

Workers' Rights to Freedom of Association, Equality, and Non-Discrimination in the United States

Submitted by: United Workers Congress, Robert F. Kennedy Center for Justice & Human Rights, International Commission for Labor Rights, National Lawyers Guild—Labor and Employment Committee, Transnational Legal Clinic at the University of Pennsylvania Law School, Cornell University Labor Law Clinic, New Orleans Worker Center for Racial Justice, Vermont Workers Center, Border Network for Human Rights, Migrant Justice

Excluded Workers Are Regularly Denied Their Rights to Freedom of Association

Public-sector workers, agricultural and domestic workers, and workers categorized as independent contractors are explicitly excluded from protections under the National Labor Relations Act (NLRA), the primary law in the U.S. guaranteeing workers the right to form and join trade unions and bargain collectively. Of the 140.5 million people in the civilian workforce, 33.5 million, or 23.8%, have no rights under the NLRA or any other labor law.¹ The NLRA exemptions violate the U.S.'s obligations under Article 22 of the ICCPR and further perpetuate the discrimination in which they are rooted. While the First Amendment provides the right to free speech, it does not provide a remedy to a worker retaliated against for exercising those rights in the workplace.

The denial of workers' full rights to freedom of association and collective bargaining has a direct negative impact on the overall working conditions for low-wage workers and their rights to liberty, safety and dignity, and in egregious cases, results in violations of Article 8's prohibition on forced labor.

Excluded Workers Are Denied Access to the Courts and Due Process of Law

In addition to those workers who are statutorily excluded from legal protections pertaining to freedom of association, workers in an irregular status are denied equal access to the courts in violation of ICCPR Article 14. While undocumented workers are considered "employees" under the NLRA, the U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), held that an undocumented worker illegally terminated for exercising freedom of association rights is not entitled to backpay, the only individualized remedy available under the law. As the International Labor Organization has held, a right without a remedy is no right at all, and regular denial of access to the courts violates excluded workers' human rights.¹¹

Many migrant workers, including those who are documented, live in employer controlled housing while they are working for the employer. Employers, sometimes with the assistance or acquiescence of law enforcement, restrict workers' access to legal, medical, union and social service outreach workers who attempt to visit workers at their housing. Migrant workers in irregular status and certain guestworkers are denied access to attorneys under federally-funded legal service programs as well, compounding violations of Article 14. Because of fundamental

flaws in its structure, the United States' H-2B guestworker program invites labor trafficking and other human rights abuses by granting workers a temporary, non-immigrant status that binds workers to their "employer-sponsor," prevents workers from changing jobs (irrespective of labor conditions), and allows workers to be victimized by foreign recruiters who need not register with the U.S. government, agree to follow U.S. law, or disclose the true terms and conditions of employment to recruits. Furthermore, the U.S. arrests, detains, and deports individuals engaged in defending and asserting their rights in the workplace. In doing so, it implicitly serves to condone private employers' use of immigration enforcement to hide their own unlawful behavior, and it directly violates the workers' right to court access, and to equality under the law.

Excluded Workers Are Regular Victims of Discrimination

Denying some workers freedom of association and access to the courts also denies them equal protection under the law, in violation of Articles 2 and 26 of the ICCPR. These Articles guarantee individuals the benefits and protections of the Covenant and the laws of the United States, "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." Excluding certain groups from freedom of association and access to the courts directly violates that mandate. U.S. laws and policies regarding freedom of association and access to the courts have an unjustifiable disparate impact on racial and ethnic minorities. For example, three-quarters of the approximately two million agricultural workers in the U.S. are Mexican-born, and two-thirds are migrants. The burden of inadequate labor protections for agricultural and domestic workers falls disproportionately on immigrants, people of color, and women.

Persons of color and women are also disproportionately affected by laws that permit employers to question potential hires about past arrests and convictions, and bars individuals with particular criminal records from accessing jobs. Workfare programs—requiring individuals to work to receive government benefits such as food assistance, social services and welfare grants—also disproportionately disadvantage minorities and women.

The U.S. response to the Committee's List of Issues Item 23 mischaracterizes the law and its application and denies the reality of the experiences of millions of workers in the U.S. Furthermore, it fails to acknowledge the government's affirmative responsibility to protect and ensure the right to freedom of association and non-discrimination.

Recommended Questions

How is the U.S. addressing explicit exclusions of entire categories of workers from protections under the NLRA, and therefore from protections of the right to freedom of association?

- What is the U.S. doing to fulfill its obligation under Article 22 to protect and ensure that agricultural and domestic workers, as well as the growing number of temporary, part-time, subcontracted and contingent workers are guaranteed rights to remedies for violations of the freedom of association accorded under the ICCPR? Furthermore, what is the U.S. doing to ensure due process, equality under the law and the right to a remedy, for undocumented workers denied an individualized remedy under the Supreme Court's decision in *Hoffman Plastics*, and for undocumented workers and workers on temporary visas from retaliatory deportation?
- What steps is the U.S. taking to ensure legal aid is available to all workers, regardless of migration status, in guaranteeing access to justice and equality under the law?
- What steps is the U.S. taking to ensure these exclusions do not have a discriminatory impact on workers on the basis of race, national origin, gender, or immigration status?

What steps is the U.S. taking to ensure prosecutorial discretion is employed in deportation proceedings where undocumented workers and workers previously employed on temporary visas have suffered retaliation for engaging in the right to freedom of association and freedom of expression in the workplace, in violation of their rights accorded under Article 22 of the ICCPR?

Proposed Recommendations

Take affirmative steps to guarantee all workers the right to freedom of association promised by Article 22.

- **Create a federal independent contractor board** to provide oversight and coordinate efforts against misclassification of independent contractors as a way to exclude workers from the right to join and form trade unions and bargain collectively under domestic law, and to avoid regulation and liability.
- **Take steps to ensure fulfillment of all existing treaty obligations and sign and ratify** the International Labor Organization's Convention concerning Decent Work for Domestic Workers and the International Convention on the Rights of All Migrant Workers and their Family Members.

Provide protection and full remedies under the domestic labor laws to all workers—regardless of employment category or immigration status—as promised by Articles 2 and 26, and take steps to guarantee workers who have been abused or exploited full and equal access to all the rights and remedies available under domestic law.

- **Conduct impartial investigations** into reports of human rights violations made by migrant and low-wage workers, including guestworkers.
- **Ensure substantive and procedural protections are in place** that will **guard against ongoing discrimination** faced by workers of an irregular status when seeking to exercise their rights to freedom of association and collective bargaining by enacting a legislative fix to the U.S. Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*, and by ensuring workers exercising their rights to freedom of association are not subjected to retaliatory deportation, and are granted prosecutorial discretion so they may pursue their legal claims.

Ensure fulfillment of the right to non-discrimination for all workers, as guaranteed in Articles 2 and 26.

- **Establish a complete firewall between labor rights and immigration enforcement.**
- **Protect non-citizen human rights defenders** who are exposing civil, labor, and human rights violations in the U.S.
- **Eliminate irrelevant questions about past arrests and/or convictions** from job applications that have a discriminatory impact on persons of color and women, and enforce Title VII of the Civil Rights Act to decrease restrictions on employment opportunities for formerly incarcerated people.
- **Abolish programs that force people to work for “workfare,”** including food assistance, social services and welfare grants.” Furthermore, take necessary steps to ensure government agencies do not use the unemployed to displace public sector employees or subsidize for-profit corporations, rather than taking affirmative measures to provide meaningful work on public works projects or public services at the prevailing wage and benefits, with union representation.

ⁱ American Rights at Work, “The Haves and Have Nots: How American Labor Law Denies a Quarter of the Workforce Collective Bargaining Rights,” November 2008. Available at <http://www.americanrightsatwork.org/publications/general/the-haves-and-have-nots-20081121-680-94-94.html>.

ⁱⁱ Report on Complaints against the Government of the United States presented by the AFL-CIO and the Confederation of Mexican Workers (CTM), Case No. 2227, ILO Committee on Freedom of Association, (November 2003).