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New Policies Pose Threat To Immigrant Workplace Rights

Law360, New York (April 17, 2017, 1:21 PM EDT) -- President Donald Trump's hard-line immigration policies have created widespread fear and uncertainty among immigrant workers who face egregious violations of their rights under employment, labor and whistleblower laws but feel too intimidated to seek redress. While most workplace protections such as minimum wage and anti-discrimination laws apply to all employees regardless of immigration status, these assurances ring hollow to many immigrant workers given the administration's aggressive rollout of its new immigration enforcement priorities.



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On April 4, 2017, U.S. Department of Homeland Security officials announced that immigration agents may arrest victims of crimes and witnesses at courthouses, where they have come forward to testify regarding unrelated matters.[1] Such a policy effectively prevents immigrant workers from benefiting from workplace protections, as they have no assurance that asserting their rights — whether informally by objecting to unlawful practices at the workplace or in court — will not result in deportation or other immigration consequences.



Debra S. Katz

Moreover, these policies embolden employers to violate workers' rights. Workers living in the country without legal status often fear that if they report discrimination or blow the whistle on unlawful practices, their employers will not only fire them, but expose their status, which could lead to detention and deportation. Workers with visas sponsored by their employers similarly fear speaking out lest they lose the job upon which their immigration status depends. The possibility that an immigrant worker seeking to testify about labor abuses or discrimination could be arrested at the courthouse sends a clear signal to employers that they may unlawfully threaten and otherwise retaliate against immigrant employees with impunity.

On Jan. 10, 2017, 10 days before Trump's inauguration, the U.S. Equal Employment Opportunity Commission, the U.S. Department of Labor and the National Labor Relations Board issued a joint fact sheet explaining that employees are protected from retaliation for asserting workplace rights regardless of immigration status. Workers of any immigration and work authorization status are entitled to the rights conferred, although remedies may be limited for employees without proper work authorization.

However, the fact sheet has done little to assuage fear of retaliation going forward given the antipathy the Trump administration has shown toward immigrants living in the country without legal status. Within his first week in office, on Jan. 25, 2017, the president signed two executive orders[2] broadening immigration enforcement priorities and ramping up resources toward detention and deportation. Rather than concentrate resources on the most serious cases such as gang members and security threats as the Obama administration did, the new guidance gives wide latitude to immigration authorities to target immigrants convicted of or even simply charged with any crime, even minor ones. On April 11, 2017, Attorney General Jeff Sessions directed federal prosecutors to prioritize felony charges against those who cross the border unlawfully, and even to

consider aggravated identity theft charges, which carry mandatory two-year prison sentences.[3] While the new policies do not alter the anti-retaliation laws covered in the fact sheet, the heightened focus on detention and deportation allows employers to subject noncitizen workers to unfair conditions and intimidate them into silence.[4]

Rights of All Workers Regardless of Immigration Status

The joint fact sheet covered the anti-retaliation provisions of various laws overseen and enforced by the DOL Wage and Hour Division, DOL Occupational Safety and Health Administration, DOL Office of Federal Contract Compliance Programs, the EEOC, and the NLRB. Under all of the laws cited, workers of any immigration and work authorization status are entitled to the rights conferred, including protection from retaliation. Retaliation occurs when an employer takes an adverse action against an employee, such as termination, for engaging in activities protected by law, such as filing a complaint about a violation of workplace rights. However, remedies may be limited for employees without proper work authorization, particularly with respect to certain forms of back pay awards.

Under the Fair Labor Standards Act, all employees, including those without proper work authorization, are entitled to minimum wage and overtime pay for the hours they worked, and are protected from retaliation for asserting these rights. Employers may not report an unauthorized worker or a worker living in the country without legal status to immigration authorities in retaliation for that worker's filing of a wage claim. Employees are similarly protected regardless of immigration status under the anti-retaliation provisions of the Occupational Safety and Health Act; the whistleblower provisions of 21 other federal laws; anti-discrimination laws enforced by the EEOC, such as Title VII of the Civil Rights Act; and anti-discrimination laws enforced by the Office of Federal Contract Compliance Programs. The National Labor Relations Act protects all employees from retaliation for engaging in certain union activities and working together to improve the terms and conditions of employment.

Federal immigration law itself contains anti-discrimination protections for employees. Under the Immigration and Nationality Act, employers may not discriminatorily hire, fire, or recruit or refer for a fee based on citizenship or immigration status, as well as national origin for employers that fall outside of the EEOC's jurisdiction. Employers are also prohibited from discrimination in the process of verifying a worker's employment eligibility using the Form I-9 and E-Verify programs. These protections are enforced by the U.S. Department of Justice Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Employers may not retaliate against workers who assert rights under the INA's anti-discrimination laws, or file charges or cooperate with the OSC.

Remedies May Be Limited for Some Workers

Remedies for employees without proper work authorization may be limited. According to the fact sheet, employees who bring NLRA claims and are without work authorization may not receive reinstatement orders or compensation for work that would have been performed had the employee not been unlawfully terminated. In *Hoffman Plastics Compounds v. NLRB*, the U.S. Supreme Court ruled that the NLRB lacked authority to order such back pay to a worker living in the country without required documentation who was discharged in retaliation for union organizing. The court reasoned that allowing such an award would undermine immigration laws, which criminalize obtaining employment with false documents, as well as encourage future violations by forcing a worker living the U.S. without legal permission to continue to violate immigration laws in order to fulfill his duty to mitigate damages. Other remedies such as cease and desist orders, may still be imposed, the court noted.

The DOL has taken the position that employees without work authorization are still entitled to recover unpaid wages for work already performed, and several courts that ruled on this question have agreed.[5] While there is little settled law on this question under other federal employment statutes, courts have been reluctant to expand *Hoffman* to other contexts. For example, in *Rivera v. NIBCO*, the Ninth Circuit refused to allow discovery inquiry into the plaintiff's immigration status in a Title VII national origin discrimination case, noting:

Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring, but insist upon their enforcement when their employees complain.

364 F.3d 1057, 1072 (9th Cir. 2004).

The court reasoned that Hoffman did not apply to Title VII claims based on significant differences between the remedial schemes of that statute and the NLRA. The ability to bring a private cause of action is very limited under the NLRA, but is a principal enforcement mechanism under Title VII. Similarly, remedies under Title VII go beyond those under the NLRA to include punitive and compensatory damages, intended to punish and deter employers.

Effect of the New Immigration Policies on Anti-Retaliation Laws

Although the president's new directives have not altered protection under these anti-retaliation laws per se, they certainly have had a very chilling effect as workers and their advocates fear that the implementation of the policies will adversely affect immigrant and especially workers living in the country without legal status who attempt to vindicate their rights under civil rights, whistleblower and labor laws.

In 2011, the DOL and the Department of Homeland Security's Immigration and Customs Enforcement, tasked with enforcing immigration laws in the interior, entered into a memorandum of understanding, which was expanded in May 2016 to include the EEOC and NLRB in similar capacities.[6] Together, these agencies, as well as the Department of Justice, form the Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws, which recognizes that employers can exploit immigration status to deter workers from asserting workplace rights. The memorandum aims to ensure that each agency's enforcement efforts in the workplace do not come into conflict with one another, thus restricting ICE's involvement in labor, discrimination and retaliation investigations. Under the memorandum, ICE agrees to refrain from enforcing civil immigration laws related to work authorization — though not any criminal immigration law — at a work location that is subject to an existing employment or labor investigation.

However, legal advocates have yet to determine how, as a practical matter, the Trump administration's policies will impact these standing relationships. While the memorandum of understanding between the agencies remains in place, advocates and workers continue to be wary. At least one immigration law advocacy group reported to the Boston Globe that it would no longer refer unpaid wage claims by clients living in the country without legal status to the DOL out of fear that the DOL would share the client's status with immigration authorities.[7] With the looming threat of arrest at courthouses, advocates must exercise caution when determining whether to advise workers living in the U.S. without required documentation to file civil employment suits, to proceed with suits filed before the Trump administration came to power, or even to testify in civil employment suits.[8]

Daniel A. Katz, senior counsel at the Law Offices of Gary M. Gilbert & Associates PC, who provides pro bono services to low-income, Hispanic and immigrant workers, has observed unprecedented levels of intimidation within the Latino immigrant community, which he has worked with in some capacity since 1984. In a recent instance, he was contacted by three immigrant women with strong minimum wage and overtime claims after their employer had not paid them for work they had done. According to Katz, "The workers declined to come in to pursue the case, 'given the situation,'" he said. "The use of that term, 'situation' was a reference to the widespread and rational fear immigrants have that coming forward to assert their legal rights could result in

becoming known to the deportation authorities.” This fear existed despite the fact that even unauthorized workers have the same right to be paid for their work.[9] Another potential client simply disappeared after the inauguration. A number of Katz’s clients with pending wage-theft claims in court have inquired about dismissing their cases because of the “changed atmosphere” — something he said has never happened before.

Katz noted that unauthorized workers face higher risks than before, explaining, “In the past, it has been clear that unscrupulous employers hire unauthorized workers on the basis that they are more vulnerable to exploitation,” he said. “Now, the ability of employers to do so with impunity is greatly enhanced given the government-sponsored climate of fear perpetuated in the immigrant community. It doesn’t take much — one arrest at a courthouse in Houston, news that a parent was arrested in Los Angeles after dropping off his kid at school, some immigrants arrested after leaving a church homeless shelter in Alexandria, Virginia — to intimidate immigrants from asserting their rights.”

Employment, labor and whistleblower anti-retaliation laws technically remain unchanged by the recent shift in immigration priorities; employers are still prohibited from threatening or firing an employee for asserting her workplace rights, regardless of immigration or work authorization status. Yet now, workers living in the country without legal status will likely continue to fear backlash and remain silent in the face of discrimination, retaliation, wage-theft, egregious sexual harassment and sexual assault in the workplace,[10] unless the Trump administration takes meaningful steps to clarify and bolster these protections in light of its shifting immigration priorities. This, of course, seems highly unlikely.

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[1] Devlin Barrett, National Security DHS: Immigration agents may arrest crime victims, witnesses at courthouses, The Washington Post, April 4, 2017, https://www.washingtonpost.com/world/national-security/dhs-immigration-agents-may-arrest-crime-victims-witnesses-at-courthouses/2017/04/04/3956e6d8-196d-11e7-9887-1a5314b56a08_story.html?tid=sm_fb&utm_term=.c5c20565e2aa.

[2] Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>; Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

[3] Matt Zapotosky and Sari Horwitz, Sessions tells prosecutors to bring more cases against those entering U.S. illegally, The Washington Post, April 11, 2017, https://www.washingtonpost.com/world/national-security/sessions-tells-prosecutors-to-bring-more-cases-against-those-entering-us-illegally/2017/04/11/9fc6e964-1eb7-11e7-ad74-3a742a6e93a7_story.html?utm_term=.2a49ac5838d5.

[4] See, e.g., Beth Healy, Trump’s moves could embolden unscrupulous employers, Boston Globe, Feb. 23, 2017, <https://www.bostonglobe.com/business/2017/02/23/some-say-trump-moves-illegal-immigration-will-embolden-unscrupulous-employers/Hk4do21qccySOMuekOnqSN/story.html> (“While officials say the priority for now is to focus on gangs and people with serious criminal records, thousands of workers in construction, child care, house cleaning and the restaurant industry could become more vulnerable to mistreatment by unscrupulous employers who might threaten to turn them in to authorities if they complain.”). Cf. Tahirih Justice Center, Review of Feb. 20, 2017, Department of Homeland Security Memoranda: Possible Impacts on Survivors of Domestic and Sexual Violence (2017), <http://www.tahirih.org/wp->

content/uploads/2017/02/Summary-of-Feb-20-2017-DHS-Memos.pdf (The Jan. 25 Executive Orders and ensuing implementation impair the ability of domestic and sexual violence survivors to access legal protections to which they are entitled out of fear of detention and deportation).

[5] See, e.g., *Zavala v. Wal-Mart Stores Inc.*, 393 F. Supp. 2d 295, 322-23 (D.N.J. 2005), *aff'd*, 691 F.3d 527 (3d Cir. 2012) (allowing undocumented worker to recover unpaid wages, reasoning that undocumented workers are “employees” under the FLSA, and that Hoffman’s holding does not extend to work already performed); *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (Hoffman does not extend to allowing recovery for work already performed, and that such recovery is consistent with the policies behind immigration law) (“If employers know that they will not only be subject to civil penalties and criminal prosecution when they hire illegal aliens, but they will also be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance.”).

[6] Department of Labor, Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (2016), <https://www.dol.gov/sites/default/files/documents/MOU-Addendum.pdf>; Department of Labor, Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (2011), <https://www.dol.gov/asp/media/reports/dhs-dol-mou.pdf>.

[7] See *supra* note 3.

[8] See *supra* note 1.

[9] Washington, D.C.'s 2014 amendment to its wage laws was specifically designed to increase accountability of employers and strengthen protection for all workers, including particularly vulnerable immigrant workers. See D.C. Council Committee on Business, Consumer and Regulatory Affairs, Report on the Wage Theft Prevention Amendment Act of 2014, B. 20-671 (2014) (summarizing testimony of several workers, including one who risked deportation for attempting to receive compensation, and testimony from community activists identifying immigrant communities as targets for exploitation).

[10] See EEOC, Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref142 (identifying women are low-wage workers, undocumented, or do not speak English as particularly vulnerable to exploitation and sexual harassment); EEOC, Meeting of Jan. 14, 2015: Preventing and Addressing Workplace Harassment: Testimony of Fatima Goss Graves, Vice President for Education and Employment, National Women’s Law Center (2015), <https://www.eeoc.gov/eeoc/meetings/1-14-15/graves.cfm#sdendnote30anc> (testifying that women in low-wage jobs face disproportionately high rates of sexual harassment, identifying sectors often staffed by immigrant workers, including the restaurant, hospitality and farmworker industries).