www.npr.org/2021/10/12/1045295677/alejandro-mayorkas-ice-workplace-raids-dhs> [<https://perma.cc/9CA9-L6EZ>].

whistleblowing worker.³⁵⁵ While far from an official apology, the memo was thus generally understood to signal significant changes to come and long overdue acknowledgement that changes in immigration policy were needed to effectively enforce labor law.

The memo gave Department components 60 days to complete their policy review and report back to Secretary Mayorkas, so advocates hoped for quick action. And that initially appeared to be the plan, since Secretary Mayorkas and Secretary Walsh invited a small group of worker rights advocates to an in-person meeting in Washington, D.C. in November of 2021 to convey both Departments' commitment to moving forward with immigration protections for workers. Advocates rushed to submit their specific recommendations for immigration policy changes to support labor enforcement and counteract fears of immigrant workers.³⁵⁶ And the public organizing campaign continued, with worker testimony detailing how the threat of immigration retaliation was suppressing participation in labor investigations.³⁵⁷ For example, Suli Garcia, another member of Arriba Las Vegas, testified: "There are still thousands of workers who for fear of retaliation, for fear of being deported, are in the same position that I was in . . . At risk of losing their homes and in some cases their lives."³⁵⁸

This push eventually succeeded in further progress, though federal labor agencies led the way through a series of announcements, with no immediate sign of advances from the Department of Homeland Security. First, on November 8, 2021, the General Counsel of the National Labor Relations Board issued a memorandum that broadly addressed remedies for immigrant workers who suffer labor rights violations.³⁵⁹ That memo reviewed the Board's policy for certifying U and T visas, and then, for the first time, also relayed that even for those who do not qualify for visas, "the NLRB may still request prosecutorial discretion from DHS, including deferred action and an employment authorization document, in appropriate cases."³⁶⁰ The memo explicitly referenced the Mayorkas worksite memo, with the General Counsel adding, "I am committed to asking DHS to exercise prosecutorial discretion

355. Penn, *Inside Biden's Push*, *supra* note 15.

356. See, e.g., *Letter to Public Officials on DHS Statement on Worksite Enforcement*, HUMAN RTS. WATCH (Nov. 19, 2021), <https://www.hrw.org/news/2021/11/19/letter-public-officials-dhs-statement-worksite-enforcement> [<https://perma.cc/GVA9-MABH>].

357. Sarmiento, *supra* note 336; *Blue Ribbon Commission on Protections for Immigrant Workers: Highlights & Recommendations*, NATIONAL DAY LABORER ORGANIZING NETWORK (December 2021), <https://drive.google.com/file/d/1SRvn74YoPbvBEUJQECYS8sDPFNjGPK2o/view> [<https://perma.cc/6LLE-CQN9>] (summarizing hearings convened between Nov. 10, 2021 and Dec. 8, 2021).

358. *Blue Ribbon Commission on Protections for Immigrant Workers: Highlights & Recommendations*, *supra* note 357, at 7.

359. Memorandum GC 22-01 from Jennifer Abruzzo, General Counsel of National Labor Relations Board, on Ensuring Rights and Remedies or Immigrant Workers Under the NLRA (Nov. 8, 2021) (The Acting General Counsel appointed by President Trump in 2025 has rescinded this memo) [hereinafter "*Ensuring Rights*"]; Memorandum GC 25-05 from William B. Cowen, Acting General Counsel of National Labor Relations Board, on Rescission of Certain General Counsel Memoranda (Feb. 14, 2025) (rescinding GC 22-01 pending further guidance).

360. Abruzzo, *Ensuring Rights*, *supra* note 359, at 3.

in all appropriate cases involving workers who are victims of, or witnesses to, violations of our Act.”³⁶¹ Months later, another memorandum from the General Counsel’s office directed NLRB agents to distribute a fact sheet on the rights of immigrant workers in English and Spanish to all interviewed witnesses.³⁶² That fact sheet relays that the NLRB will consider seeking deferred action, parole, U or T visa status, or other immigration relief if a worker or their representative shares that immigration relief is necessary to protect workers.³⁶³ Separately, in February of 2022, the White House Task Force on Worker Organizing and Empowerment issued a commissioned report to President Biden that included recommending immigration enforcement priorities to facilitate labor agency enforcement and counteract worker fears.³⁶⁴

Though the 60-day deadline in the Secretary Mayorkas’ worksite memo came and went without any announced process for worker protections, more general DHS guidance continued to reflect that worker rights and labor agency enforcement are highly relevant to immigration decisions. First, in January 2022, USCIS again updated its guidance on which cases it will grant expedited processing to emphasize labor agency interests.³⁶⁵ The new criteria added the National Labor Relations Board, Equal Employment Opportunity Commission, and state or local agencies to the previous mention of the U.S. Department of Labor as a government agency whose interests could justify expedited processing.³⁶⁶ The criteria further offered the concrete example of a “noncitizen victim of witness cooperation with a . . . agency who is in need of employment authorization because the respective agency is seeking back pay or reinstatement in court proceedings” as a meritorious example.³⁶⁷ Further, a few months later in April 2022, the lead ICE prosecutor directed the government attorneys in immigration court to consider labor and civil

361. *Id.* at 10.

362. Memorandum OM 22-09 from Joan A. Sullivan, Associate General Counsel, on Ensuring Safe and Dignified Access for Immigrant Workers to NLRB Processes (May 2, 2022).

363. *Id.* at 2, 3.

364. *White House Task Force on Worker Organizing and Empowerment: Report to the President*, WHITE HOUSE (Feb. 7, 2022), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf> [<https://perma.cc/JHW6-BZW2>]; Press Release, *White House Task Force on Worker Organizing and Empowerment Report* (Feb. 7, 2022), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/02/07/white-house-task-force-on-worker-organizing-and-empowerment-report/> [<https://perma.cc/FH5C-2ZLNK>].

365. U.S. Citizen & Immigr. Servs., *Policy Alert - Subject: USCIS Expedite Criteria and Circumstances* (Jan. 22, 2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220125-ExpediteCriteria.pdf> [<https://perma.cc/PN6P-F3TN>] [hereinafter “*Policy Alert*”]; U.S. Citizenship & Immigr. Servs., *Policy Manual: Ch. 5 – Requests to Expedite Applications or Petitions* (Jan. 26, 2022), reprinted by Wayback Machine, <https://web.archive.org/web/20220126084219/https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5> [<https://perma.cc/C93U-MVB2>] [hereinafter “*Policy Manual*”]. Because the processing times for immigration benefits applications can be extraordinarily backlogged, expedited processing offers a highly coveted safety valve for immigrants who qualify.

366. U.S. Citizen & Immigr. Servs., *Policy Alert*, *supra* note 365; *Policy Manual*, *supra* note 365.

367. *Id.*

rights equities as a mitigating factor in prosecutorial discretion.³⁶⁸ These announcements, though far short of offering a path for broad immigration protection, reaffirmed that DHS considered labor enforcement relevant to immigration decisions.

While DHS was seemingly still mulling over the contours of the path to offer workers immigration protection, the Department of Labor publicly announced their support, building awareness and momentum. A week after then-Secretary Marty Walsh visited a group of immigrant workers in Mississippi trying to hold poultry factories accountable for labor violations,³⁶⁹ the Department published its guidance for supporting worker requests for immigration protection.³⁷⁰ This guidance details that workers or their representatives should seek the agency's support by describing the labor dispute as well as any fears of retaliation.³⁷¹ Embedded in the guidance are the agency's policy justifications for the new process: that workers without status or with contingent status are "reluctant to report" to government agencies and "exercise their rights" because of fear of "immigration-based retaliation from their employers and adverse immigration consequences for themselves or their family members."³⁷²

Throughout, the DOL guidance reflects a careful balancing of the Department's desire to protect worker witnesses while still maintaining some separation between immigration and labor matters—a concern that dates back to the earlier approach of the Memorandum of Understanding between DOL and ICE.³⁷³ Therefore, the guidance directs those seeking support for immigration protections to not identify individual workers by name nor detail their immigrations status.³⁷⁴ DOL accordingly expresses its support for immigration protection for witnesses through a "Statement of US DOL Interest" "generally issued on an employer or worksite basis" that will "not identify

368. Memorandum from Kerry E. Doyle, Principal Legal Advisor of U.S. Immigr. & Customs Enf't, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws & the Exercise of Prosecutorial Discretion*, 1-5, (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [<https://perma.cc/A2A5-S6KR>]. The memo elsewhere also emphasized that "status as a victim of crime or victim, witness, or party in legal proceedings, including related to human trafficking and labor exploitation" is a mitigating factor to consider in assessing whether a noncitizen is a threat to public safety. *Id.* at 4.

369. June 2022 Calendar of Secretary Marty Walsh, U.S. Dep't of Labor, 13 (reflecting visit to IAJE on June 30, 2022 for "Meeting with Immigrant Poultry and Construction Workers"), <https://www.dol.gov/sites/dolgov/files/general/foia/calendar/202206MWalshCalendars.pdf> [<https://perma.cc/8CFW-UKH8>].

370. News Release, U.S. Dep't of Labor, *US Department of Labor Posts Process for Seeking Its Support for Immigration-Related Prosecutorial Discretion During Labor Disputes* (July 6, 2022), <https://www.dol.gov/newsroom/releases/sol/sol20220706> [<https://perma.cc/J464-QDJZ>].

371. U.S. Dep't of Labor, *Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes*, July 6, 2022, <https://www.aila.org/aila-files/80B64620-3922-4083-9661-E8B8B9D7D15E/22070800.pdf?1697589291> [<https://perma.cc/WJE8-UJYA>] at 1-2 [hereinafter "USDOL Guidance"] (last visited Mar. 9, 2025). The guidance has subsequently been updated. *Id.*

372. USDOL Guidance, *supra* note 371, at 1.

373. 2011 DHS-DOL MOU, *supra* note 16.

374. USDOL Guidance, *supra* note 371, at 2.

individual workers by name.³⁷⁵ Likewise, the factors that DOL considers in deciding whether to request immigration protection all concern the agency's enforcement interests in the relevant labor case rather than factors specific to a particular witness or victim.³⁷⁶ Some information about the labor dispute, such as employer threats of deportation, strongly implies the presence of immigrant workers in the workplace. But DOL seeks to walk a careful line in instructing advocates not to identify individual workers' status, so that DOL and its investigators are not acquiring immigration information about workers, even for the purpose of assisting them.³⁷⁷

DOL's announcement was heralded by advocates for labor and immigrant rights, especially in Nevada, Georgia, and Illinois where pioneering cases had paved the way for the more formalized, public process.³⁷⁸ The DOL announcement signaled hope that the delay from DHS might be just the machinations of bureaucracy rather than backtracking from the broader vision of using immigration protection in service of labor enforcement.

In the months that followed the DOL announcement, the public drum beat in favor of these protections continued to grow louder. A group of immigrant workers in Texas went public with their campaign to collect unpaid wages from a cleaning company that had threatened to call the police on them.³⁷⁹ They sought and received the support of the National Labor Relations Board in seeking immigration protections and shared excerpts of the Board's statement asking for deferred action for worker witnesses with the press.³⁸⁰ Other groups quietly applied for support from labor agencies and even submitted applications for deferred action, with some winning discretionary protection though the process and criteria had not been announced.³⁸¹ Coverage of

375. *Id.* at 3.

376. *Id.* at 5.

377. See generally Rick Su, *Designing Sanctuary*, 122 MICH. L. REV. 809 (2024) (analyzing policies that seek to disentangle local law enforcement from federal immigration enforcement for the purposes of cultivating trust with immigrant residents).

378. Jennifer Solis, *Feds Unveil Process to Protect Immigrant Workers Facing Employer Retaliation*, NEV. CURRENT (July 8, 2022), <https://nevadacurrent.com/2022/07/08/feds-unveil-process-to-protect-immigrant-workers-facing-employer-retaliation/> [<https://perma.cc/45BF-HSFH>]; Lautaro Grinspan, *Department of Labor Lays Out Process to Support Immigrant Whistleblowers*, ATLANTA JOURNAL-CONSTITUTION (July 7, 2022), <https://www.ajc.com/news/georgia-news/department-of-labor-lays-out-process-to-support-immigrant-whistleblowers/EFJTJHRMM5B3ZBDNVVALSDABRA/> [<https://perma.cc/8QMD-FJKG>]; Michael Loria, *Workers Rights Groups Celebrate New U.S. Labor Guidelines That Protect Undocumented Workers*, CHICAGO SUN-TIMES (July 13, 2022), <https://chicago.suntimes.com/business/2022/7/13/23207225/labor-department-undocumented-workers-immigration-workplace-abuse-chicago-workers-collaborative> [<https://perma.cc/WT3L-GT8B>]; Brill, *supra* note 345.

379. Eleanor Mueller, Nick Niedzwiadek & Shayna Greene, *How the NLRB Wants DHS to Help It Investigate Employers*, POLITICO (Aug. 22, 2022), <https://www.politico.com/newsletters/weekly-shift/2022/08/22/how-the-nlrw-wants-dhs-to-help-it-investigate-employers-00053043> [<https://perma.cc/7BRU-E7JQ>].

380. *Id.*

381. Meredith Cabell, Lynn Damiano Pearson & Jessie Hahn, *Building Worker Power Through Deferred Action: A Report on the First Year*, NAT'L IMMIGR. LAW CTR. 8 (Jan. 30, 2024), <https://www.nilc.org/resources/deferred-action/> [<https://perma.cc/L7Y4-GF2J>].

options to advance immigration policy more generally³⁸² or address the specific plight of immigrant reconstruction workers responding to natural disasters also highlighted the need for protections for immigrant workers.³⁸³ At that point, over a year since the Mayorkas memo calling for these protections, DHS responded by sharing only that “just over two dozen” cases had been approved, with no update on a publicly announced process for workers to apply.³⁸⁴

Advocates increasingly urged that it was “past time for the Department of Homeland Security to do their part,” following the DOL announcement, to publicly outline the process for worker witnesses to seek immigration protections.³⁸⁵ In mid-November, over 330 organizations wrote to Secretary Mayorkas to urge DHS to “immediately release written guidance that clarifies the process” for immigration protections for worker witnesses, saying that the “delay has real costs to the workers whose wages are stolen, who risk their safety in dangerous working conditions, who want to organize for a greater voice on the job.”³⁸⁶

Then, finally, about a month and half later, on January 13, 2023, DHS publicly shared “process enhancements” that outlined the path to immigration protections for worker victims and witnesses.³⁸⁷ That entailed a “streamlined and expedited deferred action request process,” with a “centralized intake” run by USCIS to review the requests and related work permit applications.³⁸⁸ Importantly, any request for this protection had to include a “Statement of Interest” from a federal, state, or local labor agency as support, based on the agency’s labor enforcement interests.³⁸⁹ But the inclusion of such a request did not guarantee protection: each application would be considered in a “case-by-case determination” by the immigration adjudicator.³⁹⁰ Applications from those in removal proceedings or with a final order of removal would be forwarded to ICE adjudicators, whereas all others would be adjudicated by USCIS.

382. Jean Guerrero, *How Biden Can Do Right by Undocumented Americans*, LA TIMES (September 12, 2022), <https://www.latimes.com/opinion/story/2022-09-12/joe-biden-undocumented-immigrants-deportations-covid> [https://perma.cc/2CAR-L8HH].

383. Maria Sacchetti, *Florida Needs Workers to Rebuild After Ian. Undocumented Migrants Are Stepping In*, WASH. POST (October 23, 2022), <https://www.washingtonpost.com/immigration/2022/10/23/florida-hurricane-ian-migrant-workers/> [https://perma.cc/QQU7-LSEL] (describing exasperation and complaints that the Biden administration “is acting too slowly to expand protections for immigrant workers”).

384. *Id.*

385. Martinez, *supra* note 15.

386. Letter from Hon. Alejandro Mayorkas Secretary of Homeland Security, U.S. Dep’t of Homeland Security (Nov. 17, 2022), <https://www.politico.com/newsletters/weekly-shift/2022/11/21/how-long-covid-intersects-with-disability-policy-00069668> [https://perma.cc/FDB5-NLKH]; Alyssa Aquino, *DHS Asked to Clarify Whistleblowers’ Immigration Protections*, LAW360 (Nov. 23, 2022), <https://www.law360.com/immigration/articles/1552293> [https://perma.cc/5MQA-NZMP].

387. *DHS Announces Process Enhancements Supporting Labor Enforcement Investigations*.

388. *Id.*

389. *Id.*

390. *Id.*

The protection offered through this process was still somewhat precarious. A successful application under this announcement meant a discretionary grant of deferred action for two years, but “subject to termination at any time.”³⁹¹ Deferred action meant that federal immigration agents agreed to not pursue deportation during the term of protection. But it offered no pathway to permanent immigration status like a green card or citizenship, no protection for even immediate family members, and no certainty in continued protection beyond the initial term.³⁹² To apply, workers had to disclose their biographical information, address history, and work history to the federal immigration agency.³⁹³

And yet, even this liminal protection was groundbreaking: for the first time, workers had a clear path to protection from deportation based on a labor agency’s investigation of their workplace. Four unique features of the DALE process as it was announced facilitate labor enforcement. First, eligibility for the protection is generally worksite-wide because the labor agency Statement of Interest designates a group of workers collectively who are witnesses rather specifically named individuals. This provides broad protection, including potential witnesses in an investigation, and allows labor agencies to evaluate and issue a Statement without investigating the immigration status of any individual worker, as longstanding agencies prohibit. Second, the streamlined process emphasizes speed as essential to facilitating labor enforcement, meaning that applications are processed in months rather than years, as is typical for most immigration matters. This means that workers can be protected during the labor investigation, securing worker participation when it matters most. Third, deferred action has no exclusions or bars and thus permits DHS to exercise the full range of their discretion through a totality of the circumstances determination. This allows any worker, with enough positive equities, to qualify and should avoid creating an excluded group of workers—such as those with certain criminal history—who could be exploited by employers with no opportunity for protection. Fourth, the protection is prophylactic, meaning that workers can seek the protection before they suffer retaliation and before they are asked for specific assistance in the labor investigation. This enables workers to be protected in the face of fears of immigration enforcement, rather than withholding relief until they can prove their employer targeted them. Each of these features makes it possible for the protection to counteract the broad chilling effect of immigration enforcement that can endanger labor investigations and allow unscrupulous employers to violate labor law with impunity.

391. *Id.*

392. *DHS Support of the Enforcement of Labor and Employment Laws*, *supra* note 23.

393. *Id.*; U.S. Citizenship & Immigration Services, G-325A, Biographic Information (for Deferred Action) (Mar. 8, 2025), <https://www.politico.com/newsletters/weekly-shift/2022/11/21/how-long-covid-intersects-with-disability-policy-00069668> [<https://perma.cc/4HEA-JLKB>].

A broad range of labor and immigrant rights advocates applauded the DALE announcement³⁹⁴ and set into motion implementation efforts to support workers in applying. For example, the AFL-CIO released know-your-rights materials on the steps to apply for the protection.³⁹⁵ SEIU released a short video aimed at explaining the new protection for immigrant workers.³⁹⁶ The National Immigration Project and National Immigration Law Center collaborated on a short, bilingual community explainer.³⁹⁷ Soon thereafter, the Tulane Immigrant Rights Clinic, National Immigration Project of the National Lawyers' Guild, Unemployed Workers United, and National Immigration Law Center released a practice manual with guidance for immigration attorneys on assisting immigrant workers in the application process.³⁹⁸ A few months later, labor rights groups also published a manual for organizers that focused on using DALE to support labor investigations and to build worker power.³⁹⁹

The DHS announcement also spurred further guidance from labor agencies on how they would consider requests for their support. In February of 2023, the EEOC released its guidance, making it the final federal labor agency to formally support requests for protection from worker witnesses.⁴⁰⁰ And with the DHS announcement making clear that labor agencies at any level of government could support DALE requests, a number of state and local agencies soon followed suit with formal guidance, including agencies in California,⁴⁰¹

394. Amaury Pineda, *New DHS Process Offers Streamlined Deferred Action for Noncitizen Workers Facing Labor Violations*, JOBS WITH JUSTICE (Feb. 24, 2023), <https://www.jwj.org/new-dhs-process-offers-streamlined-deferred-action> [<https://perma.cc/CZ8U-ZUHY>]; *Policy Update: New DHS Guidance Regarding Immigrant Workers & Protection from Deportation*, ALLIANCE FOR IMMIGRANT SURVIVORS, https://esperanzaunited.org/wp-content/uploads/2023/02/AIS-Policy-Update_2023-New-DHS-Labor-Guidance.pdf [<https://perma.cc/HZ4C-KQKQ>]; Aaron Reichlin-Melnick, *Immigrant Workers Who Report Labor Violations Will Be Protected Under This New Policy*, IMMIGRATION IMPACT (Jan. 19, 2023), <https://www.americanimmigrationcouncil.org/blog/protections-immigrant-workers-labor-violations-policy/> [<https://perma.cc/225G-V5UE>].

395. *Deferred Action for Workers: What You Need to Know*, AFL-CIO (Oct. 26, 2023), <https://aflcio.org/sites/default/files/2023-12/Deferred%20Action%20for%20Workers%20ENG.pdf> [<https://perma.cc/NGF7-J798>].

396. iAmerica, *Explainer: DHS' Guidance to Protect Immigrant Workers*, YOUTUBE (Mar. 29, 2023), <https://www.youtube.com/watch?v=aWvcg8wpu40> [<https://perma.cc/GH3E-SY4V>].

397. *Frequently Asked Questions: Deferred Action for Workers in Labor Disputes*, NATIONAL IMMIGRATION PROJECT & NATIONAL IMMIGRATION LAW CENTER (Mar. 2023), https://www.nilc.org/wp-content/uploads/2023/03/2023_March-NIPNLG-NILC-Worker-FAQ.pdf [<https://perma.cc/4GA3-L3XF>].

398. Mary Yanik et al., *Practice Manual: Labor-Based Deferred Action*, NATIONAL IMMIGRATION PROJECT (Mar. 2023); The practice manual was updated and reissued on Sept. 4, 2024. Mary Yanik et al., NATIONAL IMMIGRATION PROJECT (Sept. 4, 2024), <https://nipnlg.org/work/resources/practice-manual-labor-based-deferred-action/> [<https://perma.cc/8YDZ-6M4T>].

399. Bliss Requa-Trautz et al., *supra* note 35.

400. *EEOC's Support for Immigration-Related Deferred Action Requests to the DHS: Frequently Asked Questions*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (last visited Mar. 8, 2025), <https://www.eeoc.gov/faq/eeocs-support-immigration-related-deferred-action-requests-dhs> [<https://perma.cc/2TPG-3S35>]; Email from Lucy Rosas, EEOC, to Mary Yanik (February 21, 2023) (on file with author).

401. *Frequently Asked Questions on ALRB's Role in Supporting Immigration-Related Prosecutorial Discretion*, AGRICULTURAL LABOR RELATIONS BD., STATE OF CALIFORNIA (last visited Mar. 8, 2025), <https://www.alrb.ca.gov/deferredaction-faq/> [<https://perma.cc/3BY2-W97Q>]; DHS Deferred Action Process in Labor Investigations, DEP'T INDUSTRIAL RELATIONS, STATE OF CALIFORNIA (last visited Mar. 8, 2025), https://www.dir.ca.gov/DHS_deferred_action.html [<https://perma.cc/PK97-ZU4L>].

Illinois,⁴⁰² Massachusetts,⁴⁰³ Minnesota,⁴⁰⁴ New York,⁴⁰⁵ New Jersey,⁴⁰⁶ and Pennsylvania.⁴⁰⁷ Several additional agencies issued statements of interest in response to requests but without publishing formal guidance.

California also went one step further than other states in their support for workers applying for DALE: in addition to agencies issuing statements of interest, Governor Newsom announced a \$4.5 million pilot program to resource legal assistance for farmworkers in Central California to apply for DALE.⁴⁰⁸ The United Farm Workers pushed for and celebrated the initiative, emphasizing that “it is of utmost importance that undocumented workers have access to free and low-cost legal services” so that they can come forward to assist labor investigations and seek protection from deportation.⁴⁰⁹ This is the only known program to provide dedicated state funds for workers to apply for DALE protection.

As implementation efforts gradually reached workers,⁴¹⁰ some local media covered the impact of DALE protections on immigrant workers and the labor investigations they increasingly supported. Louisiana crawfish workers shared how DALE protection allowed them to pursue a labor complaint and rebuild their lives after coming to the U.S. on guestworker visas and then

402. See Chicago Comm’n on Human Relations, *Deferred Action Labor Enforcement Procedures & Information*, (Apr. 20, 2023), <https://www.chicago.gov/content/dam/city/depts/cchr/most-recent-news/CCHR%20Deferred%20Action%20Statement%20of%20Interest%20Toolkit%20Materials%202023.pdf> [<https://perma.cc/8V7C-YGZH>]; *Deferred Action*, ILLINOIS DEP’T LABOR (last visited Mar. 8, 2025), <https://labor.illinois.gov/laws-rules/legal/deferredaction.html> [<https://perma.cc/ZCD3-SPR9>].

403. Mass. Comm’n Against Discrimination, *Notice of Meeting & Agenda* (July 18, 2023), <https://www.mass.gov/doc/notice-of-mcad-public-meeting-agenda-july-18-2023/download> [<https://perma.cc/BH5R-34NG>].

404. See generally Minn. Att’y Gen., *DHS Deferred Action Policy* (June 11, 2024), <https://www.ag.state.mn.us/Consumer/Publications/DeferredAction.asp> [<https://perma.cc/PPN2-4ML4>].

405. N.Y. Dep’t of Labor, *Statement of Interest: Noncitizen Labor Disputes*, (last visited Mar. 8, 2025), <https://dol.ny.gov/statement-interest> [<https://perma.cc/LQ8Z-SF52>]; N.Y. Workers’ Comp. Bd., *NYS Workers’ Compensation Board Joins State Effort to Protect Undocumented Workers During Labor Investigations* (Jan. 8, 2024), <https://www.wcb.ny.gov/content/main/PressRe/protect-undocumented-worker-labor-investigations.jsp> [<https://perma.cc/3VL4-FH65>].

406. *Relief for Immigrant Workers*, DEP’T OF LABOR & WORKFORCE DEV., https://nj.gov/labor/myworkrights/worker-protections/immigrant_workers/ [<https://perma.cc/5UHB-BARZ>] (last visited Mar. 8, 2025).

407. Eric Schulz, *Immigration Status & Workplace Protections: What You Need to Know*, CITY OF PHILADELPHIA DEP’T OF LABOR, (Oct. 23, 2023), <https://www.phila.gov/2023-10-23-immigration-status-and-workplace-protections-what-you-need-to-know/> [<https://perma.cc/D7Z8-XFDU>].

408. California Governor Gavin Newsom, *California Providing Free Legal Services for Undocumented Farmworkers*, CAWEB PUBLISHING SERVICE (July 19, 2023), <https://www.gov.ca.gov/2023/07/19/california-providing-free-legal-services-for-undocumented-farmworkers/> [<https://perma.cc/PJ4J-NUZV>].

409. *Id.*; see also Nicole Foy, *California’s farmworkers in labor investigations will get free legal help with immigration*, CAL MATTERS (July 21, 2023), <https://calmatters.org/california-divide/2023/07/farmworker-labor-california/> [<https://perma.cc/CB32-NFQF>].

410. Organizations turned to legal clinics to collectively serve groups of workers eligible for DALE. *Immigration Legal Clinics for Labor-Based Deferred Action*, NATIONAL IMMIGRATION LAW CENTER (Sept. 1, 2023), <https://www.niic.org/resources/toolkit-immigration-legal-clinics-for-labor-based-deferred-action/> [<https://perma.cc/XLD3-VRL6>]. Law school clinics also stepped up to provide help. See, e.g., Kayla Strube, Seton Hall Law Center for Social Justice and Make the Road NJ Host DALE Clinic for Undocumented Workers (May 10, 2024), <https://law.shu.edu/news/seton-hall-law-center-for-social-justice-and-make-the-road-nj-host-dale-clinic-for-undocumented-workers.html> [<https://perma.cc/M3JQ-BNVE>].

being fired by their employer in retaliation for organizing.⁴¹¹ In New York, immigrant workers with the Restaurant Workers Union spoke of targeted misinformation to undermine union support as well as new hope from potential DALE protections requested by the National Labor Relations Board as part of their labor complaint.⁴¹² A few months later, another local outlet reported that New York state agencies had issued 41 statements of interest, covering over a hundred workers, and several had been approved for DALE protection.⁴¹³ One of those approved described his feeling of relief at being able to come forward: “For me, this is the most unbelievable thing. To finally be on my own two feet, without fear, to finally be able to take this step.”⁴¹⁴ Workers in Philadelphia sought and received a statement of interest from their city’s labor agency, in another important local breakthrough.⁴¹⁵ And Wisconsin labor organizers also celebrated DALE protection as critical to advancing labor enforcement, with one worker approved for protection describing more security at work: “a lot of people that don’t have legal status, they are victims . . . And the companies know that, so they treat them differently because they believe that they can do pretty much whatever . . .”⁴¹⁶

In January 2024, one year after the initial announcement, DHS issued a press release updating its guidance with a renewal process for deferred action and sharing its progress from the first year of the program.⁴¹⁷ DHS reported that the agency had “protected over one thousand workers” through its expedited labor enforcement process.⁴¹⁸ The simultaneously announced renewal process made clear that workers granted two years of deferred action could seek further protection by presenting an updated statement of interest from a labor agency that explains the ongoing labor agency’s need for immigration protections.⁴¹⁹ Advocates also released a report on the first year of deferred

411. James Finn, *How Louisiana Crawfish Workers Helped Reshape the U.S. Immigration System*, NOLA.COM (Sept. 5, 2023), https://www.nola.com/news/business/louisiana-crawfish-workers-reshaped-us-immigration-rules/article_6a6e59a0-d18a-11ed-b7a2-eb5ee6e1f79e.html [<https://perma.cc/8JE9-XU76>].

412. Amir Khafagy, *New National Labor Relations Board Policies Can Protect Undocumented Workers*, DOCUMENTED (Oct. 2, 2023), <https://documentedny.com/2023/10/02/national-labor-undocumented-workers-union/> [<https://perma.cc/9HJV-CXQY>].

413. Claudia Irizarry Aponte, *Immigrant Workers Are Informing on Bad Bosses – And Getting Work Permits*, THE CITY (Jan. 30, 2024), <https://www.thecity.nyc/2024/01/30/deferred-action-immigrant-workers-work-permits-dhs/> [<https://perma.cc/V6DH-EWXU>].

414. *Id.*

415. Juliana Feliciano Reyes, *Immigrants Facing Workplace Abuse Can Now Get Temporary Deportation Protection, with Help From the City Labor Department*, PHILADELPHIA INQUIRER (Mar. 7, 2024), <https://www.inquirer.com/news/philadelphia/deferred-action-labor-enforcement-immigrants-workers-20240307.html> [<https://perma.cc/DT6M-YV4R>].

416. Joe Schulz, *Immigrants in Green Bay Say Federal Policy Protects Them From Deportation During Labor Disputes*, WISC. PUBLIC RADIO (Sept. 10, 2024), <https://www.wpr.org/economy/immigrants-in-green-bay-say-federal-policy-protects-them-from-deportation-during-labor-disputes>.

417. *DHS Helps Hold Exploitative Employers Accountable*, U.S. DEP’T HOMELAND SEC. (Jan. 17, 2024), <https://www.dhs.gov/archive/news/2024/01/17/dhs-helps-hold-exploitative-employers-accountable> [<https://perma.cc/DGJ9-6YFA>].

418. *Id.*

419. *Id.*

action, profiling a few of the local organizations supporting worker applications and how DALE supported their labor enforcement work.⁴²⁰

Advocates reacted to the progress report of one thousand approved workers—a low number, given the scale of labor violations against immigrant workers—by redoubling outreach and implementation efforts. As Nadia Marin-Molina of NDLON reflected: “Obviously it’s the first year, it’s taking time. But, you know, there’s so many workers who should be eligible for this and who should be able to apply, that it’s clear that the numbers are not—it’s just not large enough.”⁴²¹

Alongside these implementation efforts by advocates, labor agencies asked DHS to lengthen the term of deferred action granted through the DALE process from two years to four years to support their enforcement interests. Labor agencies reported that cases involving immigration issues frequently became protracted, leading them to ask DHS to issue a longer term of initial deferred action to protect witnesses and facilitate enforcement. In May of 2024, the NLRB General Counsel wrote to DHS to ask for a four-year period to better serve the agency’s enforcement interests because the average case length for cases involving an immigration issue at the NLRB was over three years.⁴²² Twenty-seven state and local labor agencies similarly wrote to DHS calling for four years of deferred action for worker witnesses because of the “complex and protracted litigation and multi-year monitoring” that agencies must deploy to enforce workplace protections in industries where employers rely on subcontractors, misclassification, and informal or no recordkeeping to evade enforcement.⁴²³ The agencies also detailed employer schemes involving immigrants that had complicated labor enforcement efforts and demonstrated the need for longer worker protection.⁴²⁴ Advocates echoed these sentiments, describing worker hesitancy to come forward because of the limits of two-year protection as well as instances of prolonged labor investigations and employer intransigence.⁴²⁵

420. Cabell, Pearson & Hahn, *supra* note 379.

421. Irizarry Aponte, *supra* note 410.

422. Letter from Jennifer A. Abruzzo, General Counsel, Nat’l Labor Relations Bd. to Secretary Alejandro Mayorkas, Dep’t Homeland Sec., U.S. CITIZENSHIP AND IMMIGR. SERV., at 1 (May 28, 2024), <https://www.uscis.gov/sites/default/files/document/foia/NationalLaborRegulationsBoard-Abruzzo.pdf> [<https://perma.cc/T6J6-B9GP>].

423. Press Release, *California. Dep’t of Justice, Attorney General Bonta Urges DHS to Extend Deferred Action in Workers Witness Cooperation Case* (July 2, 2024), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-urges-dhs-extend-deferred-action-workers-witness> [<https://perma.cc/SC6L-XW53>]; Letter from State of Illinois, Kwame Raoul, et al., to Secretary Alejandro Mayorkas, Dep’t Homeland Sec., ILL. ATT’Y GEN., MASS. ATTY’S GEN., SEATTLE OFF. OF LAB. STANDARDS at 2 (July 2, 2024), <https://oag.ca.gov/system/files/attachments/press-docs/7-2-2024%20Letter%20to%20Secretary%20Mayorkas%20re%20Deferred%20Action%20Program.pdf> [<https://perma.cc/J9PC-9GS8>]; BK Reader Staff, *NYC Comptroller Calls for Protection of Noncitizen Victims of Labor Violations*, BK READER (July 7, 2024), <https://www.bkreader.com/policy-government/nyc-comptroller-calls-for-protection-of-noncitizen-victims-of-labor-violations-9171945> [<https://perma.cc/RBM4-FCPM>].

424. *Id.*

425. Advocate Letter on Extending Grants of Deferred Action for Labor Enforcement (May 2024) (on file with author).

In late July of 2024, DHS updated its guidance on labor deferred action to now reflect that the agency would issue initial grants of four years of deferred action in all newly adjudicated cases.⁴²⁶ The agency also described how workers who had received two years of deferred action could apply to extend their protection to four years, which required an additional filing but no further evidence from the labor agency that supported the initial request.⁴²⁷ The longer initial term of protection as well as advocate outreach efforts exponentially increased the number of new DALE applications in the months that followed, with nearly 8,000 approvals by November 2024.⁴²⁸

But the news that former President Trump had won the 2024 presidential election cast a long shadow over these successes. With mass deportations central to the Trump campaign platform, it was widely understood that the days were numbered for the DALE process under Trump, with very long odds of any further approvals for applications pending before DHS.⁴²⁹

Soon after Trump's inauguration in January of 2025, DHS quietly paused most DALE processing, leaving workers with pending applications in limbo.⁴³⁰ Guidance on the DALE process has been archived and the principal form for the application has been revised to remove the option to apply for labor-based deferred action.⁴³¹ In anticipation of these changes, most advocates stopped submitting new applications in November 2024, when it became clear that the applications would no longer be adjudicated before Trump's inauguration.⁴³² With processing before USCIS stalled, workers will not likely be able to renew protections beyond their initial two or four-year grant of deferred action.

These quiet changes are terrible news for immigrant workers, but they pale in comparison to other shocking announcements during the latest immigration crackdown. The administration has moved to revoke status, intimidate, and detain and deport other categories of immigrants with temporary protections such as those with temporary protected status,⁴³³ parole,⁴³⁴ and asylum

426. See *DHS Support of the Enforcement of Labor and Employment Laws*, *supra* note 23.

427. *Id.*

428. Jeanne Kuang, *California Empowered Workers to Speak Out at Work. Trump Could End Its Protections*, CAL MATTERS (Nov. 11, 2024), <https://calmatters.org/california-divide/2024/11/deportation-trump-california-workers/> [<https://perma.cc/WB74-499Q>]; Jorge Múgica, *This Little-Known Program Protects Immigrant Workers From Retaliation*, LABOR NOTES (Oct. 10, 2024), <https://labornotes.org/2024/10/little-known-program-protects-immigrant-workers-retaliation> [<https://perma.cc/WTE8-5LTA>].

429. Andrea Hsu, *These Immigrant Workers Shined a Light on Labor Abuse. Will Trump Let Them Stay?*, N.P.R. (Jan. 15, 2025), <https://www.npr.org/2025/01/15/nx-s1-5259891/labor-trump-illegal-immigration-deferred-action-wage-theft> [<https://perma.cc/7XR2-K58L>]; Kuang, *supra* note 428.

430. Elias Schisgall, *USCIS Quietly Ends Program to Shield Workers Reporting Abuse*, BLOOMBERG LAW (July 17, 2025), <https://news.bloomberglaw.com/daily-labor-report/uscis-quietly-ends-program-to-shield-workers-reporting-abuse> [<https://perma.cc/Y7JL-FYPD>].

431. *Id.*

432. *Id.*

433. Juliana Kim, *DHS Ends Temporary Protected Status for Thousands from Nicaragua and Honduras*, N.P.R. (July 7, 2025), <https://www.npr.org/2025/07/07/g-s1-76373/trump-immigration-tps-nicaragua-honduras> [<https://perma.cc/E2G3-Q87Y>].

434. Jack Herrera, *Trump's De-legalization Campaign*, NEW YORKER (June 5, 2025), <https://www.newyorker.com/news/the-lede/trumps-de-legalization-campaign> [<https://perma.cc/2KMT-HRHM>].

seekers.⁴³⁵ So far, this administration has not targeted immigrant workers with DALE for enforcement, nor has DHS moved to revoke their deferred action or work permits en masse.⁴³⁶ In fact, interestingly, ICE issued a handful of approvals in the first months of the new administration, even as USCIS seems to have entirely halted their processing of these cases.⁴³⁷ The cumulative result is that, even in the midst of the program being dismantled, DALE continues to protect thousands of workers who hold deferred action and valid work permits until they expire.

The end of DALE processing, coupled with the broad immigration crackdown of the new administration including worksite raids, has reawakened and supercharged immigrant workers' fears of reporting labor abuse.⁴³⁸ Labor agencies now face the familiar challenge of trying to encourage immigrant workers to come forward without any clear pathway to protection from deportation.⁴³⁹ As prominent health and safety advocate Debbie Berkowitz noted, some employers "will be able to get away with cutting corners on safety and maybe even wages" now that DALE has largely ended.⁴⁴⁰ So, once again, as in the era before DALE was announced, the enforcement of immigration law will undermine labor enforcement.

III. THE FUTURE FOR IMMIGRANT WORKERS AFTER TWO YEARS OF DALE

With DALE processing currently stalled, the program ran at full steam for two years from its announcement in January 2023 to the quiet dismantling after Trump's inauguration in January 2025. Even with this premature end, the program has had a profound impact, and the advocacy leading up to the DALE announcement and work done in its wake has fundamentally changed the playing field. It may be too early to assess all aspects of DALE, but some preliminary observations emerge and can inform future work in this area.

First, DALE is by far the largest scale protection of immigrant worker witnesses in U.S. history. Two years after the DHS announcement of DALE, approximately 10,000 workers had received protection through the process,⁴⁴¹ with an exponential increase in applications in the last few months before the change in administration that was likely to continue if the election had gone differently. Hundreds of thousands of workers were likely eligible

435. Ximena Bustillo, *Asylum-seekers Thought They Were Following the Rules. Now Some are Told to Start Over*, N.P.R. (Aug. 10, 2025), <https://www.npr.org/2025/08/10/nx-s1-5487598/asylum-seekers> [<https://perma.cc/N3XY-Q6UD>].

436. Schisgall, *supra* note 430.

437. *Id.*

438. *Id.*; Sarah Lazare, *How Trump's Immigration Crackdown Chills Organizing and Erodes Conditions for All Workers*, THE NATION (Jan. 15, 2026), <https://www.thenation.com/article/economy/trump-immigration-crackdown-labor-organizing-working-conditions/>.

439. Schisgall, *supra* note 430.

440. *Id.*; see also Tim Ryan, *Trump Immigration Policy May Hinder Labor Law Enforcement*, LAW360 (May 16, 2025), <https://www.law360.com/employment-authority/articles/2341279/trump-immigration-policy-may-hinder-labor-law-enforcement> [<https://perma.cc/3L6Y-EFZY>].

441. See *California Empowered Workers*, *supra* note 425.

for the protection, if they had been made aware and had access to legal advice and assistance to apply. In contrast, before the organizing for DALE of the past several years, immigration protections for workers reporting labor violations were piecemeal: a few dozen workers won some form of discretionary protection after herculean efforts to lift up their cases. Only some workers qualified for U or T visas as crime victims, and even those who qualified faced an arduous application and long waits. These previously narrow, difficult, and uncertain avenues to protection meant that workers had to take a leap of faith in reporting to labor agencies. While a few brave leaders came forward even before DALE, many others were too fearful to do so and so labor enforcement efforts suffered. In contrast, DALE was prophylactic, seeking to protect workers to enable them to come forward and to prevent employers from carrying out threats of immigration retaliation. DALE further was the first process that established clear criteria for broad protection of worker witnesses to encourage them to come forward to labor agencies. This is a blueprint for facilitating labor enforcement that can be resurrected and improved upon when future political opportunities arise.

Second, DALE built inter-agency collaboration to protect immigrant workers and specifically created a larger role for labor agencies in addressing immigration status. All three major federal labor agencies and over 20 state or local agencies issued statements of interest, supporting protection for potential worker witnesses. Those statements of interest did not guarantee that immigration adjudicators would approve deferred action,⁴⁴² but approval rates seemed to be high overall,⁴⁴³ which is consistent with the immigration adjudicators showing appropriate deference to the request from a labor agency that is included in every application. Therefore, the advocacy for DALE pushed labor agencies to envision their role and their power as more than mere neutrality or indifference to immigration status. Through the DALE process that emerged, labor agencies built relationships with the immigration agencies and learned how to advance their enforcement interests through engagement. Even under the second Trump administration, with the federal labor agencies led by new political appointees hostile to immigrant rights, the state and local labor agencies that have been activated for DALE may continue to play a significant role in advocating for immigrant workers. Also, these agencies may be willing to go further than before because of the stakes for their own labor enforcement efforts, which have been made clearer from two years of having DALE as a tool to encourage and protect immigrant worker witnesses in their investigations.

442. James Finn, *For Abused Louisiana, Mississippi Migrant Workers, Securing Protections Is Uphill Battle*, NOLA.COM (Mar. 24, 2024), https://www.nola.com/news/politics/la-ms-migrant-workers-struggle-to-get-new-protections/article_c6fa2e8c-e792-11ee-8d19-9fcf93607166.html [https://perma.cc/AVY3-DLWS] (describing a denied request for DALE along with author commentary that “any denials are significant . . . because they indicate that DHS is refusing protection to someone who is a potential or active witness in a DOL (or other labor agency) case.”)

443. *Process for Requesting Department of Labor Support*, *supra* note 371.

Third, the collaboration required to apply for DALE applications has built new expertise among organizers, advocates, and attorneys, as well as increased collaboration between labor and immigrant rights experts. Labor organizers learned to accurately describe both the benefits and limitations of DALE, with many coordinating large scale legal clinics where a combination of volunteers and trained attorneys advised workers, gathered evidence, and filled out applications. Legal aid, labor, and employment attorneys delved into the immigration concerns of their clients more deeply, screening for DALE eligibility and sometimes advising clients or filing immigration applications. Policy advocates and attorneys learned that workers themselves are the best messengers for getting the word out and that organizers play an indispensable role in connecting workers to the labor agency investigation. Every advocacy constituency grew, as more and more people learned of DALE and how it could be used to support labor enforcement and immigrant workers. A listserv of advocates started in July 2023 now has over six hundred members, with a monthly call that regularly exceeds sixty participants. This means that DALE protections laid the groundwork for a more deeply interconnected and significantly expanded community of immigrant worker advocates, with more advanced expertise as well as experience at every level of work, from advising and supporting workers, advocating with labor agencies, and navigating immigration needs and the immigration agencies. This can serve as a reservoir to draw on in the coming years.

Fourth, DALE set the precedent that immigrant workers can be law enforcers, and that immigration officials can and should defer to other interests and other agencies even as they exercise their core authority in immigration adjudications. The design of DALE elevated the expertise of labor agencies and recognized that labor enforcement interests are entitled to deference, rather than labor interests always giving way to immigration enforcement interests. More broadly, this process recognizes that immigration enforcement implicates a range of policy interests and values, which immigration adjudicators should consider in enforcement decisions. In contrast, most past prosecutorial discretion programs have focused almost exclusively on the humanitarian interests of an individual immigrant. That framing narrows the scope of inquiry and, in times of high political polarization, seems destined to fail to restrain immigration enforcement. But the justification for DALE is that all workers—both immigrant and U.S. citizen workers—and all labor agencies should have a vested interest in leveling the playing field and enabling effective labor enforcement, which requires protection for immigrant workers vulnerable to deportation. This positions immigrant workers as law enforcers (rather than law breakers) and elevates a conception of rule of law that extends beyond borders, security, and social control to consider the cost to society of lawlessness in U.S. workplaces. This has the potential to transform the conversation on immigration and serve as a roadmap for better immigration

policy that serves a broader understanding of the rule of law and the public interest.

Lastly, and relatedly, DALE protections show the opportunity for policy that aligns the interests among the working class between immigrant and U.S. workers, even in times of the increasing polarization of immigrant rights. Advocacy for DALE argued for these immigration protections based on labor enforcement interests, including for the benefit of both immigrant workers and the U.S. workers laboring alongside them, who are imperiled when immigrant workers are deterred from reporting labor violations. At first glance, this could be seen as an example of interest convergence in that it facially appeals to the interests of a more dominant group: U.S. workers who do not have vulnerable immigration status. But through an intersectional lens that recognizes class, race, and racial capitalism, the dominant group should be more accurately identified as employers who have the authority to set conditions in the workplace and to retaliate against workers who report violations. Through that lens, U.S. and immigrant workers have a converging interest as both non-dominant groups—members of the working class—in holding employers accountable through labor enforcement. Therefore, as Professor Stephen Lee identified in defending prosecutorial discretion a decade ago, immigration protections for those who assert labor claims rewards “that worker’s willingness to stand in solidarity with U.S. workers,” with such workers more likely to hold “cross-status social and economic bonds.”⁴⁴⁴ DALE as a policy can promote this cross-status solidarity among workers united in efforts to improve labor standards by removing the fear of immigration retaliation as a wedge between workers.

All of these lessons can inform both future immigrant worker policy as well as efforts to defend immigrant workers in the next several years. As the new administration is ramping up worksite immigration raids and deportations in general, worker advocates can draw on the constituencies built and strengthened in the last several years for DALE. And meanwhile, worker advocates should also prepare for the next political opportunity to resurrect and improve upon DALE as a vehicle to grapple with the legitimate fears of immigrant workers, which impede robust enforcement of labor rights for all workers in the U.S.

IV. CONCLUSION

Throughout U.S. history, labor and immigration enforcement efforts have been deeply intertwined. This history reflects that the arc for immigrant workers has generally trended toward progress but in fits and starts with uneven advancement as well as periods of significant retrenchment, such as the advent of employer sanctions and the first Trump administration’s resurrection of mass worksite raids. The second Trump administration is another

444. Lee, *Screening for Solidarity*, *supra* note 51, at 235, 242.

period of retrenchment. The end of DALE processing, aggressive worksite raids targeting day laborers, and targeting of immigrant rights defenders all serve to embolden exploitive employers, deter immigrant workers from reporting abuse, and hinder labor enforcement efforts. But the history also demonstrates that even in periods of retrenchment, political opportunity may be on the horizon.

Deferred action for labor enforcement was a particularly bright spot along that arc of progress for immigrant workers: it offered prophylactic protection from deportation that encouraged immigrant workers who were potential witnesses to come forward and assist labor enforcement. The two years of protections being available built constituencies committed to immigrant worker rights that have outlasted the administrative guidance: immigrant workers who have been granted DALE protection, state labor agencies committed to immigrant worker rights, and an expanded field of organizers, advocates, and attorneys with labor and immigration expertise and experience. These constituencies are serving as a bulwark against attacks on immigrant workers and also stand ready to resurrect affirmative protections for immigrant worker witnesses at the earliest opportunity.