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https://doi.org/10.15779/Z385638

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COMMENT

How We Treat Our Guests: Mobilizing Employment Discrimination Protections in a Guest Worker Program

Emily B. White†

With immigration reform moving to the forefront of the national agenda, proposals for a guest worker program have become politically feasible. The potential effects of these proposals on the employment rights of guest workers have not been fully considered. In this Comment, Emily White argues that a guest worker program should include undiluted federal employment discrimination protections and institutional mechanisms to encourage the mobilization of guest workers’ legal rights.

Ms. White first examines the history of guest worker programs, including the Bracero program and the H-2A visa regime. Using the framework of mobilization theory, she evaluates the weaknesses of past guest worker programs and identifies potential shortcomings in recent proposals made by the House, Senate, and President George W. Bush during the 109th Congress, that could prevent workers from meaningfully exercising their legal rights. Ms. White concludes by suggesting remedies for the most significant of these problems.

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I. INTRODUCTION

The time is ripe for a massive overhaul of our nation’s immigration policy. A number of powerful interests have converged in support of the idea that any new immigration legislation should include a guest worker program.1 Among those who support a guest worker program are President George W. Bush, Senators John McCain, Edward Kennedy, Arlen Specter, and Lindsey Graham. The program also has the support of many immigrant groups, labor unions, and pro-business organizations. See Donna Smith, Immigration Bill Advances as Protests Spread, BOSTON GLOBE, Mar. 27, 2006, available at http://www.boston.com/news/nation/washington/articles/2006/03/27/bush_tells_americans_immigrants_are_not_a_threat/; Press Release, Senator John McCain, Senator McCain Joins Religious Leaders to Reiterate Need for Comprehensive Immigration Reform (Sept. 26, 2006), available at http://mccain.senate.gov/press_office/view_article.cfm?id=758.
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U.S.-Mexico border. After the attacks, many of the calls for immigration reform focused on increased border enforcement and a crackdown on the undocumented population currently residing in the United States. While there is still an overwhelming emphasis on border enforcement in the public immigration discourse, the idea of creating a guest worker program has once again become politically feasible. President Bush has himself made the creation of such a program a domestic policy priority for his final two years in office.

Despite growing support for a guest worker program in principle, little attention has been paid to how this type of program would be effectuated. While various legislators have floated a number of proposals, many important aspects of the guest worker-employer relationship have not been fully considered. In particular, current proposals have failed to address how guest workers will be protected by federal employment and antidiscrimination laws.

Many commentators and practitioners have elucidated the heightened vulnerability of guest workers to mistreatment by their employers. Greg Schell with the Migrant Farmworker Justice Project, for example, has explained, “[B]roken promises are the norm when it comes to guest worker visas. Despite pages of regulations, oversight is lacking, and workers are often cheated out of money and mistreated.” Past experiences with guest worker systems, from the Bracero program to the modern H-2A visa program, show us that guest workers are uniquely susceptible to employer abuse. When an employee is dependent on an employer to maintain his immigration status, this exacerbates the imbalance of power between employee and employer. It becomes easier to subordinate and control the

3. See id. at 867.
4. See supra note 1.
6. See discussion infra, Part II.A.
9. See id. See also Holley, supra note 7, at 594-616.
employee. Thus, even if guest workers are given full protection under federal employment discrimination laws, those protections may be merely symbolic in practice. Individuals who are operating in a foreign system are more likely to be unaware of their legal rights, unaware of how to protect their rights, or simply too scared of the consequences they may face if they lodge complaints against their employer.

In this Comment, I argue that as Congress works to agree upon a framework for a guest worker program, special attention must be paid to protecting the rights of guest workers from employment abuses and discrimination. The protections available in federal employment discrimination provisions should not be diluted or rendered unavailable to people who will inevitably be some of the most vulnerable members of the working community. Through the lens of mobilization theory, I suggest that Congress must ensure that legal rights afforded to guest workers are not merely symbolic by creating institutional mechanisms to encourage the actuation of those rights.

In Part II, I examine the historical foundation that has led us to the current climate of reform for the immigration guest worker provisions. I trace the path from the Bracero program to the creation of the H-2A program by the Immigration Reform and Control Act of 1986 (IRCA), pointing out the lessons to be learned about protecting guest workers along the way. In Part III, I analyze the guest worker proposals recently considered by Congress. I describe the various voices involved in the discussion and how those interests will shape and possibly hinder the true protection of immigrants' rights as a new Congress takes its next steps towards immigration reform. In Part IV, I point out the failure of the recent proposals to address the special needs of guest workers. In doing so, I recommend certain steps that must be taken to fill the gaps that would leave guest workers susceptible to employer harassment and abuse. I conclude that if we are to vindicate the policies underlying employment discrimination provisions, then we must take an active approach towards ensuring those same protections are fully available for temporary foreign workers. Otherwise, we risk creating a secondary class of employees who may be easily abused and subordinated by their powerful employers and condoning flagrant disregard of the civil rights interests embedded in employment discrimination laws.

10. One advocate worries that in a guest worker program, "individual employers have too much power and leverage." Harman, supra note 8, at 10A.
11. See Holley, supra note 7, at 594-95.
12. See, e.g., Harman, supra note 8.
II. HISTORICAL BACKGROUND

A. Early History

In the United States, there is a long history of importing workers either to fill undesirable positions or to give certain employers a cheap source of labor. The widespread use of African slave labor during the colonial period and through the first century of our country's existence is the most blatant example. The importation of foreign indentured servants was also common from the colonial period and into the 1800s. The myriad of gross abuses suffered by slaves and indentured servants at the hands of their employers is painfully obvious.

The nation's immigration laws evolved (or devolved) slowly from an open door policy to a complex set of restrictions and rules governing who may and may not enter. Immigration policy has historically been fraught with racism and nativism. The first comprehensive immigration act was passed in 1917 and contained race and nationality based restrictions. It was not until 1965 that the official immigration policy discarded most color-based preferences. The Immigration and Nationality Act (INA) of 1917 had a loophole that allowed for the admission of certain classes of workers for temporary employment. In the early part of the twentieth century, temporary workers traveled to the United States to fill positions primarily in agriculture or manual labor.

B. Bracero Program

In 1942, the United States and Mexico engaged in a series of treaties that enabled employers to recruit Mexican agricultural workers. This agreement, which came to be known as the Bracero Program, was allegedly


16. See generally id. (describing legislation such as the Chinese Exclusion Act of 1882, the National Origins Act of 1924, and the Immigration and Nationality Act of 1952).


18. ALEINKOFF ET AL., supra note 15, at 162. Even now, non-citizens who are from countries associated with terrorism are treated differently in the immigration context. Id. at 168.


20. Bickerton, supra note 19, at 899.

21. Id. at 897-905.
implemented to address labor shortages in the agricultural industry during World War II.\(^{22}\) Still recovering from the effects of the Depression, Mexican authorities were attracted to the idea of putting their men to work in American jobs to support the Mexican economy.\(^{21}\) Both sides agreed that it would be beneficial for the interests of each country to allow workers to remain only temporarily in the United States.\(^{24}\) That way, Mexico would not permanently lose their able-bodied workers and would encourage the earned wages to be directed back to Mexico.\(^{25}\) The United States wanted to profit from the labor of Mexican unskilled workers without allowing their permanent settlement.\(^{26}\) Mexican President Avila Camacho rightfully feared that American employers were simply looking for a source of cheap labor and expressed concern that Mexican workers would face discrimination.\(^{27}\) In the end, the Mexican government decided that the positive aspects of the plan outweighed the negative and both sides came to an agreement.\(^{28}\) Part of the deal struck between President Camacho and President Harry Truman included the provision that the Braceros “would not be subjected to any discriminatory acts.”\(^{29}\) Consequently, certain rights were written into the law in order to protect the Braceros. These workers were supposed to receive free housing, medical treatment, transportation, and fair wages.\(^{30}\)

The legacy of the Bracero program is a stark reminder of the problems inherent in importing foreign workers and binding them in grossly unequal employment relationships. The Bracero program has been widely condemned as a failed experiment because of the severe injustices suffered by the 4.6 million workers who participated in the program from 1942 until 1964.\(^{31}\) Braceros endured squalid living conditions and worked for very low wages, with the constant threat of deportation looming over their heads.\(^{32}\) Despite the legal protections that were supposed to be part of the program, the workers were unable to secure legal redress for their injuries.

\(^{22}\) Id. at 899. The program was opposed by organized labor, which argued that there was no actual shortage of workers and were worried from the outset that wages and working conditions would be adversely affected. Id. at 899-900.

\(^{23}\) Mexican officials saw it as “providing a safety valve to deal with a politically explosive underemployed population.” Id. at 903. See generally Richard B. Craig, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY 18 (1971).

\(^{24}\) Bickerton, supra note 19, at 899.

\(^{25}\) CRAIG, supra note 23, at 41.

\(^{26}\) See Bickerton, supra note 19, at 899.

\(^{27}\) Id. at 903.

\(^{28}\) Id.

\(^{29}\) Id.

\(^{30}\) Jim Abrams, Guest Worker Programs Have Flawed Past, ASSOCIATED PRESS, Mar. 25, 2006.


\(^{32}\) Bauer, supra note 31, at 734.
because they were unaware of their rights or were too afraid to complain.\textsuperscript{33} In the words of one participant, the employers “treated us like animals . . . . But, as a bracero, you knew you couldn’t complain.”\textsuperscript{34} Records show that despite the widespread abuses that were part of the program, only one in every 4,300 Braceros ever filed a grievance.\textsuperscript{35} The perceived powerlessness of the workers, coupled with the “physical and procedural impediments to filing a complaint,” created a nearly insurmountable barrier to the meaningful enforcement of any legal rights.\textsuperscript{36}

To make sure that these workers did not wear out their welcome, “Operation Wetback” was implemented by the federal government in 1954.\textsuperscript{37} Through this program, federal immigration authorities deported workers whom they deemed no longer met its requirements.\textsuperscript{38} No corresponding monitoring of employers to ensure that they were not violating the rights of the Bracero workers existed under the plan. In 1964, the same year that important civil rights and employment discrimination legislation was passed,\textsuperscript{39} President John F. Kennedy finally ended the troubled program.\textsuperscript{40}

The Bracero program is largely credited with beginning the mass movement of workers across the southern border. Employers became accustomed to having a cheap source of labor readily available and Mexican workers came to rely on the marginally more lucrative economic opportunities available to them in the United States.\textsuperscript{41} As long as there has not been effective control of the border, undocumented workers have continued to follow the path of the Braceros into the United States. Just as the Braceros enjoyed only “illusory protections” in the law,\textsuperscript{42} the undocumented workers who have come after them endure abuses by employers without avenues for meaningful redress.\textsuperscript{43}

\textsuperscript{33} Id.

\textsuperscript{34} Holley, \textit{supra} note 7, at 585.

\textsuperscript{35} Id.

\textsuperscript{36} Id. (citing \textit{ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 197-98 (1964)}).


\textsuperscript{38} Id.


\textsuperscript{41} See Bickerton, \textit{supra} note 19, at 910; \textit{see also} Mass Protests Highlight Immigrant Clout, \textit{N.Y. TIMES}, Apr. 10, 2006, at A1 (laying out the economic advantages of working in the United States).

\textsuperscript{42} Bauer, \textit{supra} note 31, at 752.

\textsuperscript{43} See \textit{id.} at 745-52 (citing court holdings that implicitly allow employers to hire undocumented workers who are promised workplace rights in theory, but not in practice). \textit{See also, e.g., Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149-50 (2002)} (holding that federal immigration
C. Immigration Reform and Control Act

After the Bracero program, the next comprehensive effort to create a temporary worker program for unskilled workers came with IRCA in 1986. IRCA's primary purpose was to cut down on the number of undocumented workers in the country. The tools implemented to accomplish this goal were to: (1) legalize the status of some undocumented workers already present by naturalizing "special agricultural workers" (SAWs) and (2) create employer sanction provisions to punish and deter the hiring of undocumented workers. Out of a concern that employers would discriminate against job-seekers with a foreign appearance in order to avoid any possibility of sanctions, IRCA also incorporated language emphasizing that employers may not impermissibly discriminate against workers based on their citizenship status. This legislation gave increased funding to labor monitoring agencies to ensure that employers were not violating their legal obligations and increased the reach of Title VII to include employers with four to fourteen employees. The legislative history suggests that Congress may have intended that IRCA would be enforced in concert with employment discrimination protections, giving all workers (including those without documentation) access to protections under Title VII and the Age Discrimination in Employment Act of 1967 (ADEA).

D. Statutory Framework of the H-2A Guest Worker Visa

The original H-2 visa was created in 1943 with the purpose of importing Caribbean workers to cut sugar cane. In the 1960s, then Secretary of Labor Willard Wirtz expanded the program to include Mexican

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policy foreclosed the award of backpay to an undocumented immigrant who had been unlawfully terminated in violation of the National Labor Relations Act).

45. See 4 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 53.02 (Matthew Bender, Rev. Ed. 1999).
49. See H.R. REP. No. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5662 ("It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections of existing law . . . or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law."). Justice Breyer pointed out in dissent in Hoffman that with IRCA, Congress likely did not intend to diminish employment protections for undocumented workers. Hoffman, 535 U.S. at 157 (Breyer, J., dissenting); see also Ho & Chang, supra note 48, at 490.
temporary workers.\textsuperscript{51} When IRCA was proposed, employers were concerned that if it effectively reduced the number of undocumented immigrants, there would be a shortage of unskilled labor.\textsuperscript{52} Agricultural growers argued that without creating some means of authorizing work for temporary foreign workers, "crops would rot in the field."\textsuperscript{53} In response to this concern, Congress split the H-2 category.\textsuperscript{54} H-2A visas were designated for temporary agricultural workers and H-2B visas were designated for temporary workers in other fields. H-2A visas last for up to one year and can be renewed as long as the worker's total stay in the United States does not exceed three consecutive years.\textsuperscript{55}

The H-2A visa program has been roundly criticized as being a modern-day incarnation of the Bracero program.\textsuperscript{56} The statute was primarily written to protect the interests of domestic workers. To qualify for the H-2A program, employers undergo a two-step process. First, they must obtain certification from the Department of Labor that there exists a need for a foreign worker. This requires employers to make a reasonable, yet ultimately unsuccessful, effort to recruit a domestic worker.\textsuperscript{57} The employer must demonstrate that hiring a temporary foreign worker will not adversely affect the wages or working conditions of similarly situated employees.\textsuperscript{58} Second, upon receipt of the labor certification, the employer must petition the United States Citizen and Immigration Service (USCIS) for a visa so that the worker may enter the country.\textsuperscript{59}

Under the H-2A program, the employer is required to give the workers housing (commensurate with the prevailing custom in that industry), a competitive wage, meals or cooking facilities, workers' compensation insurance, and return transportation.\textsuperscript{60} Employers often see these requirements as too burdensome, so they opt to hire undocumented workers rather than take part in the complex certification process.\textsuperscript{61} Only about

\textsuperscript{51} Id.
\textsuperscript{52} H.R. REP. No. 99-682(I), at 83-84 (1986). See also ALEINKOFF ET AL., supra note 15, at 398.
\textsuperscript{53} ALEINKOFF ET AL., supra note 15, at 398.
\textsuperscript{54} Id.
\textsuperscript{55} 8 C.F.R. § 214.2(h)(5)(iv)(A), (viii)(C) (2002).
\textsuperscript{56} See generally Lorenzo A. Alvarado, Comment, A Lesson From My Grandfather, the Bracero, 22 CHICANO-LATINO L. REV. 55, 67 (2001); Ontiveros, supra note 7, at 161-62; Laura C. Oliveira, Comment, A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program, 5 SCHOLAR 153, 167-69 (2002).
\textsuperscript{57} 20 C.F.R. § 655.90(b) (2002); 20 C.F.R. §§ 655.103(d) (explaining the steps employers must take to recruit domestic workers).
\textsuperscript{58} 20 C.F.R. § 655.90(b).
\textsuperscript{59} ALEINKOFF ET AL., supra note 15, at 398.
\textsuperscript{60} 20 C.F.R. § 655.102(b).
\textsuperscript{61} See Bauer, supra note 31, at 742. The burdensome requirements have also prompted the American Farm Bureau Federation to lobby for a streamlined guest worker program. See Juliana Barbassa, Farmers Watch Debate on Immigration Reform, WASH. POST, Apr. 10, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/04/10/AR2006041000116_pf.html. "The
50,000 H-2A visas are granted per year, a number far lower than the estimated number of immigrant agricultural workers employed in the United States.62

Employers who opt to use the H-2A system do so for a variety of reasons. Some are certainly interested in obtaining legal workers so that they do not disregard the law. However, others may be willing to take on the requirements outlined by the visa process because they understand they can largely exert total control over such workers. The advantage of using an H-2A worker over an undocumented worker is that the employer utilizes a legal process to recruit the vulnerable employee, which limits the possibility of legal sanctions. Despite the rights that are conferred upon these workers in the regulations, such protections often do not exist in practice.63 The Department of Labor does not adequately monitor or enforce its own regulations.64 Consequently, employers can use the H-2A visa program to hire workers who lack meaningful legal protections and are easier to manipulate.

Although employers must demonstrate the need for a foreign worker when using the H-2A visa program, statistics show that there are high rates of unemployment among domestic farm workers.65 Therefore, it seemingly would be more cost effective for employers to find and hire those workers because they would not have to invest capital to comply with the requirements of the H-2A visa.66 Some theorists conclude that employers who continue to use the program do so in order to obtain workers who are marginalized and easy to coerce.67
Importantly, there are a number of rights that are not extended to H-2A workers. The statute explicitly excludes these workers from coverage under the federal Migrant and Seasonal Agricultural Workers Protection Act (AWPA). Enacted in 1983, the AWPA was designed to provide agricultural migrant workers with greater legal protections. Thus, H-2A workers do not have the safeguards for wages and working conditions available to other agricultural workers under the AWPA. Additionally, all agricultural workers are excluded from coverage under certain provisions of the Fair Labor Standards Act (FLSA), including the overtime provisions. Agricultural employers are also exempted from the National Labor Relations Act (NLRA), inhibiting the ability of farm workers to engage in collective bargaining. The result is that participants in the H-2A agricultural guest worker program have limited protections available to them under the current legal framework.

One of the most striking limitations on H-2A workers is that they are tied to a single employer. They have no flexibility to move from one employer to another if they are dissatisfied with the conditions or terms of their employment. This greatly restricts the practical ability of an employee to complain about discrimination. They have no leverage to collectively organize to pressure an employer to end unfair practices. If an employer is dissatisfied with an employee, he may terminate the employee, thereby ending the worker’s legal stay in the United States. The worker may then be deported to his home country. The stakes are therefore extremely high for these individuals. They have made a personal monetary investment to

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68. After the Supreme Court held in Hoffman Plastic that the NLRA does not apply to undocumented workers, it is unclear whether other federal laws protect these workers. See Department of Labor, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division (Jan. 15, 2007), available at http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm.


70. See Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985). “The legislative history of the Act and the decisions interpreting it make it clear that the purpose of this civil remedy is . . . to promote enforcement of the Act and thereby deter and correct the exploitive practices that have historically plagued the migrant farm labor market.” Id.

71. LoBreglio, supra note 7, at 948-49. The AWPA requires agricultural employers to disclose the terms and conditions of employment to workers in writing, post information about worker protections at the worksite, pay each worker in a timely fashion, ensure that provided housing complies with federal standards, and maintain payroll records for each employee for three years. 29 U.S.C. §§ 1801-72 (1994).

72. Ontiveros, supra note 7, at 167.


74. Holley, supra note 7, at 595.

75. Id.
partake in the H-2A visa program. Moreover, they risk losing not only their job, but the chance to work legally in the United States if they in any way displease their employers.

III. FRAMEWORK UNDERLYING RECENT GUEST WORKER PROPOSALS

A. Summary of Recent Proposals

During the term of the 109th Congress, the topic of immigration reform again reached the forefront of public debate. Since Democrats achieved a majority in both chambers of Congress after the 2006 midterm elections, the 110th term will likely lead to further discussion of immigration reform. After the election, President Bush noted that as congressional power switches hands, immigration is "an issue where I believe we can find some common ground with the Democrats."\(^7\)

Alongside proposals for tougher enforcement of immigration laws, many voices called for a revamped guest worker program. In January 2004, President George W. Bush began publicly advocating for a guest worker program.\(^7\) In his words, "The system is not working. Our nation needs an immigration system that serves the American economy and reflects the American Dream."\(^7\) After the 2006 midterm elections, he reiterated his belief that "[w]hen you’re talking comprehensive immigration reform, one part of it is a guest worker program, where people can come on a temporary basis to do jobs Americans are not doing."\(^8\)

Alongside tough enforcement provisions, lawmakers are seeking to create a program that would give a foreign worker temporary authorization to be in the United States to purportedly "fill jobs no American is willing to do."\(^9\) The recent proposals vary in terms of the length of the temporary period, the mechanisms for selecting workers, and the ability of the guest workers to gain permanent legal status in the United States. During the 109th term, both the House of Representatives and the Senate passed their own immigration reform bills, but neither has been enacted. Additionally,

76. A worker is responsible for paying many fees before she can participate in the program, and often is working in debt during the first months of employment. Id. at 595-96.


79. Id.

80. Press Conference, supra note 77.

81. White House Fact Sheet, supra note 5.
President Bush has made a proposal in supporting the creation of a guest worker program.

1. President Bush’s Proposal

Since he originally aired the idea in January 2004, President Bush has remained one of the most vocal advocates for a guest worker program. His current policy guidelines state that he wants a program where workers register for a temporary stay in the United States to “help meet the demands of our growing economy.” He believes that this plan will decrease unauthorized immigration by providing a legal channel for people who want to enter the country to work. He firmly opposes amnesty, although he does think that the number of nonimmigrant visas that are issued should be increased. At this point, he has failed to offer specific information about how workers would be matched with employers or what legal rights workers would enjoy.

2. The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005

On December 16, 2005, the House of Representatives passed H.R. 4437, sponsored by Representative F. James Sensenbrenner, Jr. This bill focused on aggressive enforcement, border control, and increased penalties for employers and undocumented immigrants. One provision even made it a felony to maintain undocumented status in the United States or to give assistance to undocumented immigrants. Legislators rejected a guest worker provision in the bill. Many, including organizations representing immigration advocates and religious groups, vociferously criticized the Sensenbrenner bill as draconian and inhumane. After being passed by the House, the Senate took no action on this bill while it worked on drafting its own legislation.

82. Id.
83. Id.
84. Id.
85. Id.
87. Id.
88. Id. Since the passage of this bill, public outcry has prompted Republican leaders to guarantee that the provisions making it a felony to be in the United States would be dropped. Charles Hurt, Alien Felony Proviso Dropped, WASH. TIMES, Apr. 12, 2006, at A1, available at 2006 WLNR 6190799.
89. Id. Rep. Howard Berman proposed an amendment that would include a guest worker provision, but Sensenbrenner stated a guest worker provision could not be included because there is no “clear consensus” on the idea. Id.
90. See Smith, supra note 1.
3. Comprehensive Immigration Reform Act of 2006

After the House of Representatives passed H.R. 4437, the Senate began work on its own version of an immigration reform bill. The Senate Judiciary Committee’s comprehensive approach to immigration reform, drafted primarily as a compromise between Senators Arlen Specter, Edward Kennedy and John McCain, included a guest worker program alongside new security and enforcement measures.91 The Comprehensive Immigration Reform Act of 2006 (CIRA) was passed in the Judiciary Committee on March 27, 2006 and then modified by a series of amendments and compromises negotiated by Senators Chuck Hagel and Mel Martinez.92 It was further modified during the floor debate in the Senate and passed by the Senate on May 26, 2006.93 It would create three new categories of guest workers: H-2C workers,94 conditional nonimmigrant workers,95 and agricultural “blue card” workers.96 Some of these guest workers could embark on the path towards citizenship by meeting certain residency and security requirements. CIRA also would make some modifications to the current H-2A visa program, enhancing the employment protections available to those workers.97

a. H-2C Guest Worker Program

CIRA would create a new H-2C visa category, available to workers currently outside of the United States who demonstrate intent to temporarily work in the country.98 Approximately 200,000 H-2C visas would be available each year, varying slightly based on demand.99 To qualify, a worker would have to show that she has received a job offer from a qualified employer, pay a $500 visa issuance fee, and submit information on health and security issues.100 The worker may be responsible for covering her travel costs from her home country to the place of employment.101

An H-2C worker could not immediately adjust status to permanent residency and would be permitted to stay in United States for one

93. Id.
95. Id. at § 601.
96. Id. at § 612.
97. See generally id. at § 615.
98. Id. at § 403(a)(218A).
99. Id. at § 408(g)(2)(C).
100. Id. at § 403(a)(218A)(b).
101. Id. at § 404(a)(218B)(g)(6).
renewable three-year term. By meeting additional requirements, the worker could petition for an H-4 visa for children and spouses. If the worker is terminated or otherwise becomes unemployed, she is required to leave the United States within sixty days unless she finds alternate qualifying employment. In any event, the worker must leave the United States within ten days after the end of the authorized visa period or she will be deemed ineligible for any other immigration benefit and barred from the country for ten years. Importantly, H-2C workers would be able to move to a new job once a contract ends and they are not bound to a single employer.

The obligations placed on the employer are very similar to the requirements in the H-2A visa program: The employer must attest that the guest worker is filling a job that is not wanted by a domestic worker, that the guest worker’s presence will not adversely affect U.S. workers, that the worker will receive the prevailing wage, and that the employer will provide workers’ compensation insurance. The Department of Homeland Security is charged with ensuring general compliance while the Department of Labor is directed to hire at least an additional 2000 investigators to monitor employers.

The bill replicates the definition of the terms “employee” and “employer” found in the FLSA. Presumably, H-2C workers would have access to the full range of protections under federal employment law, as the statute specifically states that it does not intend to affect a worker’s other contractual and statutory rights. The legislation explicitly prohibits employers from punishing whistleblowing employees. Although the proposed statute would not give H-2C workers an express private right of

102. Id. at §§ 403(a)(218A)(e), (f).
103. Id. at § 403(a)(218A)(m).
104. Id. at § 403(a)(218A)(f)(3). An exception can be made if: (1) the unemployment was caused by a period of physical or mental disability of the alien or its immediate relative, (2) the leave is authorized by employer policy or state or federal law, or (3) the unemployment is caused by circumstances outside of the alien’s control. Id.
105. Id. at §§ 403(a)(218A)(h), (i).
106. Id. at § 403(a)(218A)(j).
107. See generally id. at § 404(a)(218B).
108. Siskind, supra note 92, at 5-6, 10, 17.
110. Id. at § 404(a)(218B)(h)(8). A worker is entitled to back wages and civil penalties. Id. However, the amount of a civil monetary penalty that can be awarded under the statute is limited. For a non-willful violation by an employer, a worker can only recover $2000. Id. That number can extend up to $25,000 if the employer committed a willful violation of its obligations and the worker was injured. Id.
111. “[I]t shall be unlawful for an employer . . . to intimidate, threaten, restrain, coerce, retaliate, discharge, or in any other manner, discriminate against an employee or former employee” who discloses information to the Secretary of Labor or cooperates with an investigation of an employer. Id. at § 404(a)(218B)(f).
action in a federal court, they could file a complaint with the Secretary of Labor if they thought their rights had been violated. If the Secretary of Labor believed there was reasonable basis to investigate, further action could be taken and a hearing may be held. If the worker was successful in her complaint, she would be reimbursed for reasonable attorney’s fees.

CIRA would create an “Alien Employment Management System” to collect information on employers and workers. It also commissions a temporary guest worker program task force to study the impact of the program on domestic workers. Finally, CIRA outlines some minimal requirements for the labor recruiters who would potentially serve as the conduits between willing workers and employers. Before the workers could sign a contract, the recruiters must inform them of the central terms of employment, including the job description, wages, location, and length of employment. Labor recruiting organizations would be required to register their general activities with the Department of Labor and renew their profile every two years. The proposed statute gives no guidance as to how these organizations should go about recruiting foreign workers, under what standards they should operate, who they may recruit, or from which countries they may find workers.

b. Conditional Non-Immigrant Status

CIRA also would create an alternative guest worker program called “conditional non-immigrant status.” This provision is separately entitled the “Immigrant Accountability Act of 2006.” It would apply to all individuals who have been working in the United States for two to five years and would allow them to get a temporary visa for up to three years (referred to as “deferred mandatory departure”), if they are continuously employed and apply within a year of the passage of that bill. During the period that these workers are granted conditional visas, they are deemed to be a nonimmigrant and not eligible for public benefits. There are no terms explicitly guaranteeing these workers any employment rights or protections.

112. Id. at § 404(a)(218B)(h).
113. Id. at § 404(a)(218B)(h)(5).
114. Id.
115. Id. at § 405(a)(218C).
116. Id. at § 408.
117. Id. at § 404(a)(218B)(g).
118. Id. at § 404(a)(218B)(g)(7)(B).
119. Id. at § 601.
120. Id. at § 601(a).
121. Id. at § 601(b)(245C).
122. Id. at § 601(b)(245C)(b)(3).
A controversial provision would allow individuals who could prove they have been in the country for over five years to qualify for immediate permanent residency. Individuals who have been in the country for less than two years from the date of the bill’s enactment would not be eligible for deferred mandatory departure and therefore would be required to leave the country and apply for a visa in the traditional manner.

c. **Blue Card Workers**

Through a proposal by Senator Dianne Feinstein, CIRA incorporated the Agricultural Job Opportunities, Benefits and Security Act of 2006, enabling foreign agricultural workers to apply for a separate temporary visa called a “blue card.” In a five-year period, 1.5 million blue cards could be issued. If these workers were employed for a minimal amount of time, they could apply for permanent residency. Immigrants with blue card status could lawfully reside in the United States but would not be entitled to any public benefits until they had the blue card for five years. The proposed statute states that these workers could only be terminated for just cause and are entitled to a process to challenge their termination but would have to bear their own attorneys’ fees.

d. **Amendments to H-2A Guest Worker Program**

CIRA would also substantially amend some aspects of the current H-2A visa program. It would make more protections available to domestic workers to ensure that temporary foreign workers do not displace them from jobs. It reiterates that the “preferential treatment of aliens [is] prohibited,” meaning that domestic workers would be entitled to the same terms and wages as foreign workers.

Nevertheless, CIRA would add significant language to the H-2A program to help ensure the enforcement of worker protections. It

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123. *Id.* at § 601(b)(245B). A conservative website that has been tracking the immigration debate sees these provisions as simply granting a broad-based amnesty. *See* Immigration Battle in the Senate, NumbersUSA, http://www.numbersusa.com/hottopic/2454.html (last visited May 3, 2006) (on file with author).
125. CIRA, S. 2611, § 611.
126. *Id.* at §§ 612(2), 613(a)(8).
127. *Id.* at § 613. To qualify for permanent residency, the worker must work at least 100 days per year for five years or 150 days per year for three years, following enactment of the bill. *Id.*
128. *Id.* at § 613(b).
129. *Id.* at § 613(b)(3).
130. *Id.* at §§ 615(a)(1)(218)(a), (b)(H) (outlining application process and assurances from employer, recruitment provisions, and process to maintain preference for American workers).
131. *Id.* at § 615(a)(1)(218E)(a).
mandates the Secretary of Labor to "establish a process for the receipt, investigation and disposition of complaints," and states that an investigation should be conducted if the complaint establishes reasonable cause. A significant change is that it would grant H-2A workers a private right of action for employment discrimination claims, which are to be brought first with the Secretary of Labor and can then be filed in federal district court. CIRA would expressly outlaw discrimination against employees who attempt to vindicate their rights. Under this proposed legislation, employers are bound explicitly to comply with all federal, state, and local labor laws, although H-2A workers are still excluded from the AWPA. Importantly, H-2A workers would be allowed to seek other employment from a qualified employer if they filed a complaint against their current employer.

Finally, CIRA also includes the "Initial Entry, Adjustment, and Citizenship Assistance Grant Act of 2006," which would create a grant program to underwrite various education and training campaigns that assist temporary workers. This program would require the USCIS to provide funding to programs that assist temporary workers in understanding their new rights under the law. Two percent of the guest worker visa fees would be used to fund the program.

4. Other Proposals & Current Status

After passage of CIRA in the Senate Judiciary Committee, former Senate Majority Leader Bill Frist responded by proposing his own enforcement-oriented measure that did not include a guest worker provision. Legislation drafted by Senators John Cornyn and Jon Kyl included a guest worker provision but specified that the workers must return home at the end of the working period. In support of this idea, Senator

133. Id. at § 615(a)(1)(218G)(a)(1)(A).
134. Id. at § 615(a)(1)(218G)(b)(7).
135. Id. at § 615(a)(1)(218G)(d) "It is a violation . . . to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against an employee . . . because the employee has disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of [their rights], or because the employee cooperates or seeks to cooperate in an investigation or other proceeding concerning the employer's compliance with [their] requirements . . . ." Id.
136. Id. at § 615(a)(1)(218E)(c).
137. Id. at § 615(a)(218G)(e).
138. Id. at § 758.
139. Id.
140. Id. at § 758(b).
Cornyn stated that he "supports the common-sense idea that a temporary worker program for future workers should be just that: temporary."\footnote{142} Despite similar sentiments of many lawmakers who were uncomfortable with the guest worker provisions in CIRA, the legislation was passed by the Senate.\footnote{143} However, no action has yet been taken on reconciling the House and Senate approaches to immigration reform.\footnote{144} How leaders from both parties will move forward on this issue after the Democratic victory in the mid-term elections of November 2006 remains to be seen. Despite the setbacks, President Bush has continued to voice his support for immigration reform including a guest worker program.\footnote{145}

Widespread protests and economic boycotts took place on May 1, 2006, in an effort to galvanize public support for compassionate immigration reform.\footnote{146} Yet, immigration remains a very divisive issue. Within the Republican Party, there is a schism between pro-business moderates and nativist conservatives.\footnote{147} Some conservatives have taken extremely tough stances and appear unwilling to budge on any legislation that would offer either a guest worker program or a route to permanent status for undocumented immigrants currently in the country.\footnote{148} At the time of writing, it remains to be seen whether the powerful interests who are invested in immigration reform will be able to feasibly restart the initiative to bring about a change in the 110th Congress or whether any meaningful reform will have to wait.

**B. Interests in Creating a New Guest Worker Program**

Various interest groups from all over the political spectrum have supported a guest worker measure, in some form or another. What are the underlying motives of the groups now converging on the idea of a guest worker program? Although there is a rare display of bipartisan support on this issue, the goals and motivations of the political players diverge significantly.

\footnote{142} Michelle Mittelstadt, *Senate Plan Would Treat Immigrants Based on Time in U.S.*, DALLAS MORNING NEWS, Apr. 5, 2006, at 1A.
\footnote{144} Carl Hulse & Sheryl Gay Stolberg, *Senators to Reignite Debate on Immigration*, N.Y. TIMES, Apr. 24, 2006, at A15.
\footnote{145} See Press Conference, supra note 77.
Much of the discourse around the recent proposals is a reenactment of the debate that surrounded the passing of IRCA. At that time, the public was similarly concerned that illegal immigration was out of control and felt that Congress needed to take swift steps to ameliorate the perceived problem.\textsuperscript{149} That brought about the tough employer sanction provisions in IRCA, along with the normalization of status for a number of workers already in the country. The idea was that Congress would deal with the undocumented workers who were already here and then start with a clean slate to deter future unauthorized hiring.\textsuperscript{150} Agricultural employers worried that strict new legislation would have an adverse effect on their industry and therefore pushed for the creation of the H-2A visa program.

History tells us that IRCA failed in many respects. Employers continued to flout federal immigration laws, hired unauthorized workers, and avoided facing meaningful sanctions.\textsuperscript{151} IRCA left open a loophole that allowed employers to rely on workers' representations without requiring them to closely inspect anyone's immigration documents.\textsuperscript{152} Therefore, the H-2A guest worker program was never really needed because a steady flow of undocumented workers continued to fill the labor market.

The current concern of the business community is that legislators may have learned from their mistakes and will pass an enforcement bill that will actually stem the tide of undocumented workers. Employers are concerned now, as they were in 1986, that they will not have sufficient unskilled workers to meet production quotas.\textsuperscript{153} They still see a guest worker program as a means to ensure a steady source of cheap labor. Pro-business groups, such as the United States Chamber of Commerce and the National Restaurant Association, along with some Republican senators, are pushing hard in favor of a guest worker program.\textsuperscript{154}

Additionally, many prominent Democrats have voiced support for such a plan.\textsuperscript{155} It is not always clear whether more liberal-minded individuals genuinely believe that a guest worker program is a good idea or if it is embraced as a means to temper the harsh enforcement provisions that are being called for by many members of Congress. A guest worker provision

\begin{flushleft}
150. \textit{Id.}
151. \textit{Id.}
152. Oliveira, supra note 56, at 164.
155. Senator Edward Kennedy, "a longtime liberal," was one of the drafters of CIRA. In addition, "All eight Democrats on the Judiciary Committee supported [the] guest worker provisions." David Espo, AFL–CIO chief criticizes guest worker programs for immigrants, ASSOCIATED PRESS, Mar. 29, 2006, available at 3/29/06 AP Alert - Political 10:32:54.
\end{flushleft}
has been framed as a humane way to deal with the large number of undocumented workers who are already in the country.\textsuperscript{156} Many concede that it would be logistically impossible to deport every undocumented person in the country.\textsuperscript{157} The question then is how to cope with the reality of the undocumented community. Most politicians have steered clear of calling for any general amnesty. "Amnesty" is a loaded term that now causes furor from conservative constituencies.\textsuperscript{158} This means that many politicians are looking for a middle ground that normalizes the status of undocumented workers and is clearly distinguishable from a concept of amnesty.

\textbf{C. Concerns for Immigrant Advocates}

Before lawmakers embrace the passage of a guest worker program, more thought must be given to how this program will affect the ability of workers to vindicate their rights. The guest worker proposals are not the result of a proactive initiative to protect workers' rights; rather, they reflect a compromise among various interest groups. These provisions suggest ways that undocumented workers can stay in the United States, register with the authorities to bring them out from the underground economy, and allow employers to have access to this fertile labor pool. However, the volatile political environment giving birth to the guest worker program gives rise to fears that such a provision will not adequately protect immigrants' rights.\textsuperscript{159}

Many advocates for immigrant workers are appropriately wary of the support given to a guest worker program by pro-business interest groups. The main entities to profit from the Bracero program and the H-2A visa program were employers who saw guest workers as objects without meaningful legal rights and protections.\textsuperscript{160} Immigrant rights advocates see pro-business interests as primarily looking to maximize the bottom-line

\textsuperscript{156} Senator Dianne Feinstein stated that the agriculture industry was "almost entirely dependent on undocumented workers . . . . The people are here. They're going to work regardless." \textit{Id.}

\textsuperscript{157} On the conservative Fox News show \textit{Hannity & Colmes}, co-host Alan Colmes agreed that "the president's right on this when he says you can't deport 11 million people. It's logistically impossible. It will cost billions of dollars." \textit{Hannity & Colmes} (Fox News broadcast May 1, 2006) (transcript available at 2006 WLNR 7459831).

\textsuperscript{158} See Rachel L. Swarns, Senator Drafts Foreign Labor Bill, INT'L. HERALD TRIB., Feb. 27, 2006, at 6. Representative Tom Tancredo, an outspoken critic of any legalization mechanism for undocumented workers stated, "By legalizing the millions upon millions of illegal aliens in the U.S., [CIRA] makes a mockery of our laws and crushes our already strained legal immigration system." \textit{Id.}

\textsuperscript{159} Additionally, there are many undocumented immigrants in the country who are not eligible to participate in a guest worker program for a host of reasons. They may be disabled, elderly, or simply not interested in working in the industries that will participate in the guest worker program. The legislation does not provide a way to normalize the status of those individuals.

\textsuperscript{160} See generally Sean A. Andrade, Comment, \textit{Biting the Hand That Feeds You: How Federal Law Has Permitted Employers to Violate the Basic Rights of Farmworkers and How This Has Begun to Impact Other Industries}, 4 U. PA. J. LAB. & EMP. L. 601 (2002).
profits for employers, not to protect the civil rights of immigrant workers.\textsuperscript{161} They view such support for the new legislation not as expansive protection for workers under federal employment discrimination laws, but rather a way to continue the profitable system that they have enjoyed with the widespread use of illegal labor. Advocates view this as a system that drives down wages, weakens employment protections, and worsens working conditions. Business groups have fought long and hard to make sure that employment law protections are not extended to undocumented workers and the decisions of the United States Supreme Court in cases like \textit{Hoffman Plastic} have further undermined these protections.\textsuperscript{162} These same interests will likely look for ways to make sure that guest workers, although legally employed, are also limited in their access to federal employment protections.

The labor movement has been ambivalent in its support of a new guest worker proposal. Traditionally, there has been a tension between labor unions and immigrants’ rights groups.\textsuperscript{163} Labor unions have expressed concern that immigrant workers drive down wages and working conditions and increase the unemployment rate among domestic workers.\textsuperscript{164} When President Bush first proposed this idea in 2004, the AFL-CIO publicly worried that it would create a “permanent underclass of workers who are unable to fully participate in democracy.”\textsuperscript{165} The AFL-CIO still opposes to a guest worker program but does now call for a general amnesty for immigrant workers and an end to employer sanctions.\textsuperscript{166} This tactic is in the best interests of the self-preservation of organized labor as immigrant labor is pervasive within many job markets.\textsuperscript{167}

In contrast to the AFL-CIO position, the Service Employees International Union issued a statement supporting a guest worker program.\textsuperscript{168} Some unions have realized that it is better to push for the normalized status of these workers to give them equal footing in the marketplace.\textsuperscript{169} When all workers can collectively bind together to take

\textsuperscript{162} In \textit{Hoffman Plastic}, the Supreme Court agreed with the employer, holding that immigration policy as established by IRCA made it impossible for an undocumented worker to recover backpay from an employer who violated the NLRA. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149-50 (2002). As the dissent points out, this gives employers a perverse incentive to hire undocumented workers because it “lowers the cost to the employer of an initial labor law violation.” \textit{id} at 155 (Breyer, J., dissenting). It remains unclear whether Title VII protections are available to undocumented workers. \textit{See Ho & Chang, supra} note 48, at 490.
\textsuperscript{163} See Garcia, \textit{supra} note 7, at 742.
\textsuperscript{164} \textit{Id}.
\textsuperscript{165}Minehan, \textit{supra} note 78.
\textsuperscript{166}Garcia, \textit{supra} note 7, at 743.
\textsuperscript{167} \textit{Id}.
\textsuperscript{168}Espo, \textit{supra} note 156.
\textsuperscript{169} \textit{Id}.
action that improves wages and conditions and reduces arbitrary discrimination, then workers as a whole are better off.

The public is clamoring for changes to the immigration framework. Current law is unduly harsh.170 The recent proposals in the House and the Senate would make the enforcement provisions of the law even stricter. Therefore, any guest worker program that is drafted must be carefully thought out so that it will effectively enable workers to enjoy legal protections. Business interests, labor unions, and immigrants’ rights groups are largely in favor of creating a plan for legalizing immigrant workers. Progressive politicians must seize this opportunity to create a small piece of meaningful immigration reform and resist the impulse to push through a program in which too many rights are compromised away.

IV. MOBILIZING PROTECTIONS FOR TEMPORARY WORKERS

A. Mobilization Theory

The previous experiences of guest workers in the country demonstrate that only a small portion of the legally cognizable injuries that regularly take place ever become fully formulated legal disputes. Mobilization theory lays out the process by which an injury is perceived by an actor, that actor identifies the agent who inflicted the harm, and eventually seeks legal redress from that agent.171 Legal disputes are essentially social constructs. A number of factors must converge before a particular abuse or harm enacts society’s institutional dispute resolution mechanisms. Felstiner, Abel, and Sarat identify this process as “naming, blaming, and claiming.”172 This path traces the “transformation of disputes”: How experiences become grievances and how grievances become disputes.173 This theory argues that despite the common notion that our society is over-litigious, perhaps too few perceived wrongs are ever fully remedied in the legal system.174 Whether or not an injury will transform into a legal conflict depends on an individual’s experience and the power dynamic between the parties.175

170. The last major immigration reform took place in 1996 with the Illegal Immigration Reform and Immigrant Responsibilities Act (IIRIRA). Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (codified in scattered titles of U.S.C. 8, 18 (Supp. IV 1998)). This severely restrictionist statute enhanced immigration penalties for criminal convictions, increased funds for enforcement, restricted immigrants’ access to public benefits, and made it more difficult to sponsor family members entry into the United States. Id.
172. Id.
173. Id. at 632.
174. Id.
175. Id. at 633-37.
This framework is useful in understanding systematic flaws that prevent disadvantaged groups in society from vindicating their legal rights. If the terms of CIRA are any indication, proposed guest worker legislation will provide some legal protections for this new class of employees. However, past experiences for undocumented workers, Braceros, and H-2A workers instructs that special consideration must be given to how those paper rights are turned into living and breathing legal protections. Any new guest worker legislation must include mobilization mechanisms to ensure that these potentially vulnerable workers do not face undue discrimination or harassment. Anything less would undermine the values of equality and civil rights that underlie federal employment discrimination protections.

B. Past Failures in Mobilization and Special Issues for Temporary Workers

1. Naming

The first step in mobilization is the perception of an injurious experience. This occurs when an individual senses that there has been some abuse, injustice, or injury inflicted upon her. Naming is the process by which an individual identifies and begins to explain a perceived injury. The way an individual views the scope of the injury affects how it is named. Differences in class, education, and social networks also inform how a particular injury is identified. For example, if a group has been so subjugated that its members become used to suffering abuses at the hands of their subjugators, the injury will still be perceived, but it may be considered to be just another fact of life. A person who feels disenfranchised by society will not feel that she has full access to the legal system. On the other hand, if an individual has traditionally felt empowered within society, then an injury to that person may be named differently. Such a person may be more likely to seek redress for the perceived wrong because of her knowledge of the legal system and confidence in its ability to rectify her rights.

Examining the experiences of previous guest workers makes it clear that it is fairly common for these workers to subjectively perceive that some sort of wrong has been committed against them. Interviews with Braceros tell of a largely negative experience in which many workers express an element of fundamental unfairness that they felt while in the

176. Id. at 635.
177. Id. at 636.
178. Id. at 636-37.
Similarly, reports of how workers in the H-2A visa program perceive their position reveal that they have felt largely mistreated and vulnerable. There is some element of "naming" that takes place among these workers. However, the injuries are often described as a general feeling of mistreatment and are not translated into specific legally cognizable claims.

The proposed hiring process for potential guest workers presents special concerns in the perception of an employment discrimination injury. A person who applies for a job through the guest worker program and does not receive a position will not necessarily know why they were not hired. That individual may feel upset that he did not get the opportunity to work in the United States, but may have no insight into the rationale behind the hiring decisions. It may be that there were simply no positions available or that he did not meet the minimum requirements for a particular job.

There is also the possibility that elements of discrimination could be at play. An employer who is hiring temporary workers may have a fixed notion of the type of worker she is looking for based on stereotypes and personal biases. An employer hiring for an agricultural job may only want to hire male workers under the age of thirty because of a belief that those are the people who will be the most productive. In addition, she may believe that workers from one country are more fit for her needs than another. For example, an employer may act on a racist belief that workers from a Caribbean country would be better suited for certain work than people from Mexico. In a different context, someone who is hiring for a job cleaning hotel rooms may have another perception of what type of worker she wants to hire. She may believe that the stereotypical maid is a Mexican woman and only seek that type of applicant through the guest worker registry.

The above scenarios present an initial barrier that would prevent the development of an employment discrimination claim. The applicant who was turned away because he did not meet the discriminatory job description may be unaware that any discrimination is at play. If he applied for the job from outside of the country by putting his name and information into a worker database, he likely did not have access to any information about who was actually hired, or why. Unless the individual is part of a community where everyone applied for the same jobs and shared the results, he would have no basis for comparison to begin to discover patterns of discrimination. This is particularly true of workers who come from

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homogenous communities and therefore cannot make any inferences about how the presence or absence of a protected characteristic came into play in the hiring process. Accordingly, although they are likely to be upset that they did not get hired, it is less probable that they will feel an injury to their civil rights. They will not feel the type of injury that could eventually give rise to a claim of employment discrimination under the ADEA or Title VII. In the hiring context, the failure to properly identify an injury at this early stage significantly limits the likelihood that employment discrimination protections would be vindicated.

Another hurdle in the naming process is the way that society views the worth of immigrant guest workers. Most of these individuals perform low-wage and unskilled work, which in itself carries a negative social stigma. Leticia Saucedo describes “status contamination”: a process through which the low-wage jobs filled by Latino immigrants are seen as less desirable, the work is culturally devalued, and that devaluation is internalized by workers. The result is that workers who have internalized this norm will cease to feel that they deserve strong legal protections. For example, sexual harassment and national origin discrimination are among the employment abuses suffered by low-wage immigrant workers. Despite the relative prevalence of these unlawful actions in this employment context, these abuses are rarely reported. An injury that is perceived as generally harmful will likely be too imprecise to mature into a legal dispute.

2. **Blaming**

Blaming is the process of identifying the cause of the injury from the perspective of the injured person. In this step, an individual narrows the likely class of agents that could be the source of the harm. The agent who is identified as the cause of the injurious experience will help to determine what action will be taken. Such attributions are not static: They can be altered as an individual gathers new information and insights.

A person may believe that no one specific entity is to blame for her injury and that she had bad luck or was even herself to blame. A person may also believe that there is no specific source of the injury, but that instead some larger “system” is working against her. Faced with a perceived systemic or institutionalized agent of abuse, a person may feel

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182. Saucedo, supra note 180, at 312.
183. Id. at 312-13.
184. Saucedo points to the “[s]ystematic hiring discrimination” suffered by low-wage immigrant workers, ethnic segregation in the workplace, and the intersection of gender and national origin discrimination felt by female “brown collar workers.” Id. at 313.
185. See Holley, supra note 7, at 585.
186. Felstiner et al., supra note 171, at 635.
187. Id. at 641-42.
188. Id. at 641.
discouraged from seeking legal redress. Although systemic challenges can occasionally be successful in bringing about widespread social change, such a challenge is daunting for anyone, let alone an individual who feels marginalized. This type of challenge is more frequently brought by organizations (such as the American Civil Liberties Union or Mexican American Legal Defense and Education Fund) that specialize in legal transformation. On the other hand, an individual may identify one particular agent (such as an employer) who is the cause of her injury. Although there are still many hurdles to cross, it is in these situations that a legal claim would most likely go forward.

In the guest worker context, once an immigrant worker has perceived an injury, there are a variety of attributions that she could make for the cause of the injury. For an injury to grow into a legal dispute, the worker must identify a duty that has been breached by an actor or an employment practice. The way the injury is perceived plays a large role in who is blamed. If a worker has internalized a diminished sense of self-worth, then she may blame only herself and her general station in life after being the victim of sexual harassment or race discrimination. In this scenario, the perception is that the cause of the injury is not an external actor, thereby hindering the maturation of a legal dispute.

Blame also may be attributed on a societal level. A worker may presume that any injury caused to her is just the result of highly entrenched patterns of racial, gender, and socioeconomic discrimination in the American low-wage workplace. A worker who perceives a culture of discrimination may attribute blame on a wider scope rather than focus on a specific employer or practice. For temporary foreign workers, there is the added consideration that they may be inhibited from attributing any blame because they feel indebted simply by having the opportunity to legally work in the United States. They may enter the program ready to work under almost any conditions in order to earn higher wages and will therefore not direct their energies towards blaming employers for poor treatment.

In the guest worker hiring process, if a worker is able to perceive discriminatory intent, there is the added issue of who they would blame for that injury. If a prospective worker applied for a job in the United States from outside of the country, it is not clear who she would blame for a discriminatory act. The current proposals allow labor recruiters to post openings through a national registry and then connect workers with

189. See id. at 639-40.
190. Id. at 640.
191. A worker may see so much discrimination and harassment in the workplace that it is seen as the normal state of affairs. See Saucedo, supra note 180, at 312-13. See also Lisa Catanzarite, Dynamics of Segregation and Earnings in Brown-Collar Occupations, 29 WORK AND OCCUPATIONS 300, 306 (2002).
employers.\textsuperscript{192} A foreign applicant from the program may not be sure who is making decisions and how decisions are made. This limits the ability of prospective workers to blame a party who has a legally cognizable duty and therefore lessens the likelihood that employment discrimination claims would arise from workers who are applying for the program from outside of the United States.

3. Claiming and Legal Disputes

Claiming is the process where an individual approaches the person she believes is responsible for her grievance and asks for redress.\textsuperscript{193} If that request is then rejected, it may become a legal dispute. There are a variety of mechanisms that are employed in the claiming process. Whether an individual decides to initiate a legal claim will depend on that person's objectives, familiarity with his legal rights, and access to the legal system.\textsuperscript{194} The empowered individual feels entitlement in his rights, is aware when he has been wronged, can identify the source of his injury, and is confident that he can navigate the legal system to rectify his rights. Ironically, through this system, inequalities in access to justice are exacerbated because the empowered individual has his power strengthened, while the status quo is reinforced for the marginalized individual.\textsuperscript{195}

We must think seriously from a policy perspective about how our institutions should encourage the mobilization of legal claims to reinforce values of equality and civil rights. For the legal system to work in the interests of traditionally disadvantaged groups, there must be mechanisms in place to increase access to justice.\textsuperscript{196} There are a variety of devices operating in different arenas that can encourage the mobilization of legal rights. For example, legislation that guarantees rights can promote enforcement by granting attorney's fees for successful claims or providing increased funding for administrative monitoring. Access to education and legal representation is an important aspect of mobilization. Government representatives and officials must help people understand their grievances and their options. If there are large cultural barriers, gatekeepers may be needed to serve as conduits from institutional bodies to communities so as to not allow those barriers to disenfranchise large groups of people.\textsuperscript{197} The success of a few courageous individuals seeking to vindicate their rights can be transformed into a sense of collective entitlement. In this respect, it is vital that traditionally marginalized groups have social networks through

\begin{itemize}
  \item \textsuperscript{192} For a more complete discussion of the labor recruiting process, see \textit{supra} Part III.A.3.
  \item \textsuperscript{193} Felstiner et al., \textit{supra} note 171, at 635-36.
  \item \textsuperscript{194} \textit{Id.} at 636-37.
  \item \textsuperscript{195} \textit{Id.} at 637.
  \item \textsuperscript{196} \textit{Id.} at 636-37.
  \item \textsuperscript{197} \textit{Id.} at 645.
\end{itemize}
which unified identities are reaffirmed.\textsuperscript{198} Navigating the court system is an onerous burden for anyone to take on.

As we have learned from the H-2A visa and Bracero programs, guest workers exist in a precarious employment situation that hinders their ability to "claim" any legal rights. They are particularly vulnerable to acts of discrimination because employers exert such extraordinary control over these workers.\textsuperscript{199} The constant threat of deportation hangs over their head and diminishes any desire to vindicate a worker's legal rights. Rachel Micah Jones, director of the Center for Migrants' Rights, stated: "They are scared of retaliation. They are scared to death their boss will report them to the consulate and they will be blacklisted and never get a visa again."\textsuperscript{200} Due to the huge disparities in wages between the United States and other developing countries in the western hemisphere, the possibility of working in this country, under almost any conditions, is extremely attractive.\textsuperscript{201}

It is estimated that there are currently around eleven to twelve million undocumented workers in the United States.\textsuperscript{202} They have limited legal rights and exist at the margins of society.\textsuperscript{203} However, the undocumented population continues to grow as the factors pulling people to try their luck in the United States remain strong enough to outbalance countervailing concerns.\textsuperscript{204}

Workers legally authorized to participate in a guest worker program are theoretically in a marginally better legal position than completely undocumented individuals. Although still in a tenuous situation based on their employment status, they do not have to constantly worry that they will get picked up by immigration authorities on the street or in an enforcement raid. In addition, they have employment that is slightly more secure than working as a day laborer or through an independent contractor. This suggests that a worker would rather endure harassment and discrimination than jeopardize her chances at gainful, legal employment. Even if a worker perceives that her employer has inflicted a legally cognizable injury upon her, she may still be unwilling to actively pursue any remedy. In the H-2A context, a study found that "blacklisting" of temporary employees from future employment visas "appears to be widespread, is highly organized, 

\textsuperscript{198} Id. at 644.  
\textsuperscript{199} See, e.g., Harman, supra note 8.  
\textsuperscript{200} Id.  
\textsuperscript{201} Ibid.  
\textsuperscript{203} See generally Ho & Chang, supra note 48.  
\textsuperscript{204} See Bickerton, supra note 19, at 915.
and occurs at all stages of the recruitment and employment process." The threat of losing future opportunities to participate in a guest worker program is an intimidation tactic that may prevent workers from complaining about harassment or discrimination.

Another significant barrier preventing guest workers from entering into a formal dispute process is that they are likely unaware of their legal rights. There are barriers in language, culture, and education that limit foreign guest workers' access to information about their legal standing. A worker who does not speak English, has had minimal education, and who lives in isolation may not understand employment protections that are available under United States law. Even if a worker knows that American workers receive legal protections, he may not know that those same protections apply to guest workers. Workers who apply for jobs from outside the United States may have even less familiarity with American employment protections and be fully unaware that discrimination in the hiring process is actionable conduct.

A guest worker is less likely to have a strong social support network in this country. The proposed guest worker legislation permits an individual to travel to this country alone, without authorization to bring along family members. The worker is then placed with an employer for a term of work that lasts for a number of months, or possibly years. A worker, who comes to the United States on a temporary basis and then has to leave, will have less opportunity to build strong social connections and feel a sense of belonging within a wider community. A person is much less likely to partake in the process of vindicating a legal right if she is operating largely in isolation and without strong support networks.

Unscrupulous employers in the H-2A visa program have used mechanisms to ensure that their employees are subordinated. Aside from blacklisting employees, there are shocking reports of employers taking active steps to discourage them from understanding their legal rights. In one example, legal aid attorneys distributed an informational pamphlet to H-2A workers when they entered the United States. In response, their employer ordered the workers either throw away the pamphlets or get sent


206. See Holley, supra note 7, at 585, 594-95 (describing barriers in vindication of legal rights for Braceros and H-2A workers).

207. See Saucedo, supra note 180, at 315.

208. Aside from an express statement from Congress, it is not clear that employment protections would apply to workers hired extraterritorially. See infra Part IV.C.

209. See Ontiveros, supra note 7, at 162 (explaining the lack of kinship bonds and social support networks available in many migrant worker communities).

210. Felstiner et al., supra note 171, at 644.

211. See, e.g., Jackson, supra note 14, at 1285.

212. Leah Beth Ward, Desperate Harvest. CHARLOTTE OBSERVER, Oct. 31, 1999, at 1A.
back to Mexico.\textsuperscript{213} The North Carolina Growers Association (NCGA) has also reportedly told H-2A workers to discard a similar “know your rights” booklet.\textsuperscript{214} At an NCGA orientation, there was a banner stating “Legal Services Wants to Destroy the H-2A Program,” along with a marquee warning workers against interacting with any legal services attorneys.\textsuperscript{215} It comes as no surprise that a 1999 study reported that in North Carolina, there had never been a complaint lodged against employers by an H-2A employee with any governmental agency.\textsuperscript{216} The “unwritten rules” are that guest workers stay silent in the face of poor working conditions and mistreatment.\textsuperscript{217}

If a worker did have the courage to take on an abusive employer, there is a dearth of legal services available to him. The Legal Services Corporation (LSC) is prohibited from providing services to undocumented workers.\textsuperscript{218} This prohibition has resulted in shortage of LSC offices that serve any immigrant population, affecting the access for those workers who are legally employed and therefore eligible for LSC assistance.\textsuperscript{219} Accordingly, finding competent legal representation is an additional hurdle that a guest worker must confront in order to transform a perceived injury into a legal complaint against an employer. Assuming that employment protections would reach workers outside of the United States, the problem of finding legal help could be an insurmountable barrier.

Finally, there is the concern that workers outside the United States would not have standing in a federal court to enforce their rights. In \textit{Reyes-Gaona v. North Carolina Growers Association}, the Fourth Circuit held that the ADEA could not be applied extra-territorially to support the claim of a Mexican worker who applied for the H-2A visa program.\textsuperscript{220} Despite the Equal Employment Opportunity Commission’s (EEOC) arguments to the contrary, the court reasoned, “Nothing in the ADEA provides that it shall apply anytime the workplace is in the United States regardless of the nationality of the applicant or the country in which the application was

\begin{itemize}
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Hall, \textit{supra} note 179, at 534. The North Carolina Growers Association is a group that actively participates in the H-2A program. \textit{Id.} at 526.
\item \textsuperscript{215} Id. at 533-34.
\item \textsuperscript{216} Ward, \textit{supra} note 212.
\item \textsuperscript{217} Ontiveros, \textit{supra} note 7, at 168.
\item \textsuperscript{219} See Holley, \textit{supra} note 7, at 613.
\item \textsuperscript{220} 250 F.3d 861, 865 (2001). The plaintiff was a Mexican national over the age of forty. When he applied for a job with the NCGA labor recruiter, he was told they would not accept workers over forty unless they had previously worked with the NCGA. \textit{Id.} at 863.
\end{itemize}
The court determined there is a serious “presumption against the extra-territorial application of U.S. laws” and there must be an express statement of Congress to abrogate that presumption. Unless Congress indicates in new legislation that employment discrimination protections do apply to guest workers when they are outside of the United States, then there is a real risk that employers could disregard antidiscrimination measures in the hiring process.

C. Mobilizing Protections in Current Guest Worker Legislation

There are a variety of ways that the legislation underlying the Bracero and H-2A visa programs did not provide any meaningful protections for those guest workers. There were acute failures in the drafting and the enforcement of that legislation that resulted (and continue to result) a dearth of employment protections for guest workers. In the Bracero program, only one in every 4,300 workers brought a complaint against their employer. As mentioned above, a study of H-2A workers in North Carolina found that not a single complaint had been brought by an employee. Mobilizing claims on behalf of foreign guest workers presents special concerns. There are a host of factors limiting the probability that any individual guest worker will travel the long road from identifying a subjective injury as being caused by a particular employer, to actually lodging a legal complaint. There is no doubt that throughout the hiring and employment process, individuals have been, and will continue to be, wronged in legally cognizable ways. However, there are a number of barriers that prevent these individuals from translating the subjective injury into legal redress.

The guest worker program in the CIRA legislation passed by the Senate has caused considerable consternation among some Senate Republicans, who equate this plan with granting amnesty. It would overhaul the current immigration system and sensibly allow a path towards permanent residence for many undocumented immigrants. Through its guest worker provisions, this bill begins to address the problems faced by the Bracero and H-2A visa program. In its terms, it defines a guest worker as an “employee” who is entitled to full coverage under the FLSA. By not tying a visa to a single employer, it allows a worker to leave a harassing

221. Id. at 866.
222. Id.
223. See, e.g., Abrams, supra note 30.
224. Holley, supra note 7, at 585.
225. Ward, supra note 212.
or abusive employer. The mobility in that provision is a key reason why this program garnered support from the Service Employees International Union.\(^{228}\) The H-4 visa enhances the likelihood that a guest worker will have a support network because it permits immediate family members to accompany the temporary worker. In addition, it specifically provides funding for initiatives that assist nonimmigrant workers and also mandates monitoring mechanisms. Senator Kennedy, a long-time supporter of organized labor, believes this approach will avoid the problems faced by prior programs by “strengthening key protections for the workers.”\(^{229}\)

There are notable gaps in the proposed guest worker legislation. It does not indicate whether these employees are entitled to the full range of employment discrimination protections available under Title VII and the ADEA. It is clear that employees are covered by the FLSA but the statute does not define the extent of the employers’ obligations to adhere to other aspects of federal law. Arguably, since there is no declaration in the legislation that guest workers will not be covered by Title VII or the ADEA, it may be assumed that Congress intended to allow guest workers these protections.

In addition, the proposed legislation does not make clear that employment discrimination measures could be applied extra-territorially to workers who have not entered the United States or have already left the country. As Hoffman Plastic and Reyes-Gaona teach us, without express words stating that workers are affirmatively covered by certain protections, the argument can always be made the other way and employers will fight to ensure that they owe minimal duties to immigrant workers.\(^{230}\) To reaffirm the values underlying employment discrimination legislation, Congress should make an express statement reiterating the duty of employers to comply with the full range of employment protections.

The various guest worker proposals seriously being discussed by Congress all fail to help guest workers mobilize potential employment discrimination claims because no funding is earmarked for education programs, social services, or legal assistance. The funding it makes available to community organizations is targeted to specifically help one subset of the immigrant population apply for permanent residency. This grant program is only a small portion of what would likely be needed.

\(^{228}\) “Eliseo Medina, executive vice president of [SEIU], said his father was a ‘bracero’ so he’s ‘very aware of how these programs can be abused.’ Medina said he supports [his] approach because it gives temporary workers job portability, so they don’t have to stay with an employer who mistreats them.” Abrams, supra note 30.

\(^{229}\) Id.

\(^{230}\) In Hoffman Plastic, the United States Supreme Court interpreted the congressional silence as indicating that the NLRA protections did not extend to undocumented workers. 535 U.S. at 149-50. In Reyes-Gaona, the Fourth Circuit limited the ADEA so that it did not extend to H-2A workers. Reyes-Gaona v. N.C. Growers Ass’n, Inc., 250 F.3d 861, 865 (2001).
truly mobilize the rights of temporary workers. The problem of access to legal representation has been well established. Congress should use its authority over the LSC program to ensure that rural guest workers are being served by legal aid attorneys. Furthermore, active steps must be taken to thwart the appalling intimidation tactics used by employers to dissuade workers from seeking legal advice. There should be a cause of action that criminalizes schemes hindering workers from understanding their rights and seeking representation, enforceable by individual workers and the Department of Labor. It is a long recognized principle that "the vigorous enforcement of antidiscrimination laws depends almost exclusively on the willingness and ability of private plaintiffs to come forward in defense of their civil rights."\(^{231}\) Encouraging injured parties to come forward "depends upon whatever protections they may have against \ldots employer retaliation."\(^{232}\)

The legislation takes a step in the right direction by mandating the deployment of 2,000 agents of the Department of Labor to monitor working conditions. Congress must consider the failure of monitoring mechanisms to work in the H-2A visa program and see if further steps should be taken to better ensure monitoring and enforcement. In the employment discrimination context, officers from the EEOC should also take active steps to watch for abuses in the implementation of the guest worker program.

Moreover, there is no indication in the proposed guest worker legislation that employers would be monitored at all to ensure that they are not engaging in discriminatory measures in their hiring. It appears that employers could easily rely on blatantly discriminatory tactics in recruiting workers that fit the profile they desire. Aside from the creation of a job registry, there are no provisions comprehensively covering how workers are recruited, how workers apply for positions, or how employers make hiring decisions. Presumably, a market would be created for labor recruiters to act as the link between workers in foreign countries and domestic employers since it is unlikely that individual employers would spend the time and money required to travel outside of the United States to personally select workers. Therefore, guidelines should be implemented to monitor the labor recruiting process to ensure that recruiters are acting within the boundaries of the law. CIRA mandates that labor recruiters register with the Department of Labor but it does not outline any minimum requirements for labor recruiters, nor does it make recruiters seek Department of Labor approval.

\(^{231}\) Ho & Chang, supra note 48, at 526.

\(^{232}\) Id.
Finally, it is important to understand how the intersectionality of identity plays a role for guest worker employment discrimination claims. In particular, female foreign workers have special concerns that should be considered by legislators and advocates alike. Due to the prevalence of sexual harassment in some low-wage industries, this legislation should take a strong approach towards protecting female guest workers. Female workers face not only issues of gender, but also race, class, and national origin. Cultural differences, such as how a particular community’s view of sexual harassment may inhibit a female worker from coming forward out of shame, must be taken into account. Traditional employment discrimination claims focus on discrimination based on a single protected characteristic, which fails to properly understand how these claims are experienced. Although this issue may be outside of the bounds of the any new guest worker legislation, advocates working with guest workers must be conscious of this concern.

V. CONCLUSION

There is a natural interplay between employment laws and immigration laws. Aside from family-based immigration, employment-based visas are the key mechanisms that are used by individuals who wish to enter the United States. The policy behind who we allow into the United States is largely driven by considerations of who we want to work in this country. Howard Chang suggests that immigration law itself is a form of government-mandated employment discrimination. Through immigration regulations, the government forces employers to discriminate against individuals based on alienage.

As long as restrictionists find new ways to “crackdown” on immigration, business interests will seek compromises that facilitate a continuous flow of cheap labor. In this balance, it is vital that immigrants’ advocates work hard to ensure that any legislation creating a new class of immigrant laborers is responsive to the special concerns faced by temporary foreign workers. Almost by definition, a guest worker is coming to the United States to do work that is undesirable to most Americans. That

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234. One inquiry found that ninety percent of immigrant women working in the agricultural industry in California felt that sexual harassment is a major problem. Women were routinely groped, badgered, and had sex with employers to get or keep jobs. Ontiveros, supra note 7, at 171.

235. *Id.* at 179.

236. *Id.* at 178.

should not give employers the license to treat them in a way that no American would be treated. The vulnerability faced by guest workers makes it extremely important that the Democratic majority in the 110th Congress pushes for legislation that offers more than merely symbolic protections. Rather, institutions must actively work to support the transformation of injuries into the vindication of legal rights.