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Beyond the Chilling Effect: Immigrant Workers and the Regulation of Occupational Safety & Health

Jayesh Rathod

American University Washington College of Law, jrathod@wcl.american.edu

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BEYOND THE “CHILLING EFFECT”: IMMIGRANT WORKER
BEHAVIOR AND THE REGULATION OF OCCUPATIONAL SAFETY
& HEALTH

BY
JAYESH M. RATHOD*

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I. INTRODUCTION

On July 6, 2005, flyers appeared at the Seymour Johnson Air Force Base in Goldsboro, North Carolina, alerting a group of contract workers about a mandatory workplace safety meeting to be held later that day.¹ The flyers, written in both English and Spanish, emphasized that the meeting was being sponsored by the Occupational Safety and Health Administration (OSHA), and touted the availability of free doughnuts and coffee.² Later

* Assistant Professor of Law, American University Washington College of Law. Thanks to Elizabeth Keyes and Sarah Paoletti for their comments on earlier drafts of this paper. I also thank WCL students Maggie Donahue, Nishant Keerikatte, Jamie Rudert, and Dennis Tristani for their editorial and research assistance.

1. Steven Greenhouse, *Immigration Sting Puts 2 U.S. Agencies at Odds*, N.Y. TIMES, July 16, 2005, at A11.

2. *Id.*; Flyer, *OSHA Briefing* (July 6, 2005) (on file with author).

that day, forty-eight workers – immigrants from El Salvador, Honduras, Mexico, and the Ukraine – attended the meeting, only to discover the true purpose behind the gathering: a sting operation, conducted by U.S. Immigration and Customs Enforcement (ICE), to apprehend undocumented workers.³ Agents from ICE and other cooperating agencies arrested the workers on the spot.⁴

In the immediate aftermath of the Goldsboro raid, labor leaders, immigrant advocates, and safety professionals vigorously denounced ICE's actions, warning that such tactics would lead workers to distrust OSHA and would undermine the agency's efforts to reach out to immigrant workers.⁵ And in the weeks and months following the sting, as advocates urged ICE to discontinue similar enforcement actions, they warned of the "chilling effect" that such tactics would have on workers who would otherwise seek to assert rights and remedies relating to occupational safety and health.⁶ These observations justifiably placed concern about immigration status as a key factor guiding immigrant worker behavior in the United States. As described more fully below, concerns about the "chilling effect" have been articulated in other areas of U.S. employment and labor law (apart from occupational safety and health), in diverse scenarios where disclosure or

3. Greenhouse, *supra* note 1.

4. *Id.*; Sandy Smith, *Immigration Agents, Posing as OSHA Trainers, Arrest Workers*, EHS TODAY (July 18, 2005, 12:00 AM), <http://ehstoday.com/news/ehs_imp_37691/>.

5. *See, e.g.*, Tyler Moran, *North Carolina Work Site Enforcement Action Puts Workers at Risk*, IMMIGRANTS' RTS. UPDATE (Nat'l Immigration Law Ctr., L.A., Cal.) (Oct. 5, 2005), <http://www.nilc.org/immsemplmnt/wkplce_enfrmnt/wkplcenfr021.htm> (Warning that the ICE action will make it "extremely difficult for OSHA – as well as other governmental agencies – to gain the trust of immigrant workers in the future."); Press Release, AFL-CIO, Statement by AFL-CIO Executive Vice President Linda Chavez-Thompson on False OSHA Meeting Used by Immigration and Customs Enforcement in North Carolina Raid (July 14, 2005), *available at* <<http://www.aflcio.org/mediacenter/prsptm/pr07142005.cfm>> ("ICE's actions not only undermine OSHA's mission, but they also seriously erode the trust between agencies charged with protecting workers and the immigrant community."); Letter from Jack H. Dobson, Jr., President, Am. Soc'y Safety Eng'rs to Michael Chertoff, Sec'y of Homeland Security, Regarding the Impersonation of OSHA Personnel by ICE Agents (Feb. 14, 2006), *available at* <http://www.asse.org/professionallaffairs_new/communications/federal/archive/files/ngcomm152.html> (expressing concern over the "egregious usurpation of another federal agency's good name and positive contributions to occupational safety and health").

6. *See, e.g.*, Monica Guizar, *ICE Discontinues Health and Safety Ruse for Immigration Enforcement*, IMMIGRANTS' RTS. UPDATE (Nat'l Immigration Law Ctr., L.A., Cal.) (May 23, 2006), <http://www.nilc.org/immsemplmnt/wkplce_enfrmnt/wkplcenfr023.htm> ("Immigrant workers' rights advocates and labor unions expressed concern that worksite enforcement actions such as ICE agents' impersonation of OSHA personnel would have a chilling effect on immigrant workers."); Letter from Monica Guizar, Emp't Pol'y Att'y, Nat'l Immigration Law Ctr., to Jonathan Share, Deputy Assistant Sec'y of Labor for Occupational Safety & Health, Regarding OSHA and Katrina Rebuilding Efforts (Oct. 4, 2005), *available at* <http://www.nclr.org/files/34264_file_OSHA_Final_letter.pdf> (the National Immigration Law Center, the AFL-CIO, and the National Council of La Raza offer "to work with OSHA in remedying the potential chilling effect that [the Goldsboro raid and similar] type[s] of immigration enforcement will have on workers reporting health and safety concerns in the workplace").

reporting of immigration status is positioned as a force that inhibits immigrants from claiming workplace protections.⁷

The importance of immigration status to foreign-born workers, particularly those who are undocumented or who have temporary status, cannot be understated. Status permeates nearly all aspects of an immigrant's existence in the U.S., and it would be unreasonable to discount it as a factor that influences behavior. Moreover, the link between status and immigrant behavior is likely to be pronounced in the workplace, given the connection between lawful status and employment authorization.⁸ In legal and advocacy circles, however, the focus on immigration status vis-à-vis workplace protections has been heightened by the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*,⁹ and the line of cases it has spawned. *Hoffman Plastic Compounds* limited relief available to undocumented workers under federal labor law, noting that awarding full remedies would "trivialize[] the immigration laws [and would] also condone[] and encourage[] future violations."¹⁰ By positing that federal immigration and labor enforcement create competing incentives for immigrants, *Hoffman Plastic Compounds* has sharpened the focus on macro-level legal policies and economic forces, and on their effect on immigrants. Indeed, *Hoffman Plastic Compounds* has indelibly framed discourses relating to immigrant worker behavior in terms of these broader structural forces.

With this article, however, I encourage legal scholars, lawmakers, and immigration advocates to strive for a more nuanced understanding of immigrant worker behavior, and to situate immigration status and the "chilling effect" as one of many relevant factors that guide behavior. The case of occupational safety and health provides an optimal lens to examine the multifaceted roots of immigrant worker behavior – in the context of interactions with employers and regulatory bodies, and relating to choices that workers themselves make about how to perform their work.¹¹ While

7. See *infra* Section II for a fuller discussion of the "chilling effect" and immigrant workers.

8. Although this link is exceedingly complex, several laws proscribe the employment of large classes of noncitizens. See, e.g., 8 U.S.C. § 1182(a)(5)(A)(1) (2006) ("Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless [certain conditions are met]."); 8 U.S.C. § 1324a(a)(1)(A) (2006) ("It is unlawful for a person or other entity . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.").

9. 535 U.S. 137 (2002).

10. *Id.* at 139.

11. When striving to understand immigrant worker behavior as it relates to occupational safety and health, there are many points of inquiry: whether a given worker will request protective equipment or a change in unhealthy working conditions; whether she will properly use equipment provided to her; whether she will perform her assigned duties in a healthy and safe manner; whether she will contact

status-related concerns may influence many of the decisions that immigrant workers make, additional determinants must be considered. By drawing upon scholarship from other disciplines – including anthropology, economics, psychology, and sociology – a more robust understanding of immigrant worker behavior can emerge. This scholarship suggests that worker attributes (apart from status), and a range of external influences, also shape worker behavior.

An understanding of these multiple currents, and the powerful intersectionalities between immigration status and other factors, will contribute to more effective policy making relating to occupational safety and health. Apart from providing guidance for safety and health regulations, the inquiry also uncovers how other aspects of the existing regime of employment, labor, and immigration laws might contribute in unexpected ways to occupational safety and health concerns. This analytical shift also validates the importance of individual worker attributes and experiences, which, at times, are subsumed in debates about broader structural conditions.¹² Finally, it acknowledges the autonomy of immigrant workers and the multiple forms of resistance practiced by these workers, notwithstanding concerns related to status.¹³ In short, this inquiry is premised on a theory of agency that situates immigrant worker behavior as a product of *both* individual autonomy and the structural conditions that shape human experiences and identities.¹⁴

The focus on worker behavior in this article also complements research into other factors that influence occupational health and safety conditions. This article, which explores the underpinnings of worker behavior, serves as the theoretical prelude for the second in a series of three articles on immigrant workers in the U.S. and occupational safety and health. The first contribution, *A New Vision for Workplace Regulation*, examined recent trends in immigrant worker fatalities through the lens of

OSHA if safety- or health-related concerns arise at her workplace; whether she will communicate her concerns with an OSHA Compliance Safety & Health Officer; and more.

12. For a thoughtful exploration of the societal and individual stories behind *Hoffman Plastic Compounds*, see Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

13. Christian Zolniski, *Immigrant Labor in the New U.S. Economy: Anthropological Notes*, in *LABOR IN CROSS CULTURAL PERSPECTIVE* 265, 270-71, 273-74, 277 (E. Paul Durrenberger & Judith E. Martí eds., 2006) (describing social networks, the informal economy, and extended households as sites of resistance for immigrant labor in Silicon Valley).

14. See Susan D. Carle, *Theorizing Agency*, 35 *AM. U. L. REV.* 307, 318 (2005) (exploring the classical pragmatist approach to theorizing agency, as an alternative to both liberal individualism and post-structuralism).

OSHA and its history, structure, and operations.¹⁵ Beginning with this article, I turn to a second important determinant of occupational safety and health – namely, the behavior of workers themselves. This article presents multiple theories of worker behavior, which I intend to test through empirical work in the future. The third article will examine the role of employers, their perceptions of immigrant workers, and their compliance with safety and health standards.

In Section II of this article, I briefly explore the concerns related to status and the “chilling effect” frequently highlighted in discussions of immigrants and workplace rights – including discussions of occupational safety and health. In particular, I note how the normative frame of *Hoffman Plastic Compounds* has sharpened the focus on questions of status. In Section III, I underscore the need for a more robust understanding of the forces that underlie the behavior of immigrant workers vis-à-vis safety and health protections. To this end, I draw upon literature from multiple disciplines and detail some of the different factors that may influence the choices that immigrant workers make. I conclude, in Section IV, with an initial assessment of the theories explored earlier and articulate the need for empirical work to test these theories.

II. IMMIGRATION STATUS & THE “CHILLING EFFECT”

The passage of the Immigration Reform and Control Act (IRCA) in 1986 marked, for the first time at the federal level, the prohibition against employing unauthorized immigrants.¹⁶ IRCA created a regime for the enforcement of these provisions through the imposition of civil fines and criminal penalties.¹⁷ Although IRCA was designed to reduce unauthorized migration by targeting employers who hire undocumented workers, enforcement generally declined following the law’s passage, until a very recent surge in enforcement activity.¹⁸ When enforcement actions do occur,

15. Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety & Health Regime – Part I: A New Vision for Workplace Regulation*, 33 N.Y.U REV. L. & SOC. CHANGE 479 (2009).

16. Immigration Reform and Control Act of 1986 §101(a)(1), Pub. L. No. 99-603, 100 Stat. 3360 (codified as amended at 8 U.S.C. § 1324a (2006)); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 193 (2007).

17. 8 U.S.C. §§ 1324a(e)(4), (f) (2006) (setting out civil and criminal penalties for noncompliance with the IRCA).

18. See Wishnie, *supra* note 16, at 209 (noting a decline in IRCA enforcement throughout the 1990s, and through 2005). In April 2009, the Obama administration announced a new worksite enforcement strategy, including an enhanced focus “on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration.” Press Release, U.S. Dep’t of Homeland Security, *Worksite Enforcement Strategy* (Apr. 30, 2009), available at <http://www.ice.gov/doclib/pi/news/factsheets/worksite_strategy.pdf>. Subsequent reports indicate that DHS has, in fact, stepped up its IRCA enforcement. See Elise Fialkowski, *The Administration’s New*

they can take the form of pre-planned workplace raids,¹⁹ or, as the Obama administration has preferred of late, behind-the-scenes audits of employment records that result in the termination of employees.²⁰

Given the enforcement tactics used over the years, immigrant advocates have warned of a “chilling effect” that inheres in IRCA’s basic architecture – namely, that workers will be reluctant to complain about substandard labor conditions, lest they draw any government attention to the fact of their unauthorized employment or undocumented status. Advocates have also expressed concern about a slight variation on the “chilling effect”: that employers can, and often do, use the threat of deportation or other immigration consequences as a strategy to dissuade immigrant workers from asserting their labor rights. When workers invoke labor protection, and immigration consequences follow, the “chilling effect” is at its coldest. In this third scenario, other workers are reluctant to file complaints (lest they meet a similar fate), the reputation of labor agencies and their employees is sullied, and workers conflate labor inspectors with immigration enforcement agents. Under each of these formulations, when the “chilling effect” silences and immobilizes workers, degraded working conditions and weakened workplace standards are an inevitable result.

While the “chilling effect” is certainly not a new phenomenon, it has received particular attention since the 2002 U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB*. In that case, an undocumented worker named Jose Castro was laid off from his job at Hoffman Plastic Compounds due to his participation in union organizing activities.²¹ Attorneys for Castro and three other laid off employees brought unfair labor practice charges before the National Labor Relations Board (NLRB). The NLRB found that Hoffman had unlawfully targeted Castro and his co-workers due to their union involvement and ordered that they be reinstated

Work Site Enforcement Initiatives, BUS. L. TODAY, Jan.-Feb. 2010, at 17, available at <<http://www.abanet.org/buslaw/blt/2010-01-02/fialkowski.shtml>> (reporting a significant increase in the number of Notices of Inspection issued by DHS to U.S. employers).

19. Yvonne Abraham & Brian R. Ballou, *350 Are Held in Immigration Raid*, BOSTON GLOBE, Mar. 7, 2007, at A1 (describing the apprehension of 350 immigrant workers in New Bedford, Massachusetts, as part of a large-scale workplace raid conducted by ICE); Spencer Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008 (offering different perspectives on the raid at an Agriprocessors, Inc., plant in Postville, Iowa). The sting operation at Goldsboro is another example of a workplace raid targeting the employment of undocumented workers.

20. Daniel Connolly, *Immigration Audits Take Place of Raids on Places of Employment*, MEMPHIS COM. APPEAL, Nov. 29, 2009, at B1 (observing the increased use of audits by ICE in pursuing employers that fail to comply with employment eligibility verification requirements).

21. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

with back pay.²² The NLRB modified its ruling in subsequent proceedings, but ultimately decided that Castro should be entitled to back pay, notwithstanding his undocumented status. In the Board's view, the chosen outcome upheld labor standards, while also serving the immigration policy interests enshrined in the IRCA.²³

Hoffman appealed the NLRB decision up to the U.S. Supreme Court, which ultimately held that Castro, and similarly situated undocumented workers, are *not* entitled to the remedy of back pay for violations of the National Labor Relations Act (NLRA).²⁴ As noted above, the majority in *Hoffman Plastic Compounds* reasoned that an award of back pay would undermine federal immigration policy reflected in the IRCA, as it “would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”²⁵ With its controversial interpretation of the IRCA, *Hoffman Plastic Compounds* reignited debate about the structural forces that encourage (or discourage) unauthorized labor migration. By staking its claim, the Court in *Hoffman Plastic Compounds* framed the discourse – for advocates on all sides of the issue – as fundamentally about altering these structural forces so as to reign in unlawful or undesirable behavior.

As noted above, *Hoffman Plastic Compounds* also renewed concern about the “chilling effect.” By limiting the relief available to undocumented workers under the NLRA, *Hoffman Plastic Compounds* tacitly invited employers to test the significance of immigration status in other areas of employment and labor law. What followed *Hoffman Plastic Compounds* was a cascade of litigation relating to immigration status and remedies, including discovery requests relating to the status of immigrant worker plaintiffs.²⁶ This litigation has covered a broad range of employment law statutes, including the Fair Labor Standards Act,²⁷ Title VII of the Civil Rights Act of 1964,²⁸ and state workers' compensation laws.²⁹ Although

22. *Id.*

23. *Id.* at 141-42.

24. *Id.* at 151-52.

25. *Id.* at 151.

26. See Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 475 (2005).

27. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) (upholding the lower court's protective order barring discovery into plaintiffs' immigration status, notwithstanding the defendant's invocation of *Hoffman Plastic Compounds*).

28. See, e.g., *EEOC v. Bice of Chicago*, 229 F.R.D. 581 (N.D. Ill. 2005) (barring discovery into immigration status in the context of an employment discrimination suit).

29. See, e.g., *Design Kitchen & Baths v. Lagos*, 882 A.2d 817 (Md. 2005) (distinguishing

Hoffman Plastic Compounds has not been raised in any OSHA litigation,³⁰ it has arisen in the context of personal injury actions for workplace accidents.³¹ Workers' representatives have cautioned that these inquiries into immigration status will inhibit litigants from moving forward or would discourage similarly situated workers from filing claims.³² In line with these concerns, several courts have heeded the rationale of the "chilling effect" in seeking to protect immigrant workers.³³

In a sense, the rationale of the majority in *Hoffman Plastic Compounds* and arguments about the "chilling effect" share a common element: both position immigrant workers largely as objects, swayed by structural forces that override individual agency; immigration status is the central focus, and other attributes and experiences are mitigated. To be clear, there is little doubt that the "chilling effect" does exist in some form; moreover, in order to resolve important policy questions, critics and proponents of *Hoffman Plastic Compounds* should engage on the terrain of structural forces and consequences. In some respects, however, the ubiquity of *Hoffman Plastic Compounds* has prioritized discussion of these broader factors, at times obscuring the individualized choices that immigrant workers make with respect to workplace standards, and the multiple currents that inform these choices.

The drift in the discourse towards broader issues of status and labor

Hoffman Plastic Compounds and finding that undocumented workers are covered by the Maryland state workers' compensation laws).

30. *Hoffman Plastic Compounds* has not been cited in any publicly available decision analyzing the anti-retaliation provisions of the OSH Act. A worker who has been discriminatorily discharged in retaliation for raising safety- and/or health-related concerns at the workplace may file a retaliation complaint with the U.S. Department of Labor. 29 U.S.C. § 660(c)(2) (2006). Following an investigation, the agency may choose to bring an action in federal district court, and may seek reinstatement and back pay, among other remedies. *Id.*

31. *See, e.g.,* Balbuena v. IDR Realty, LLC, 845 N.E.2d 1246 (N.Y. 2006) (holding that an undocumented worker who is injured due to an employer's violation of state labor law may recover lost earnings, notwithstanding *Hoffman* and IRCA).

32. *See, e.g.,* Rivera v. NIBCO, 364 F.3d 1057, 1064 (9th Cir. 2004) (accepting the plaintiffs' contention about "the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights"). Litigation relating to the "chilling effect" continues through the present. *See, e.g.,* Romero-Hernandez, v. Ryan Alexander, No. 3:08CV93-M-A, 2009 U.S. Dist. LEXIS 61017 at *15 (N.D. Miss. June 24, 2009) ("Plaintiffs argue that inquiry into these matters would have an *in terrorem* effect and would therefore have a chilling effect on their claims and their right to pursue them.").

33. *See, e.g.,* Flores v. Albertson's, Inc., No. CV 01-0515 PA (SHx), 2004 U.S. Dist. LEXIS 29083 at *10 (C.D. Cal. Apr. 9, 2004) (quoting a protective order, which stated that "[i]t is entirely likely that any undocumented class member forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such documents and face termination and/or potential deportation."); Flores v. Amigon, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) ("If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this in the first instance.").

rights is suggestive of a broader societal trend to define immigrants (and immigrant workers, specifically) in terms of their status.³⁴ The worker's status and concern about maintaining that status (or fear of being removed due to a lack of documentation) is positioned as the most salient attribute guiding his or her behavior; other characteristics are diminished in importance. While immigration status is among the factors that should continue to be considered, other worker characteristics and experiences need to be considered simultaneously, so as to discuss intersectionalities between status and other factors, and to recognize individual agency in the workplace.³⁵ As discussed in greater detail below, this more nuanced understanding is particularly valuable in discussions of occupational safety and health.³⁶

III. IMMIGRANT WORKER BEHAVIOR & SAFETY AND HEALTH CONDITIONS

Despite the prominence of *Hoffman Plastic Compounds* and ongoing public debates about immigrant workers, issues of immigrants and occupational safety and health have received comparatively little attention. Federal entities (in particular, the Bureau of Labor Statistics), along with groups such as the AFL-CIO, have documented some troublesome trends relating to immigrants and workplace safety.³⁷ Since the early 1990s, occupational fatalities among foreign-born workers in the U.S. have generally been on the rise. In absolute numbers, workplace fatalities among foreign-born workers rose from 635 in 1992 to 1009 in 2007.³⁸ Although foreign-born worker fatalities dropped noticeably in 2008 (to 795 fatalities), the drop is likely attributable to the overall economic downturn and not to a significant improvement in addressing the workplace health

34. See generally Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197 (1998) (describing the complex interplay between immigration status and Latino group identity).

35. See Nancy Krieger, *Workers are People, Too: Societal Aspects of Occupational Health Disparities – An Ecosocial Perspective*, 53 AM. J. INDUS. MED. 104, 105 (2010) (“At issue are diverse aspects of people’s social location within their societies, in relation to their jointly experienced – and embodied – socioeconomic position, race/ethnicity, nationality, nativity, immigration and citizenship status, age, gender, and sexuality, among others . . . [O]ccupational health . . . involves people in societal and historical context and must be analyzed accordingly.”).

36. See generally *infra* Section III.

37. See generally U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS, 1992-2007 (2008), available at <<http://www.bls.gov/iif/oshwc/foi/cfch0006.pdf>>; AFL-CIO, IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED SAFETY AND HEALTH PROGRAMS 3-11 (2005), available at <http://www.aflcio.org/issues/safety/upload/immigrant_risk.pdf>.

38. AFL-CIO, FOREIGN-BORN WORKER FATALITIES, 1992-2008, at 3 (2008), available at <http://www.aflcio.org/issues/safety/memorial/upload/_49.pdf>. Foreign-born worker fatalities actually peaked in 2006, with 1046 recorded deaths. *Id.*

and safety concerns of immigrants.³⁹ OSHA itself has acknowledged the need for ongoing engagement with the Latino workforce, and convened a National Action Summit for Latino Worker Safety and Health in April 2010.⁴⁰

A. *The Importance of Worker Behavior*

Given the data on immigrant worker health and safety, legal advocates and scholars now seek to understand the roots of these fatality and injury trends, with the goal of crafting possible solutions. A natural area of inquiry is OSHA, the agency charged with protecting the nation's workers. Specifically, observers have criticized OSHA for gaps in regulations of importance to immigrant workers and for failing to enforce existing regulations at worksites where immigrants predominate.⁴¹ For example, OSHA has failed to adequately address workplace violence and entirely excludes domestic workers from health and safety protections.⁴² Moreover, OSHA's enforcement scheme largely overlooks sites where large numbers of immigrants work, including smaller employers and the informal economy.⁴³

This focus on deficiencies in regulations and the need for enforcement is consistent with the traditional "engineering controls" approach to fostering occupational safety and health. Under this model, work sites and production processes are altered to guard against hazards inherent in the site and against risky human behaviors.⁴⁴ This includes, *inter alia*,

39. See Economic News Release, U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Census of Fatal Occupational Injuries Summary, 2008, <http://www.bls.gov/news.release/archives/cfoi_08202009.htm> (last updated Aug. 25, 2009) (noting a 21 percent drop in foreign-born worker fatalities from 2007 to 2008). Preliminary data for 2009 suggest that workplace fatalities among immigrants are continuing to decline. See Economic News Release, U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Census of Fatal Occupational Injuries Summary (2009), <<http://www.bls.gov/news.release/cfoi.nr0.htm>> (last updated Aug. 19, 2009) (noting a 19 percent drop in foreign-born worker fatalities from 2008 to 2009).

40. See Press Release, Occupational Safety & Health Admin., U.S. Dep't of Labor, Secretary of Labor Hilda L. Solis Convenes 1st Ever National Action Summit on Health and Safety of Latino Workers (Apr. 14, 2010), available at <http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17358> (listing some of the participants and workshop topics for the "historic" summit focused on Latino workers).

41. Rathod, *supra* note 15, at 515-36.

42. *Id.* at 523-26.

43. *Id.* at 528-29.

44. ALBERT S. GLICKMAN ET AL., ORGANIZATIONAL AND BEHAVIORAL FACTORS IN WORKPLACE SAFETY & HEALTH 4 (1978) ("Over a long period, safety and health have been improved mostly by redesigning equipment and work spaces to make the work situation less hazardous – to protect the worker from the equipment and the environment. . . . [A]ccident reduction programs have tended to use engineering modifications, but have not considered the "uncontrollable" human element in sufficient detail."); George W. Watson et al., *Dimensions of Interpersonal Relationships and Safety in the Steel*

modifying the layout of the work site, equipping machinery with safeguards (such as protective guards or automatic shut-off functions), mandating specific working procedures in different industries, and requiring the use of personal protective equipment. Indeed, many of OSHA's industry-specific regulations are premised on this approach.

As a complement to the "engineering controls" approach, safety engineers and scholars have also examined how individual and organizational behavior contributes to workplace safety and health conditions and how that behavior might be modified so as to promote safer worksites. "Behavioral safety" theorists maintain that our understanding of workplace injuries and fatalities must include a close analysis of the choices that workers make. These choices include: how to perform their assigned duties; whether or how to utilize safety protections or follow safe working procedures; and whether to raise concerns about health and safety matters.⁴⁵ Behavioral safety also encompasses group behavior (implicating consideration of workplace culture and industrial psychology), as well as management practices and attitudes vis-à-vis health and safety matters.⁴⁶

Within these broad lines of inquiry, researchers have explored specific variables and approaches that affect safety- and health-related behavior in the workplace: screening for select worker characteristics that might correlate to unsafe practices; encouraging workers to behave more safely through training and the use of incentives; and understanding how the social and cultural dimensions of the workplace affect safety.⁴⁷ It is clear that behavioral safety is an important, and yet complex component of the promotion of occupational safety and health. The existing body of scholarship points to many sub-issues that must be explored, particularly

Industry, 19 J. BUS. & PSYCHOL. 303, 305 (2005) ("The major thrust in this approach has been to revise policies, redesign jobs, and engineer and ergonomically design tasks with the human factor in mind.").

45. ALEXANDER J. COHEN ET AL., SELF-PROTECTIVE MEASURES AGAINST WORKPLACE HAZARDS 2 (1979) (emphasizing the importance of the "human factor," including the proper use of personal protective equipment, and adherence to safe work practices); Earl Blair, *Improving Safety Performance with Behavior-Based Safety*, in FUNDAMENTALS OF OCCUPATIONAL SAFETY & HEALTH 251, 257-58 (Mark A. Friend & James P. Kohn eds., 5th ed. 2010) (encouraging organizations to create a climate in which the reporting of injuries and other safety-oriented behaviors are rewarded).

46. COHEN ET AL., *supra* note 45, at 17-18 (offering multiple examples of how management practices and behaviors can contribute to a favorable workplace safety climate); GLICKMAN ET AL., *supra* note 44, at 19 ("The social forces that are built up in [a given] work group can create pressures to hinder or to help improve safety and health conditions.").

47. COHEN ET AL., *supra* note 45, at 3, 15 (describing worker training as a means to "elicit, shape, and maintain target behaviors" and noting the controversy around the "use of incentive or award programs to foster increased interest in job safety"); David M. DeJoy et al., *Creating Safer Workplaces: Assessing the Determinants and Role of Safety Climate*, 35 J. SAFETY RES. 81, 86 (2004) (finding a positive correlation between the social factors that define "organizational climate" and "safety climate"); Watson, et al., *supra* note 44, at 305-306.

with respect to immigrants in U.S. workplaces.

By focusing on theories of behavioral safety, I do not intend to shift the focus entirely away from engineering controls and the roles of employers, managers, and OSHA. Worker advocates have rightly been wary of behavioral safety and behavioral economics; at times, the doctrines are deployed by proponents of deregulation to shift attention away from (often costly) regulations and instead blame rogue and unpredictable worker behavior.⁴⁸ Jordan Barab has written eloquently of the tendency to blame workers for injuries and fatalities, and otherwise “blame ‘acts of God’ or the ‘whims of Mother Nature’ to explain . . . ‘unpredictable’ tragedies[.]”⁴⁹ These subversive narratives must be considered when discussing the relevance of worker behavior to occupational safety and health.

On the whole, however, a more thorough understanding of immigrant worker behavior should lead to more effective regulation, and optimally, a reduction in fatalities and injuries, without resorting to the assignation of blame that Barab and others decry. The examination should yield a robust understanding of the multiple factors that influence immigrant workers; at the same time, it will contextualize the emphasis on immigration status in existing discourses about immigrants and U.S. labor and employment law. As a point of departure, I describe below some of the factors that influence immigrant worker behavior vis-à-vis occupational safety and health.

B. Factors that Influence Immigrant Worker Behavior

Behavioral safety theory suggests that multiple factors may contribute to individual and organizational behavior relating to occupational safety and health. A closer examination of scholarship from the disciplines of sociology, psychology, anthropology, and economics help to uncover the various influences on immigrant behavior in the workplace. As outlined

48. See, e.g., James A. Gregson, *A Critical Examination of Safety Texts: Implications for Trade and Industrial Education*, J. INDUS. TEACHER EDUC., Winter 1996, at 29, 38 (criticizing the overemphasis on “carelessness and lack of knowledge among workers” as causes of workplace accidents).

49. Jordan Barab, *Acts of God, Acts of Man: The Invisibility of Workplace Death*, in WORKER SAFETY UNDER SIEGE: LABOR, CAPITAL AND THE POLITICS OF WORKPLACE SAFETY IN A DEREGULATED WORLD 3, 8 (Vernon Mogensen ed., 2006). Similarly, social psychologists have explored the human tendency to explain the behavior of others in terms of their attributes or attitudes, while minimizing to the broader context in which the behavior occurs. This is known as the fundamental attribution error. See WAYNE A. LESKO, READINGS IN SOCIAL PSYCHOLOGY 91 (2006) (defining “fundamental attribution error” as “our tendency to overestimate the importance of dispositional factors and to downplay the importance of the situation in which the behavior is being observed”).

above, immigration status has often been positioned as the key (if not overriding) concern for immigrants. In the context of safety and health, researchers have already pointed to possible links between immigration status and workplace behavior. For example, some safety experts claim that undocumented workers may be reluctant to report injuries or illnesses for fear of getting deported.⁵⁰ While status concerns are undoubtedly significant, other worker attributes and experiences must also be considered.

Understanding immigration status in context allows for consideration of intersections between status and these other attributes and experiences. Proponents of intersectionality theory emphasize that individuals who belong to multiple subordinated groups – for example, gay Asian American men – have interests and concerns that are not adequately addressed by either LGBT rights advocates or advocates for ethnic and racial justice.⁵¹ Rather, the experience of dual subordination requires a unique approach. While intersectionality theory has been applied to the workplace context, it is most often discussed in terms of the experience of women of color, typically with regard to discrimination and Title VII.⁵² Although intersectionality theory is focused on subordination, its value includes understanding the multiplicity of attributes and experiences that define individuals, and the unique intersections between these attributes and experiences on the one hand and existing legal regimes on the other. Along these lines, in the context of workplace safety and health, a similar range of attributes and experiences must be analyzed to fully understand how workers are positioned and how they might be inclined to behave.

An exploration of the multiple currents that inform worker behavior also highlights the interconnectedness of labor, employment, and immigration laws. As scholars and advocates uncover relevant factors – related to immigrants and behavior safety – corollary legal regimes are quickly implicated as factors that may drive or reinforce certain types of behavior. Below, I describe a range of different factors, and their

50. *The Impact of Language and Culture on Job Safety*, SAFETY.BLR.COM (May 3, 2002), <<http://safety.blr.com/reference.aspx?id=88020>> (citing Joseph McFadden, a safety expert, who has tried to “assur[e] [immigrant] workers that if they made a mistake, they would not be deported as a result.”).

51. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

52. See, e.g., Julissa Reynoso, *Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins*, 7 HARV. LATINO L. REV. 63, 68-72 (describing the salience of intersectional claims under Title VII, and arguing that intersectionality theory should be applied to better understand the experiences of Latinas in the U.S.).

intersections.⁵³

1. Economic Status & Economic Security

Given that a significant portion of undocumented migration into the U.S. is economic migration,⁵⁴ immigration status concerns are often closely linked with economic insecurity. For purposes of understanding immigrant worker behavior in the area of occupational safety and health, it is important to decouple the concepts, while also recognizing how they intersect.⁵⁵

As a general rule, workers who are economically disadvantaged and rely upon regular income to cover their expenses (i.e., workers without significant savings) are less likely to engage in behavior that would jeopardize their employment or frustrate their employer.⁵⁶ Therefore, to the extent a worker is concerned about income maintenance, and perceives that his or her employer would react negatively to worker requests or actions related to safety and health, that worker is likely to be inhibited from acting on that concern. This link between economic security and workplace rights is both commonly made, and easily understood. This rationale applies to all workers, regardless of their status.

When the unique experiences of immigrant workers are added as an overlay, additional factors emerge. For example, many low-wage immigrant workers – both documented and undocumented – incur significant debt in order to travel to the United States. Many documented workers who travel to the U.S. to work on temporary visas take out loans, or mortgage properties, in order to pay for the actual costs of travel, along with recruitment fees, and expenses related to obtaining travel documents.⁵⁷

53. Some researchers have already begun to explore these considerations, but mostly as a means to more effectively train foreign-born workers on safety and health matters. *See, e.g.*, Glenn Pransky et al., *Occupational Risks and Injuries in Non-Agricultural Immigrant Latino Workers*, 42 AM. J. INDUS. MED. 117, 122 (2002).

54. *See* Max J. Pfeiffer, *The Underpinnings of Immigration and the Limits of Immigration Policy*, 41 CORNELL INT'L L.J. 83, 94 (2008) (“The lack of economic opportunities in Mexico primarily drives unauthorized migration from Mexico to the United States.”)

55. Pransky et al., *supra* note 53, at 117 (immigrant workers “may be at greater risk for occupational injuries and illnesses due to limited economic and political resources”).

56. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 63-64 (2006) (noting the economics associated with employer retaliation); *cf.* Pransky et al., *supra* note 53, at 121 (describing some consequences that follow from loss of income).

57. *See* *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1234, 1248 (11th Cir. 2002) (finding that migrant workers entering the U.S. through the H-2A program were required to pay transportation and visa costs, and holding that the employers must reimburse these pre-employment expenses, to the extent they brought the first week's earnings below the minimum wage); *see also* Bryce W. Ashby, *Indentured Guests – How the H-2A and H-2B Temporary Guest Worker Programs*

For undocumented workers who rely on *coyotes* to assist with passage into the United States, similar liabilities are typically incurred.⁵⁸ Another dimension of economic security for immigrant workers is the obligation to cover expenses not only in the U.S., but also for family members in their countries of origin.⁵⁹ As evidenced by the sheer volume of remittances, and as supported by studies on migration, many immigrant workers in the U.S. serve as a primary source of income for family members overseas.⁶⁰ These additional obligations may heighten economic concerns and may correspondingly affect safety and health behavior. For example, immigrant workers may be reluctant to call upon federal labor officials not only because they fear retaliation themselves, but also because they are loath to harm the business entity that provides them with much-needed income.

The multiple economic demands borne by many immigrant workers may also dissuade them from paying for personal protective equipment. Although OSHA recently passed a rule requiring employers to pay for most equipment,⁶¹ researchers have not measured compliance, particularly in the industries where immigrant workers predominate. Assuming *arguendo* some degree of non-compliance and lack of information about this right, workers may simply opt for a cost savings rather than purchase (sometimes costly) protective equipment.

Economic insecurity among immigrant workers may affect safety and health behavior in other, unique ways. Researchers who have examined workplace safety and health have found a link between the *pace* of work

Create the Conditions for Indentured Servitude and Why Upfront Reimbursement For Guest Workers' Transportation, Visa, and Recruitment Costs is the Solution, 38 U. MEM. L. REV. 894, 917 (2008) (noting that although *Arriaga*-type reimbursement is the law in a number of circuits, actual enforcement is difficult because few non-profits and legal services organizations have the capacity or the resources to devote to reimbursement claims).

58. See Monica Alonzo, *Illegal Immigrants, Desperate to Find Work in U.S., Risk Kidnapping, Rape and Murder from Those Smuggling Them Across the Border*, DALLAS OBSERVER, Aug. 12, 2010, available at <<http://www.dallasobserver.com/2010-08-12/news/illegal-immigrants-desperate-to-find-work-in-the-u-s-risk-kidnapping-rape-and-murder-from-those-smuggling-them-across-the-border/>> (reporting the experience of a group of immigrants who each paid \$1,800 to a *coyote* to be guided across the Mexico-U.S. border).

59. Pransky et al., *supra* note 53, at 121.

60. See *Mexico: Remittances Drop 4 Percent in 1st Half of 2010*, ASSOCIATED PRESS, Aug. 3, 2010 (reporting \$10.63 billion in remittances from the U.S. to Mexico in the first six months of 2010). The current economic crisis, and the corresponding decline in remittance income, has had a devastating effect on some migrant-sending communities. See Chris Hawley, *With USA in Recession, Rural Mexico Feels the Pain*, USA TODAY, July 7, 2009, at 1A available at <http://www.usatoday.com/news/world/2009-07-09-mexico_N.htm> (describing the desperate situation felt by Mexican families who depend on relatives working in the U.S. for survival, but who are struggling because of a significant drop in remittances).

61. See *Employer Payment for Personal Protective Equipment*, 72 Fed. Reg. 64,342, 64,342-64,430 (Nov. 15, 2007).

and the propensity for accidents.⁶² In short, when workers are under pressure to perform their tasks quickly, accidents are more likely to occur.⁶³ Relatedly, some workers may be reluctant to use personal protective equipment (for example, masks or gloves), because it slows the pace of their work.⁶⁴ These theories, in turn, invite the question of whether immigrants face unique pressures to work quickly. Two possible explanations present themselves, both linked to abuses of wage and hour laws.

First, the prevalence of wage violations suffered by immigrant workers may contribute to a rapid (and hence more unsafe) pace of work. Several studies have documented that a large proportion of day laborers and other immigrant workers have been victims of wage theft.⁶⁵ The incidence of wage theft and the lack of stable employment opportunities may put pressure on immigrant workers to trade safety for speed, so as to quickly reinsert themselves into the labor pool. Second, many immigrant workers – including casual laborers and long-term employees – are misclassified as independent contractors.⁶⁶ This misclassification may yield a lower net income than what the market would otherwise pay for work performed at a reasonable pace at an hourly rate. Due to the misclassification, workers may feel pressured to complete their tasks as quickly as possible and to move on to the next assignment. A similar dynamic may occur when workers are paid a piece rate instead of an hourly rate.⁶⁷

62. See, e.g., F. G. Benavides et al., *Associations Between Temporary Employment and Occupational Injury: What are the Mechanisms?*, 63 OCCUPATIONAL & ENVTL. MED. 416, 420 (2006) (suggesting a link between accelerated pace of work and risk of occupational injury).

63. See Watson et al., *supra* note 42, at 306 (discussing how work pace affects employees' perception of the importance of safe conduct in the workplace, which in turn affects workplace injury rates).

64. See AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW INTERNATIONAL HUMAN RIGHTS LAW CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, *PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY* 27 (2010) (reporting that migrant workers in the Maryland crab industry are reluctant to wear protective gloves while picking crab meat, as it slows the pace of work and makes it difficult to meet employer-imposed poundage requirements); Gregson, *supra* note 48, at 39.

65. ABEL VALENZUELA, JR. ET AL., *ON THE CORNER: DAY LABOR IN THE UNITED STATES* 14 (2006), available at <http://www.sscnet.ucla.edu/issr/csup/uploaded_files/natl_daylabor_on_the_corner1.pdf>.

66. The prevalence of misclassification has sparked legislative efforts to curb the practice. See, e.g., Workplace Fraud Act of 2009, MD. CODE ANN., LAB. & EMPL. §§ 3-901 to 920 (2009) (legislation designed to crack down on employers who misclassify their employees as independent contractors).

67. See, e.g., Gregson, *supra* note 48, at 39 (“[T]here is evidence that more accidents are likely to occur when work is done ‘by the foot’ or ‘piece’ rather than by the hour because of intensified pressure on workers to produce. When workers are paid ‘piecework’ they are more likely to remove guards or not wear personal protection equipment because such devices tend to hinder production.”).

While the pressure to work quickly may affect all immigrant workers – particularly those who may lack knowledge of their rights in the workplace – undocumented workers are more likely to be affected by these influences. When concerns about immigration status are clearly present and overlaid with economic insecurity, further theories of behavior emerge. Sociologists and economists have observed that workers coming from poor countries, and who have temporary status, contingent status, or no status in the U.S., will work as fast as possible and as many hours as possible.⁶⁸ (Again, rapid work, as well as excessive hours, has been found to contribute to workplace accidents.) For these workers, the opportunity cost of losing their jobs in the U.S. is very high.⁶⁹ Due to pressing economic needs and the indeterminacy of their status, workers may develop habits that undermine workplace safety.

2. Language Ability & Literacy

Apart from immigration status and economic security, language ability is a factor often cited when considering immigrants and workplace safety. As with economic security, language ability and immigration status are conceptually distinct. Although limited English proficiency is related to national origin, it is not a reliable indicator of immigration status, given the large numbers of U.S. citizens and lawful permanent residents who are limited English proficient (LEP).⁷⁰

Language difference can affect workplace health and safety in multiple ways. Workers who are unable to *read* the language that predominates in the workplace may be unable to read written instructions or understand warning signs and notices.⁷¹ Limited reading and writing ability may also affect the worker's knowledge of, and ability to interact with agencies such as OSHA (to the extent materials are more readily available in only English and Spanish).⁷² Inability to *understand* and *speak*

68. Malcolm Sargeant & Eric Tucker, *Layers of Vulnerability in Occupational Health and Safety for Migrant Workers; Case Studies from Canada and the United Kingdom*, CLPE Research Paper 08/2009, at 9 (2009), available for download at <<http://ssrn.com/abstract=1415371>>.

69. *Id.*

70. See, e.g., James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195, 235-36 (2006) (listing various jurisdictions with large numbers of LEP citizens).

71. The need for written translations of safety warnings is underscored by economic studies of immigrants in the labor market. While there is a strong link between ability in spoken English and earning capacity, there is less of a wage benefit for workers to acquire proficiency in reading and writing English. Anthony P. Carnevale et al., *Understanding, Speaking, Reading, Writing, and Earnings in the Immigrant Labor Market*, 91 AM. ECON. REV. (PAPERS & PROC.) 159, 162 (2001).

72. Federal OSHA has made efforts to provide information and materials in Spanish, and has translated much of its website into Spanish. See *OSHA en Español*, OCCUPATIONAL SAFETY & HEALTH

English proficiently poses additional concerns: immigrant workers may not fully comprehend spoken instructions; and they may be uncomfortable communicating with co-workers or supervisors about their assigned duties and also about safety- and health-related concerns.⁷³ Additionally, LEP workers are likely to be at a disadvantage if safety trainings are provided only in English. These communication barriers are all documented contributors to workplace health and safety risks.⁷⁴

LEP status may pose particular challenges to workers who seek to engage with OSHA personnel. Despite recent recruitment efforts, OSHA still lacks bilingual inspectors (formally known as Compliance Safety & Health Officers (CSHOs)) in its various regional offices. Several offices do not even track data regarding the language abilities of their personnel.⁷⁵ Moreover, OSHA offices generally lack formal protocols for the use of interpreters and translators by its personnel.⁷⁶ These deficiencies pose clear challenges for LEP immigrant workers, regardless of whether immigration status is a concern for them.

When considering language barriers, the default response of many

ADMIN., U.S. DEP'T OF LABOR, <<http://www.osha.gov/as/opa/spanish/index.html>> (last visited Sept. 30, 2010). Some of the websites for OSHA state-plan states, however, have not been translated into Spanish. See, e.g., MINNESOTA OSHA, <<http://www.dli.mn.gov/MnOsha.asp>> (last visited Sept. 30, 2010); IOWA OCCUPATIONAL SAFETY & HEALTH ENFORCEMENT, <<http://www.in.gov/dol/iosha.htm>> (last visited Sept. 30, 2010).

73. Even if employers use interpreters or Spanish-speaking personnel to help train Latino immigrant workers, there are likely to be challenges with accurate translations, particularly given the technical language involved. At times, what may seem to be the most accurate translation may actually be inaccurate or misleading. See, e.g., *Cultural Differences Serve to Complicate Translating Safety Messages into Spanish*, 53 CONSTR. LAB. REP. (BNA) 421 (May 23, 2007) (describing difficulties in finding the most accurate translation in Spanish for the term "tied off"; the most literal translation for "tied off" created confusion among workers, and suggested undesirable practices).

74. Am. Soc'y Safety Eng'rs Council on Pracs. & Standards, Technical Report: The Impact of Multi-Language Worksites on Safety, Health & Environmental Professionals 5, available at <<http://www.asse.org/practicespecialties/bosc/docs/multilanguageworksitesarticle.pdf>> (last visited Oct. 10, 2010).

75. As part of a broader scholarly project relating to OSHA and foreign-born workers, the author sent Freedom of Information Act (FOIA) requests to OSHA headquarters and each of the nine regional OSHA offices. Among the information requested was a breakdown of CSHOs who have foreign language ability. At the instruction of OSHA headquarters, responses to this request for information were provided directly by local (subregional) OSHA offices. Responses received as of mid-December 2009 reflected some language diversity among these front-line OSHA personnel, but certainly not in enough numbers to adequately engage with the foreign-born workforce. Additionally, several local offices reported no Spanish-speaking CSHOs, despite the predominance of Spanish speakers among immigrant workers in the U.S. See generally FOIA Requests and Responses (on file with author). While these responses do not reflect language abilities of the inspectorate in OSHA "state-plan" states, they provide some insight into the agency's limited ability to engage with foreign-born workers.

76. In the FOIA requests mentioned *supra* note 75, the author also inquired about existing protocols on the use of interpreters or translators by OSHA personnel. Responses were provided directly by OSHA's regional offices. Based on the responses received as of October 2010, only one OSHA regional office had procedures in place for the use of interpreters and translators by their personnel. All other reporting offices disclosed that no such procedures existed.

employers – providing Spanish translations and hiring bilingual personnel – is likely to be insufficient, for several reasons. First, given the growing diversity of the workplace, and the reliance on guest workers from around the globe, worksite language issues cannot be reduced to Spanish and English.⁷⁷ Additionally, even among Latino immigrants, Spanish may not be the optimal language for communication with workers. Some immigrant workers hail from indigenous communities in Latin America, and Spanish is their second language. While Spanish might be used as a common language for some purposes, regulators and employers must understand the limitations of Spanish-only translations and recognize the diversity that exists even within the Latino immigrant community.⁷⁸ This requires a challenge to the broader cultural frame that equates “immigrant,” “Latino,” and “Spanish-speaker.”

Psychologists and sociologists point to other, less obvious, effects that language difference can have on occupational safety and health. Linguistic isolation in the workplace can have a number of effects on behavior. First, linguistic isolation and the inability to communicate with co-workers, can have a direct detrimental effect on the mental and physical health of the LEP worker.⁷⁹ Additionally, workers who are unable to communicate with co-workers are less likely to form supportive relationships with their peers.⁸⁰ This, in turn, may affect the worker’s susceptibility to workplace risks: the worker may be less likely to communicate with peers about safety-related questions and concerns, and vice-versa. In particular, workers may be less likely to mention unsafe or unhealthy work habits that they observe among peers who speak a different language.

These studies, which underscore the importance of *accommodating* (rather than suppressing) language difference, in some ways contradict existing norms in the Title VII context relating to language discrimination. Under current interpretations of Title VII’s prohibition on national origin discrimination, employers may impose an English-only requirement at the workplace if the requirement is job-related and based on a legitimate business necessity.⁸¹ Among the acceptable business necessities is the

77. AM. SOC’Y OF SAFETY ENG’RS, *supra* note 74, at 5 (concluding that the issue of language diversity on the job “has been viewed incorrectly as a matter of Spanish and English” and acknowledging the existence of “a greater diversity of people and languages”).

78. A similar factor to be considered is the great diversity in vocabulary and dialects among Spanish speakers. *Id.* at 6.

79. Sargeant & Tucker, *supra* note 68, at 3.

80. *Id.*

81. EEOC Compl. Man. (BNA) § 13 (2002), available at <<http://www.eeoc.gov/policy/docs/national-origin.html>>.

desire to protect the safety and health of employees.⁸² Yet, an employer who imposes an English-only requirement at a worksite may effectively silence workers who have limited English proficiency and thereby put workers at even greater risk.⁸³

Another critical attribute related to language is that of literacy. Even if language differences are accommodated through written translations, some workers may be illiterate in both English and their first language.⁸⁴ Although precise numbers are not available, safety and health experts suggest that illiteracy rates are high among immigrant workers.⁸⁵ Illiteracy poses a number of problems related to workplace health and safety:

These workers are potentially at risk because they are unable to read and understand machinery operating instructions, safety precautions, equipment and repair manuals, first-aid instructions, or organizational policies on workplace health and safety. They may be unable to leave a warning note for the next shift worker regarding a damaged machine or part. . . . Low literacy skills potentially put workers and their co-workers in harm's way and increase the likelihood of work stoppages due to accidents or errors.⁸⁶

These literacy concerns highlight the importance of using colors, numbers, and symbols to communicate about workplace risks and safe practices.⁸⁷ Recognizing illiteracy and addressing it is also important because literacy skills are often essential for more advanced training on safety and health matters.⁸⁸

3. Culture

The concept of "culture," while often elusive, has considerable importance for understanding worker behavior related to occupational safety and health. Two dimensions of "culture" are relevant for this inquiry. First, "culture" in the traditional sense – the set of norms, values, and practices that define a community – penetrates all aspects of society, including the workplace and occupational safety and health matters therein.

82. AM. SOC'Y OF SAFETY ENG'RS, *supra* note 74, at 15.

83. Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 NW. L. REV. 1689, 1762-63 (2006) (casting doubt on the "safety" rationale for English-only rules under Title VII and encouraging a more searching inquiry when safety concerns are invoked).

84. AM. SOC'Y OF SAFETY ENG'RS, *supra* note 74, at 5.

85. *The Impact of Language and Culture on Job Safety*, *supra* note 50 (recounting observations by OSHA official R. Davis Layne regarding "a high rate of illiteracy among many non-English-speaking workers").

86. ALISON CAMPBELL, THE CONF. BD. OF CAN., ALL SIGNS POINT TO YES: LITERACY'S IMPACT ON WORKPLACE HEALTH AND SAFETY 4 (2008).

87. Doreen O. Maxcy et al., *Workplace Safety: Minimum Print and Nonprint Literacy Skills*, 38 J. READING 362, 362 (1995).

88. CAMPBELL, *supra* note 86 at 6-7.

Second, the culture of a particular workplace or industry can affect health and safety conditions for all workers, including immigrants. These various aspects of “culture” are explored below.

a. Traditional Culture

Culture is critical to health and safety matters in that it helps define what a community or society designates as a risky behavior or a risky occupation. The very concept of what is “safe” and what is “dangerous” is socially constructed and embedded in culture and communities.⁸⁹ While there are some situations that may be universally and objectively perceived as “dangerous” (e.g., having a gun pointed to one’s head), most perceptions of safety and danger are “products of social construction, collective agreement, and socialization.”⁹⁰

It is therefore unsurprising that when socially constructed norms relating to safety and danger are codified into law and regulations, they will vary across regional and national boundaries. By way of example:

[I]n uniting twelve countries, the European Community had to resolve disputes over speed limits, safety levels for ferries, acceptable levels of pollution, and the definition of drunk driving. [citation omitted] Truck drivers carrying hazardous waste across the United States experience regional variation first hand when they must adjust their cargoes to accommodate the different safety regulations of the states they cross.⁹¹

These variations and the cultural embeddedness of risk perception raise important questions about foreign-born workers and health and safety concerns on the job. Based upon these sociological theories, immigrant workers are likely to bring to the United States their own constructs of “safety” and “danger.” This invites questions as to how understandings of safety and danger are developed or modified. For example, if a foreign-born worker emigrates from a community or society where the workplace is traditionally considered a “safe” or at best, a “neutral” sphere, and is employed in a job in the U.S. that objectively poses some significant health and safety risks, how does that worker’s perception shift? What is the role of training and workplace socialization in that transition? At first glance, these theories suggest that the length of a worker’s presence in the U.S. may be a relevant factor in his or her behavior vis-à-vis workplace safety and health.

Similarly, some immigrant workers perform work that is comparable

89. Ruth Simpson, *Neither Clear nor Present: The Social Construction of Safety and Danger*, 11 Soc. F. 549, 551-53 (1996).

90. *Id.* at 550.

91. *Id.* at 553.

to what they had performed in their countries of origin. Naturally, these workers will have been acculturated into certain work styles and habits. (These work habits may objectively be “safer” or “less safe,” but there are bound to be some differences.) Again, the transition between cultures, and differing perceptions of risk, can affect safety and health conditions on the job.

Occupational safety and health specialists have flagged other aspects of culture that may affect working conditions. First, the employee’s relationship with her supervisor and how that relationship is perceived may affect occupational safety and health matters. For example, an employee who is culturally accustomed to working autonomously and believes supervisors are to be contacted only in case of emergency may be unlikely to ask questions about work practices or raise safety and health concerns.⁹² Second, some commentators have described worker deference to employers as a cultural attribute that can affect working conditions. In short, “deferential” workers are reluctant to challenge their employers and instead do as they are told, even if they are asked to perform work in an unsafe manner or without adequate protections.⁹³ Similar cultural arguments have been made with respect to age (i.e., that some immigrants are more likely to respect elders, which should be considered for supervision and training purposes) and gender (i.e., that *machismo* may affect behavior, including the use of personal protective equipment).⁹⁴ Finally, culture may influence whether a worker chooses to call upon an outside entity (e.g., a government agency) when a concern or dispute arises in the workplace.

There is, of course, considerable risk in essentializing workers under the guise of culture, or ascribing to “culture” behavior that is driven by other factors. As Leti Volpp has described, “immigrants do not bring with them to the United States a frozen, monolithic culture. . . . Culture is constantly negotiated and highly contested by those claiming particular cultural identities.”⁹⁵ Moreover, culture is often attributed as a determinant

92. *The Impact of Language and Culture on Job Safety*, *supra* note 50 (describing an incident involving a Thai worker employed on the late-night shift at a hospital, and suggesting that the worker did not contact his supervisor because “in Thai and other Asian cultures, a worker does not bother a boss except for extremely serious reasons (which this worker did not perceive). Employees are shown how to do their tasks and are expected to perform them with few questions asked”).

93. Elisabeth Boone, CPCU, *The Language of Safety*, ROUGH NOTES MAG., April 2003, at 25, available at <<http://www.roughnotes.com/rnmagazine/2003/april03/04p25.htm>> (profiling safety trainer Joseph E. Halcarz, who observes that Hispanic “[w]orkers do not challenge authority. When they’re told to do something they do it, whether or not they believe it’s right.”).

94. *The Impact of Language and Culture on Job Safety*, *supra* note 50.

95. Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT’L L. & COM. REG. 507, 513 (2002).

of behavior for disempowered and devalued groups, whereas the behavior of dominant communities is described in terms of individual agency.⁹⁶ Despite these significant limitations to the use of “culture” as a relevant factor, this aspect of immigrant worker behavior is worthy of further exploration.

b. Workplace Culture

The “culture” of the workplace in the U.S. is another factor that influences worker behavior. Studies have found that management values focused on workplace safety and trust in management generally contribute to safer behavior on the part of workers, and safer workplace environments.⁹⁷ The relationship of trust is critical for several reasons. Sociologists have long established a link between interpersonal trust and “successful social cooperation,” including in the workplace.⁹⁸ Moreover, in environments where workers distrust management, they are likely to resist oversight efforts, including those related to occupational safety and health. If workers do not trust their supervisors “to make honest, unbiased assessments of their behavior,” they may resist critique and even cover up errors or accidents on the job.⁹⁹

For immigrant workers, the relationship with “management” can be complex. Certainly, some employers who hire immigrant workers will knowingly violate safety and health standards, assuming that the workers are not informed about their rights or will not complain. Even among employers who do not purposefully take advantage of immigrant labor, setting a standard for safety and building trust can be a challenge. Immigrant workers are disproportionately employed in contingent jobs, in which they have a temporary or irregular relationship with their employers.¹⁰⁰ For employers that operate on this basis, there is likely less incentive to cultivate a “workplace safety culture,” given the turnover rate of employees. Moreover, building a relationship of trust between management and immigrant workers can be challenging for many of the reasons mentioned above, including language difference, concerns about

96. *Id.*

97. Watson et al., *supra* note 44, at 308 (hypothesizing, and finding empirical support for the proposition that “risky behavior, whether required due to job tasks and design, or attributable to work pace, or simply enacted through personal choice, is less likely to occur in organizations where management sincerely values safe conduct”).

98. *Id.* at 309.

99. *Id.*

100. Kristin J. Cummings & Kathleen Kreiss, *Contingent Workers and Contingent Health*, 299 *JAMA* 448, 448 (2008) (“[C]ontingent workers are more likely to be young, female, black or Hispanic, and to have lower incomes and fewer benefits.”).

economic security, culturally-based perceptions of the employer-employee relationship, and more.

Apart from the disposition of management, the safety culture among co-workers can have a powerful influence on worker behavior. For example, an environment in which peers feel comfortable in offering and receiving criticism about unsafe behavior has been found to have a positive effect on worker behavior.¹⁰¹ At times, the safety culture among co-workers can be shaped by the nature of the work, and the composition of the workforce:

[S]ome work cultures may promote a machismo that “valorizes risk-taking and denigrates health and safety concerns” [citation omitted] Young male workers may be particularly prone to cultures that support risk-taking because of their need to demonstrate their own bravado. Occupational areas such as the construction industry frequently possess such sub-cultures because of the need for workers to have strength, speed, and a willingness to work at great heights.¹⁰²

These attributes of workplace culture can have a significant effect on safety and health matters and must be considered as a determinant of immigrant worker behavior.

4. Gender, Age & Experience

Sociologists have long explored how gender and age influence behavior and choices in all aspects of life. Unsurprisingly, in the area of workplace safety and health, these attributes also affect behavior. A worker’s level of experience in a given occupation – a factor often considered alongside age – is another critical variable when assessing workplace risks.

Estimates put forth by the Bureau of Labor Statistics note that the foreign-born workforce in the U.S. is disproportionately male.¹⁰³ The prevalence of male immigrant workers is significant, given that men are generally more likely to engage in risky behavior in the workplace, as compared with women.¹⁰⁴ Moreover, male workers may be more likely to downplay or disguise on-the-job injuries, particularly when such injuries

101. Watson et al., *supra* note 44, at 306.

102. See, e.g., Gregson, *supra* note 48, at 39.

103. News Release, U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, Foreign-Born Workers: Labor Force Characteristics, 2009 (Mar. 19, 2010) available at <<http://www.bls.gov/news.release/forbrn.nr0.htm>> (reporting that in 2009 “men made up a larger proportion of the foreign-born labor force (59.3 percent) than they did of the native-born labor force (52.2 percent)”).

104. Women tend to be more sensitive to risky situations, and have a lower tolerance for risk than men, who often gravitate towards more dangerous jobs. Rachel Croson & Uri Gneezy, *Gender Differences in Preferences*, 47 J. ECON. LITERATURE 448, 448 (2009); Jan L. Hitchcock, *Gender Differences in Risk Perception: Broadening the Contexts*, 12 RISK 179, 179, 196-97 (2001).

will undermine their role as patriarch or breadwinner within their families. This trend has been documented, for example, among Latino day laborers in the U.S.¹⁰⁵

BLS data also indicate that the foreign-born workforce is, on the whole, younger than the native-born workforce.¹⁰⁶ The relationship between age and susceptibility to workplace injury is complex, but existing studies suggest a few general trends. On average, younger workers tend to experience workplace injuries and illnesses at a higher rate than their older peers.¹⁰⁷ This trend is attributable, in part, to youthful risk-taking, but also to a more basic causal factor: inexperience. Researchers have consistently found that workers who are new to a certain type of work, or have recently transitioned to a new employer, are more likely to sustain a workplace injury.¹⁰⁸

Due to a range of factors, immigrant workers – regardless of their age – may find themselves in jobs for which they have little background or training. Day laborers, for example, may routinely cycle in and out of different types of jobs. This is also true of contingent workers generally, as employers move away from the use of long-term, full-time employees.¹⁰⁹ Moreover, immigrant workers with specific skills that can be applied to jobs in the U.S. often encounter discrimination in the hiring process, which may lead them to pursue alternative career paths, or even self-employment. For a recently arrived immigrant, the risks posed by inexperience are often heightened by limited English proficiency.

105. See Nicholas Walter et al., *Social Context of Work Injury Among Undocumented Day Laborers in San Francisco*, 17 J. GEN. INTERNAL MED. 221, 221 (2002) (“Day laborers frequently perceive injury as a personal failure that threatens their masculinity and their status as patriarch of the family. Their shame and disappointment at failing to fulfill culturally defined masculine responsibilities leads to intense personal stress and can break family bonds.”).

106. News Release, *supra* note 103 (reporting that in 2009, “[t]he proportion of the foreign-born labor force made up of 25- to 54-year-olds was higher than for their native-born counterparts (76.7 and 65.6 percent, respectively)”)

107. Pransky et al., *supra* note 53, at 121. That said, researchers have also examined the physical and cognitive limitations that accompany aging, and the implications for workplace safety. See, e.g., TEXAS DEP’T OF INS., DIVISION OF WORKERS’ COMPENSATION, AGING IN THE WORKPLACE FACT SHEET, available at <<http://www.tdi.state.tx.us/pubs/videoresource/fsageinwork.pdf>> (analyzing the implications of physiological and mental changes that occur in aging workers, including loss of muscular strength and sense of balance, deterioration in vision, and slower mental processing and reaction times).

108. See, e.g., Fred Siskind, *Another Look at the Link Between Work Injuries and Job Experience*, MONTHLY LAB. REV., Feb. 1982, at 38, 40 (1982) (“[W]orkers . . . generally experience disproportionately high injury rates during their first year on a new job or working for a new employer. . . . Almost all age and sex groups have disproportionately high injury experiences during their first few months and first full year on a new job.”) This correlation is logical, as workers with less experience may lack formal training, or may simply be unfamiliar with specific workplace risks.

109. Cummings & Kreiss, *supra* note 100, at 449 (“Contingent workers may have less experience and familiarity with operations in a dangerous workplace, putting them at higher risk.”).

To the extent that gender- and age-related attributes do correlate with more risky behavior among immigrant workers, they raise questions about the composition of the immigrant workforce, the gendered nature of certain industries, and discrimination in recruitment and hiring. If, for example, women and older workers are less likely to engage in risk-taking on the job, what barriers exist to their entry into professions where they may have a positive, moderating effect upon workplace culture? Moreover, what obstacles prevent skilled immigrants from obtaining jobs for which they were trained in their countries of origin? At a minimum, one might examine the failures of Title VII and the Age Discrimination in Employment Act vis-à-vis the rights of immigrants, and consider the broader implications, including on workplace safety and health.

5. Worker Resistance & Autonomy

In the midst of different factors and sociological attributes that guide behavior, one must also consider the salience of worker resistance and acts of autonomy. Despite the powerful influence of immigration status and the significance of the factors mentioned above, the discourse on immigrant workers must contemplate acts of individual agency that sometimes run directly counter to established behavioral theories.

In recent decades, immigrant workers have begun to organize themselves and respond directly to the structural forces – including immigration and labor laws – that might otherwise inhibit assertions for their rights and for greater respect. One result of these organizing efforts has been the development of workers' centers across the U.S., which have emerged as tangible sites of resistance for disenfranchised populations of workers.¹¹⁰ Despite status concerns and possible compromises to their economic status, workers routinely engage in public campaigns to demand justice in individual cases and fair treatment by communities and society as a whole.¹¹¹ These efforts have begun to shift the narrative of immigrant workers from passive “victims” to that of “heroes” who can guide their own destinies.¹¹²

These acts of resistance are particularly notable, given the proliferation of anti-immigrant sentiment across the U.S. In recent months, for example, some undocumented immigrants have participated in a

110. Volpp, *supra* note 95, at 513.

111. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2005-06) (describing several immigrant-led campaigns for workplace justice).

112. Volpp, *supra* note 95, at 513.

“coming out” campaign, where they openly reveal their immigration status to draw attention to the plight of the undocumented, and the need for comprehensive immigration reform.¹¹³ While many of these persons are immigrant youth who have spent most of their lives in the U.S. and have strong ties here – and arguably are in a strong political and economic position than a recently arrived undocumented worker – their actions nevertheless undermine the prevailing narrative that immigrants will prioritize the preservation and privacy of their status above all else.

The emergence of these counter-narratives complicates the work of occupational safety and health scholars. It would be easier to devise regulations based on established, predictable theories of immigrant worker behavior. The multiplicity of factors described above, however, in combination with acts of individual agency, underscore that immigrant behavior – as with all human behavior – can be varied and unique. The challenge for regulators and others who seek to improve working conditions for immigrants is to gain an even deeper understanding of worker behavior and to identify the most appropriate sites for regulatory intervention.

IV. CONCLUSION: TOWARDS FURTHER EMPIRICAL WORK

In part due to the shift in terrain created by *Hoffman Plastic Compounds*, the behavior of immigrant workers is often described in terms of broader structural forces. In many labor and employment law contexts, immigration status has been positioned as a central determinant for worker behavior.

While questions of immigration status undoubtedly weigh heavily on foreign-born workers, the emphasis on status to the exclusion of other factors contributes to an incomplete understanding of immigrant worker behavior and obscures the rich interplay between immigration status, other structural forces, worker characteristics, and expressions of individual agency. As described above, multiple factors and attributes likely contribute to the behavior of immigrants on safety and health matters.

The theories of worker behavior outlined above are not meant to be an exhaustive list; nor are the theories to be accepted at face value. In order to gain a better understanding of immigrant worker behavior on health and

113. See, e.g., Mary Schmich, *Undocumented Youth Brace for "Coming Out"*, CHI. TRIB., Mar. 10, 2010, News, at 6 available at <http://articles.chicagotribune.com/2010-03-10/news/ct-met-schmich-0310-20100309_1_tania-undocumented-banners> (describing a rally organized by the Immigrant Youth Justice League, at which various undocumented youth intended to “come out” and openly disclose their status).

safety matters, I intend to undertake empirical work in select geographic areas and industries. The theories presented above will serve as key guideposts in framing lines of inquiry and specific questions. Although considerable empirical research has been undertaken on worker behavior and legal scholarship is emerging on immigrants and workplace safety, there is a specific need for empirical work that examines immigrant worker behavior, attitudes, and perceptions of safety and health matters through the lens of the regulatory regime and of other legal norms related to labor and employment law.¹¹⁴

Empirical work on the behavior of immigrant workers may inform debates in other areas of labor and employment law. It may also enrich discussions of immigration status and the “chilling effect” in different contexts. (For example, activists and scholars have raised “chilling effect” concerns with respect to local police cooperation with federal immigration agents.¹¹⁵) Further empirical research about the how immigration status affects immigrants’ decisions to engage with government entities will enhance many ongoing policy discussions. With respect to occupational safety and health, the goal is to ensure that existing laws, regulations, and agency functions contemplate the different dimensions of immigrant behavior, so as to provide safe and healthy work environments for immigrants and all workers.

114. Pransky et al., *supra* note 53, at 118 (“Little is known about the specific circumstances leading to occupational injuries and illnesses in US immigrant populations A lack of surveys designed for these workers, difficulties accessing the population, informal work arrangements, . . . transient employment, concerns about confidentiality, [and other factors] have limited the assessment of occupational risk factors.”).

115. See, e.g., Muzaffar A. Chishti, *Enforcing Immigration Rules: Making the Right Choices*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 451, 470 (2007) (“[P]olice chiefs agree with immigrant advocates and social service providers that police enforcement of immigration laws has a chilling effect on reporting of crimes by immigrant victims and witnesses.”)