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# Barriers in Immigrant Laborers' Access to Workplace Rights

By Anita Sinha

All workers generally have equal rights under U.S. labor and employment laws regardless of their citizenship or immigration status. In reality, however, immigrant workers, especially undocumented workers, face particular barriers in accessing these rights. Here I address three barriers: Social Security Administration “no-match” letters, employment verification systems, and work-site raids. These enforcement tactics have been utilized with particular vigor against low-wage immigrant workers in the post-September 11 climate. But, even in this context, well-informed advocates can help immigrant workers overcome these barriers and access their workplace rights.

## “No-Match” Letters

The Social Security Administration initiated its “no-match” program in 1993 to help ensure that workers’ earnings are credited to them properly. When a worker’s name or social security number listed on the employer’s W-2 forms does not agree with Social Security Administration records, the agency sends a letter calling attention to the mismatch to the employee or, if the employee’s address is missing or incorrect, as is often the case, to the employer. The program’s express purpose is to notify employers about employees who are not receiving proper credit for their earnings—a circumstance jeopardizing their retirement or disability benefits.

Not only has the Social Security Administration failed to accomplish this goal, but also the letters issued through this program have become a de facto immigration enforcement method for employers who either misunderstand the purpose of no-match letters or misuse the letters to target and harass immigrant workers. In fact, one report on the no-match letters’ implications for workers’ rights found:

While [the Social Security Administration] emphasizes the no-match program is not part of an immigration enforcement effort, employers have fired thousands of workers identified in no-match letters, assuming that they are undocumented immigrants. . . . many workers identified in the letters have quit their jobs out of concern that immigration authorities may raid their workplace. Further evidence indicates that many employers have used the letters to undermine workers’ rights to organize, and to cut pay and benefits.<sup>1</sup>

Employers have used no-match letters as a basis for termination and to lay off workers temporarily without pay. The letters have also been used to undermine organizing activity at work sites—an illegal tactic similar to another common response to an organizing campaign involving immigrant workers: a sudden request for work authorization documents.<sup>2</sup>

**Crisis and Partial Scale-Back.** The impact of the no-match program reached a crisis level in 2002 when the Social Security Administration changed its policy and began sending no-match letters to any employer who had at least one employee with

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<sup>1</sup>CENTER FOR URBAN ECONOMIC DEVELOPMENT, UNIVERSITY OF ILLINOIS AT CHICAGO, SOCIAL SECURITY ADMINISTRATION’S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS’ RIGHTS IV (2003), at [www.uic.edu/cuppa/uicued/Publications/RECENT/SSAnomatchreport.pdf](http://www.uic.edu/cuppa/uicued/Publications/RECENT/SSAnomatchreport.pdf)

<sup>2</sup>Requiring workers to reverify their employment authorization under certain conditions violates their rights under antidiscrimination laws. See NATIONAL IMMIGRATION LAW CENTER, BASIC INFORMATION BRIEF: REVERIFICATION (2004), at [www.nilc.org/imm-employment/WVR\\_Material/Attorney/BIB\\_Reverification.pdf](http://www.nilc.org/imm-employment/WVR_Material/Attorney/BIB_Reverification.pdf).

information that did not match the agency's records. The change created tremendous confusion and caused thousands of workers, primarily low-paid immigrants, to lose their jobs. The crisis also affected businesses as employers lost hard-working employees in whom they had invested time and training resources.

In response, immigrant and labor rights groups across the country worked to educate community members, regional Social Security Administration offices, and others about the no-match letters. Delegations were very effective in meeting with employers who sought to take advantage of the letter particularly to interfere with workers' rights to organize unions. National immigrant rights and labor groups continued meeting with the agency to express concerns over the impact of the letters and offered suggestions for language that the agency might use in the 2003 no-match letters.

In December 2002 the Social Security Administration announced that it would roll back the number of no-match letters. In 2003 the agency sent the letters only to employers with a no-match for at least ten employees, or for at least one-half of 1 percent of the total number of items that the employer reported on the W-2 for tax year 2002. This change lowered the number of no-match letters that the agency sent to employers in 2003 to 126,250, down from more than 950,000 in 2002.<sup>3</sup>

The Social Security Administration also changed the text of the letters in response to input from advocates. The current letter contains strong language warning employers not to take adverse action against workers based solely on receiving the letter; such adverse action includes laying off, suspending, firing, or discriminating against anyone who appears

on the list. The letter still asks employers to respond within sixty days but clarifies that this deadline is simply a recommendation to employers to help the agency correct its records.<sup>4</sup> The agency still sends no-match letters to employers, but only when the workers' residential address is incomplete or missing.

**Current Problems and Advocacy Tips.**

Despite these improvements, significant problems persist. Many employers and workers mistakenly believe that the letters are notices of immigration violations. Some employers fire workers without giving the workers a chance to show that they are mistakenly on the list. Unscrupulous employers continue to use the Social Security Administration's no-match letters against labor-organizing campaigns and other worker efforts to obtain better wages and improve working conditions.<sup>5</sup>

Not only has the letter itself been reworded to clarify misunderstandings, but also in late 2003 the Internal Revenue Service (IRS) issued long-awaited guidance concerning penalties associated with the letters. The guidance makes clear that the IRS does not automatically fine an employer who receives a no-match letter: "IRS penalty notices relating to mismatched [tax identification numbers] are issued based on IRS systems, not [Social Security Administration Systems] systems." An employer is not fined if the reporting error is caused by "events beyond the filer's control" and the employer acts in a "responsible manner" after being notified of an error. The guidance states that "if the employer received a social security number from its employee, relied on that number in good faith, and used it on a Form W-2," the employer can show that his reporting error was beyond his control.<sup>6</sup>

The Office of Special Counsel for Immigration-Related Unfair Employment

<sup>3</sup>In 2004 the Social Security Administration plans to send approximately the same number of no-match letters as it sent in 2003.

<sup>4</sup>This recommended time line now appears at the end of the letter rather than at the beginning

<sup>5</sup>For case examples, see CENTER FOR URBAN ECONOMIC DEVELOPMENT, *supra* note 1.

<sup>6</sup>Letter from Thomas B. Dobbins, Director, Partnership Outreach, Taxpayer Education and Communication, Department of the Treasury, Internal Revenue Service, to Michael O'Neill and Connie Davis, Information Reporting Program Advisory Committee, Wage and Investment Subgroup (Sept. 24, 2003) (on file with Anita Sinha)

Practices also clarified that receiving no-match letters from the Social Security Administration does not obligate employers to reverify workers' employment eligibility.<sup>7</sup> Employers should not respond by asking workers to submit particular documents (e.g., a social security card), nor should they make workers fill out a new I-9 forms.<sup>8</sup>

The best solution to the problems spawned by no-match letters from the Social Security Administration would be elimination of the program. In the meantime, however, timely education and intervention can make a significant difference in employers' and workers' responses to the letters.<sup>9</sup> Advocates should

- educate workers to not admit anything (e.g., their immigration status or the authenticity of their work authorization documents) when told about a no-match letter;
- educate employers about the no-match program's purpose and give them copies of documents such as the IRS's and Office of Special Counsel's letters;
- educate employers about what they should not do (i.e., take adverse action) and the extent of what they should do (i.e., give a copy of the letter to the worker and indicate this in the worker's personnel file).
- reach out to diverse allies such as labor, immigrant rights, and interfaith group representatives to help advocate on

behalf of workers facing potential adverse action and encourage such coalitions to write to and meet with employers when appropriate; and

- educate a unionized workplace about what the union can do such as bargaining for contract language outlining appropriate responses to Social Security Administration no-match letters.

### Employment Verification Systems: The Basic Pilot Program

In 1996 Congress created three pilot programs—the basic pilot, the citizen attestation pilot, and the machine-readable document pilot—to test new ways for employers to verify that the employees whom they hire are authorized to work in the United States. The programs allow employers to tap directly into government databases to check on workers' employment eligibility. Congress characterized these pilot programs as an important feature of the Illegal Immigration Reform and Immigrant Responsibility Act and represented an attempt by Congress to “fix” the employer sanction provisions of the Immigration Reform and Control Act.<sup>10</sup>

The pilot programs effectively modified the I-9 employment verification procedures by giving employers direct access to records maintained by the U.S. Department of Homeland Security or the Social Security Administration.<sup>11</sup> The programs are voluntary, but employers who choose to participate gain certain

<sup>7</sup>The Office of Special Counsel, part of the U.S. Department of Justice's Civil Rights Division, was created to enforce the antidiscrimination provisions of the Immigration Reform and Control Act of 1986.

<sup>8</sup>Letter from Sarah DeCosse, Senior Trial Attorney, Office of Special Counsel for Immigration-Related Unfair Employment Practices, to Ana Avendano Denier, Associate General Counsel, American Federation of Labor and Congress of Industrial Organizations (Apr. 1, 2004) (on file with Sinha). For more information on reverification, see NATIONAL IMMIGRATION LAW CENTER, *supra* note 2; National Employment Law Project, *Reverification: When May Employers Check Work Authorization?* (May 2002), at [www.nelp.org/docUploads/pub138%2Epdf](http://www.nelp.org/docUploads/pub138%2Epdf).

<sup>9</sup>See, e.g., National Immigration Law Center, *SSA “No Match” Letters: Toolkit for Organizers*, (April 2004), at [www.nilc.org/immsemplymnt/SSA-NM\\_Pack/index.htm](http://www.nilc.org/immsemplymnt/SSA-NM_Pack/index.htm); National Employment Law Project, *Social Security No-Match and Employer Sanctions: What Advocates Need to Know* (May 2004), at [www.nelp.org/docUploads/Social%20Security%20no%20match%20policy%20update%20033004%2Epdf](http://www.nelp.org/docUploads/Social%20Security%20no%20match%20policy%20update%20033004%2Epdf); *id.*, *Social Security No-Match Letters: Top Ten Tips for Employers* (May 2004), at [www.nelp.org/docUploads/SSANomatch%20top%20ten%20tips%20october%202003%2Epdf](http://www.nelp.org/docUploads/SSANomatch%20top%20ten%20tips%20october%202003%2Epdf); *id.*, *Social Security No-Match Letters: Questions and Answers for Workers* (July 2002), at [www.nelp.org/docUploads/pub155%2Epdf](http://www.nelp.org/docUploads/pub155%2Epdf).

<sup>10</sup>Pub. L. No. 99-603, 100 Stat. 3359 (1986).

<sup>11</sup>See Rebecca Smith, Cynthia Mark, and Anita Sinha, *Protecting the Labor and Employment Rights of Immigrant Workers*, in this issue.

legal benefits, including a presumption, in the event of a Homeland Security investigation, that they did not violate the employer sanction provisions of the law.

The citizenship attestation and machine-readable pilots were tested in only a handful of states and were terminated by the Department of Homeland Security in 2003. The remaining basic pilot began in September 1997 in California, Texas, New York, Florida, and Illinois—states estimated to have the highest numbers of undocumented workers. In March 1999 the basic pilot was expanded to Nebraska. Congress extended the basic pilot in 2001 and again in December 2003, this time for five years. The program is scheduled to be available to employers in all states as of January 2005.<sup>12</sup>

**The Basic Pilot's Impact.** As noted above, the basic pilot allows employers direct access to government databases to verify employees' eligibility for employment. Workers' rights advocates have long been concerned about the accuracy of records maintained by the Department of Homeland Security and the Social Security Administration, which struggle to keep pace with name and status changes among a fast-growing population. The databases maintained by immigration authorities (currently the Department of Homeland Security, formerly the Immigration and Naturalization Service) are notoriously inaccurate and outdated. As the no-match letters revealed, the Social Security Administration's database also contains numerous discrepancies; these errors particularly affect immigrant workers.

The basic pilot makes it the *worker's* responsibility to challenge discrepancies between government records and their own and gives workers only a very short time to do so. Thus workers and their representatives must be informed about the pilot programs and how to protect employees' rights. Workers who do not understand their right to challenge a discrepancy or the consequences of failing to do so will lose their jobs.

Advocates also fear that the basic pilot may tempt some employers to use the databases unlawfully to prescreen workers for hire or to choose citizen workers over noncitizens because confirming citizens' employment eligibility may seem easier. Legal remedies protect workers from such practices but the remedies are effective only if workers know how to enforce their rights.

**Ensuring Workers' Rights Under the Basic Pilot.** Before participating in one of the pilot programs, an employer must enter into a memorandum of understanding with the Department of Homeland Security and, where applicable, the Social Security Administration. The memorandum requires the employer to agree (1) not to use the verification procedures until *after* an employee is hired and an I-9 form completed, (2) to use the confirmation system *only* to verify employees' employment eligibility, (3) not to discriminate against employees based on national origin or citizenship status, (4) not to verify employees selectively or use the confirmation system to reverify employees, and (5) not to take adverse action against an employee while the employee is challenging a nonconfirmation result.

Violation of these terms is grounds for immediate termination of the employer's participation in the pilot. Both the Department of Homeland Security and the Social Security Administration must refer all cases involving discrimination against workers to the Office of Special Counsel for Immigration-Related Unfair Employment Practices. Meaningful protection from discrimination depends on workers and their representatives being knowledgeable about how to assert workers' rights and contacting the Office of Special Counsel directly if they think that an employer misused the basic pilot.<sup>13</sup>

### Work-Site Enforcement

Immigrant workers face the threat of work-site raids by the Department of Homeland Security and other government agencies.

<sup>12</sup>Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944.

<sup>13</sup>For more information, see National Immigration Law Center, Basic Information Brief: DHS Basic Pilot Program, at [www.nilc.org/immsemplymnt/IWR\\_Material/Attorney/BIB\\_Reverification.pdf](http://www.nilc.org/immsemplymnt/IWR_Material/Attorney/BIB_Reverification.pdf)

Such raids have increased since September 11, with airport workers specifically targeted. For example, in October 2002 Homeland Security announced "Operation Tarmac," an interagency effort involving employment-file audits and criminal background checks on airport workers, and proceeded with enforcement sweeps to arrest and charge airport workers with criminal and immigration violations.<sup>14</sup> Most workers whom Operation Tarmac affected were low-income service workers such as janitors, food service workers, and baggage and cargo handlers.

In 2004 the Immigration and Customs Enforcement director Michael Dougherty testified that the proposed budget for agency's work-site enforcement operations includes an additional \$23 million, more than doubling the funds devoted to work-site enforcement in the past.<sup>15</sup> Devoting increasing resources to targeting low-income undocumented workers clearly is a misguided antiterrorism tactic, and advocates must keep in mind that, despite these heightened efforts, certain worker protection provisions remain intact. Immigrant workers must know their rights if Immigration and Customs Enforcement appears at their workplace.<sup>16</sup>

Employees are protected against employers who try to instigate a workplace raid

in retaliation against union activity or a labor dispute. In a memorandum of understanding with the Immigration and Naturalization Service that now applies to the Department of Homeland Security, the U.S. Department of Labor agrees that when an employer involved in a labor dispute makes a complaint, the Labor Department will not report the undocumented status of workers discovered during the ensuing investigation.<sup>17</sup> Homeland Security also states in field guidance that if information received from any source creates a suspicion that immigration enforcement involves Homeland Security in a labor dispute, enforcement officers must try to determine whether a labor dispute is in progress.<sup>18</sup> An immigration judge in New York recently terminated deportation proceedings against two workers on the basis that Homeland Security violated these guidance instructions when apprehending the workers.<sup>19</sup>

As with no-match letters from the Social Security Administration and the basic pilot, educating workers, employers, and unions about how to respond to work-site enforcement has a significant positive impact on protecting the labor and employment rights of low-wage immigrant workers.<sup>20</sup>

<sup>14</sup>Other agencies involved in Operation Tarmac include the U.S. Department of Transportation, the Social Security Administration, the Federal Bureau of Investigation, U.S. Marshalls, the U.S. Attorney's Office, and state and local police and other agencies.

<sup>15</sup>Hearing Before the House Committee on Judiciary Subcommittee on Immigration, Border Security and Claims, 108th Cong. (Feb. 25, 2004) (Statement of Michael Dougherty, Director of Operations of Immigration and Customs Enforcement, Department of Homeland Security), available at [www.house.gov/judiciary/dougherty022504.pdf](http://www.house.gov/judiciary/dougherty022504.pdf).

<sup>16</sup>See National Immigration Law Center, Protecting Yourself Against Immigration Enforcement (April 2004), at [www.nilc.org/immsemplymnt/IWR\\_Material/Worker/10-Protecting\\_Yourself.pdf](http://www.nilc.org/immsemplymnt/IWR_Material/Worker/10-Protecting_Yourself.pdf).

<sup>17</sup>See Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Administration, Department of Labor (Nov. 23, 1998), available at [www.nilc.org/immsemplymnt/emprights/MOU.pdf](http://www.nilc.org/immsemplymnt/emprights/MOU.pdf). The U.S. Department of Labor may, however, report the undocumented status of workers in an investigation that is not prompted by a specific complaint, i.e., a random investigation into an industry (such as poultry factories) known for wage and hour violations. Despite these antiretaliation protection provisions, if an employer does report an undocumented worker to the Department of Homeland Security in retaliation for filing a claim under the Fair Labor Standards Act or any other employment or labor claim, the worker receives no preferential treatment from the department, i.e., the employer's action does not rescind deportation or bar the department from placing the worker in deportation proceedings. However, legal advocates should move to suppress evidence of immigration status in deportation proceedings, seek protective orders, and use other litigation tools to prevent disclosure of immigration status. See Rebecca Smith, Cynthia Mark, and Anita Sinha, *Protecting the Labor and Employment Rights of Immigrant Workers*, in this issue, for a discussion of these tools.

<sup>18</sup>Operations Instruction 287 3a, redesignated as Transmittal Memo (SA 00-01), M-490 Special Agent's Field Manual (April 28, 2000), available at [www.nilc.org/immsemplymnt/emprights/Revised\\_Op\\_Inst.pdf](http://www.nilc.org/immsemplymnt/emprights/Revised_Op_Inst.pdf)

<sup>19</sup>In *re Herrera-Priego*, U.S. D.O.J. EOIR (Lamb, I.J., July 10, 2003), at [www.lexis.com/practiceareas/immigration/pdf-sweb428.pdf](http://www.lexis.com/practiceareas/immigration/pdf-sweb428.pdf)

<sup>20</sup>See National Immigration Law Center, *supra* note 16.