

United States' Compliance with the International Covenant on Civil and Political Rights Freedom of Association and Right to Equality and Non-Discrimination in Work

Submitted by
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I. Reporting Organization

1. The mission of the **United Workers Congress (UWC)** is to expand the right to organize for all workers. The building of power among low-wage workers is based on our capacity to organize and collectively bargain. While the nine sectors of workers represented in the UWC have a long history of organizing, each of our sectors is excluded – either by default or design – from labor laws and regulations in the United States, thus compromising our capacity to achieve not just economic justice but economic security as well. The UWC represents millions of workers throughout the country. The UWC is comprised of national alliances or organizations that represent nine (9) sectors, with members across the United States, including: Restaurant Workers –Restaurant Opportunities Center United (ROC United); Day Laborers –National Day Laborer Organizing Network; Guest Workers – National Guestworkers Alliance; Domestic Workers –National Domestic Workers Alliance and Direct Care Alliance; Formerly Incarcerated Workers –All of Us or None; Workfare Workers– Community Voices Heard, SF Living Wage Coalition; Farmworkers –Coalition of Immokalee Workers, CATA; Southern Right-to-work states - National Jobs with Justice, Mississippi Workers Center for Human Rights, and Black Workers for Justice; and Taxi drivers –New York Taxi Workers Alliance, Taxi Workers Alliance of PA and LA Taxi Workers Alliance.

II. Issue Summary

2. The United States fails to guarantee full labor rights and remedies, including the right to freedom of association and collective bargaining, to entire categories of workers, in violation of Article 22, and Articles 2 and 26 of the ICCPR.

Article 22: Right to Freedom of Association, Right to Form and Join Trade Unions.

3. The primary law under which workers are guaranteed the right to organize trade unions and to bargain collectively in the United States is the National Labor Relations Act (NLRA),ⁱ which explicitly excludes agricultural and domestic workersⁱⁱ, as well as workers categorized as independent contractors,ⁱⁱⁱ such as most taxi drivers and non-employees such as workfare participants. In addition, a significant number of states, particularly though not exclusively states throughout the South, exclude public employees from protection.
4. Although undocumented workers are considered “employees” under the NLRA, following the US Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), undocumented workers illegally terminated for exercising freedom of association rights guaranteed under Art. 22 are denied the right to an individualized remedy under the law. The decision found

undocumented workers are not entitled to compensation for wages they would have earned had they not been terminated, the only individual remedy for such violations.

5. The right to organize designed to put existing labor rights within reach of ordinary workers, falls far short of its goal for millions of workers due to the mentioned exclusions. For many others, it is unavailable as a practical matter due to intensive employer interference with organizing campaigns. This is especially true in the 24 states that have right-to-work laws. These laws force unions to represent non-member employees deprive those unions of the infrastructure needed for effective organizing and bargaining. Employers threaten to close the plant in 57% of union election campaigns. They discharge workers in 34 percent of elections and threaten to cut wages and benefits in 47% of elections. Workers are forced to attend anti-union, one-on-one sessions with a supervisor at least weekly in two-thirds of elections.^{iv} The intensification of employer anti-union campaigns and the proliferation of right-to-work laws have had a clear impact on union participation rates. In 1983, there were 17.7 million union members in the United States, 20.1% of the workforce. In 2009, that proportion was 12.3%. In the right-to-work states, union density—the percentage of workers who belong to a union—now averages 6%.^v

Articles 2 and 26: Right to Equality and Non-Discrimination

6. In addition to the de facto and de jure exclusions that permit the denial of the right to freedom of association for entire categories of workers, agricultural and domestic workers, and workers categorized as independent contractors, contingent workers, and tipped-employees, and guestworkers are also denied fundamental workplace protections and equal rights under the law.
7. The Fair Labor Standards Act (FLSA), which mandates minimum wages and overtime pay, excludes from overtime protection agricultural workers and live-in domestic workers, the majority of whom are people of color and recent immigrants. Certain home health care workers are entirely excluded from the protection of minimum wage and overtime laws.¹¹ Tipped-workers are provided a different minimum wage scheme under FLSA, with a special minimum wage which remains at \$2.13 per hour, while the current federal minimum wage is \$7.25 per hour (14 states have state minimum wages that are even higher).^{vi}
8. While Title VII of the federal Civil Rights Act protects workers' rights to be free from discrimination based on several factors: sex, color, race, religion and national origin, small employers are excluded under the national law,^{vii} as well as under several state anti-discrimination laws (which also may exclude specific categories of workers). Moreover, immigrants without work authorization are excluded from the protection of the Unfair Immigration-Related Employment Practices Act, which protects against discrimination based on citizenship and national origin in employment.^{viii}
9. In addition, workers have experienced an abuse of criminal-background checks. Nearly one in three US adults has a criminal record that shows up on a routine background check. Increasing use of background checks in all sectors of the economy, means qualified workers are unjustly excluded from employment based on arrest (not conviction) records, old and non-serious convictions, and offenses that are not job related^{ix}.
10. The *Hoffman* decision (referenced above) has had a negative spill-over effect into other areas of labor and employment laws as applied to migrant workers in an irregular status. Specifically, some state courts have refused to accord undocumented workers compensation for wages lost due to work-related injuries and on-the-job discrimination. In the workers compensation arena, most state courts and agencies have granted undocumented migrants the full range of benefits claimed, including medical benefits and lost wages at court in least two states, however- Michigan and Pennsylvania, have held

undocumented workers are not entitled to compensation for lost wages because of injuries, following the reasoning employed in the *Hoffman* decision. In other states, workers fear retaliation – such as prosecution for document fraud and ultimately removal – if they pursue their full rights under the law.^x In the context of employment discrimination, both New Jersey and California courts have concluded that victims of discrimination who are undocumented have no right to certain forms of compensation.^{xi} At the federal level, U.S. law against citizenship discrimination does not protect these workers.

Article 14: Right to Equality Before Courts and Tribunals

11. Compounding the de jure and de facto discrimination experienced by agricultural and domestic workers, as well as independent contractors and other categories of excluded workers, is denial of equal access to justice. Specifically, migrant workers in irregular status and certain guestworkers are refused access to attorneys under various state and federally funded legal services programs, in violation of Art. 14.^{xii} No nationwide policy protects these migrants in irregular status who are victims of labor law violations from disclosure of their status and deportation as a consequence of their involvement in judicial proceedings.

III. Concluding Observations

12. Following the 2006 review of the United States' compliance with the ICCPR, the Committee noted in its concluding observations that it “regrets that it has not received sufficient information on the measures the State party considers adopting in relation to the reportedly nine million undocumented migrants” (para. 27).
13. With regard to the right to equality under the law and non-discrimination, the Committee reminded “the State party of its obligation under articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis. The State party should conduct in-depth investigations into the de facto segregation described above and take remedial steps, in consultation with the affected communities.” (para. 23).

IV. Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights

14. The U.S. Fourth Periodic Report acknowledges that freedom of association is not explicitly included within the U.S. Constitution, but instead “has been found to be implicit in the rights of assembly, speech, and petition.” (citation omitted). It notes freedom of association, “including the right of workers to establish and join organizations of their own choosing, without previous authorization by or interference from either the federal government or the state governments,” has been recognized by the U.S. Supreme Court (para. 380). The Report mentions in passing that the National Labor Relations Act (NLRA), the federal regulatory framework governing employees' rights to form and join trade unions, contains specific exceptions, but fails to elaborate on those exemptions and their impact on millions of workers, with a disproportionate impact on racial and ethnic minorities, and non-citizens. Furthermore the U.S. Fourth Periodic Report fails to acknowledge the judicial exclusions from protection, and specifically, the U.S. Supreme Court's denial of the right to an individualized remedy for undocumented workers unlawfully terminated in retaliation for exercising their right to organize, form and join trade unions. (paras. 387-389).
15. While listing the number of unions and percentage of workers in different industries that participate in unions, the U.S. report fails to account for the role the statutory exclusions in excluding the majority of both public and private sector workers from the protection of organized labor. It further fails to tell the

complete story regarding membership by racial, ethnic and national origin identity, and specifically does not account for the disproportionately high percentage of people of color in the industries excluded from protection under the NRLA and state labor relations laws, and the resulting de facto workplace segregations and discrimination.

16. Similarly, the U.S. Fourth Periodic Report fails to acknowledge the various ways in which immigrant workers are denied their rights under Article 26, Right to Equality Before the Law (paras. 481-484), or their Article 2 right to Equal Protection in Employment (paras. 77-78) (noting employers may not treat workers differently because of immigration status) through the failure to guarantee that right through adequate protection and enforcement mechanisms, including access to justice mechanisms.

V. Human Rights Committee General Comments

17. ICCPR General Comment No. 32 explicitly makes note that the article 14 Right to Equality Before Courts and Tribunals and to a Fair Trial extends to migrant workers, and recognizes that a “situation in which an individual’s attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14.” (CCPR/C/GC/32 at para. 9). It further notes “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way (id. at para. 10).
18. With regard to the rights of non-citizens under the Covenant, General Comment No. 15 makes clear the ICCPR provisions relevant to the issues set forth herein “apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.” It goes on to provide, “Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant,” specifically making reference to the rights to freedom of association and equal protection of the law (CCPR/C/GC/15 at paras. 1, 2, and 7).

VI. Other UN Body Recommendations

19. With regard to undocumented migrants, the UN Committee on the Elimination of Racial Discrimination specifically noted:

28. The Committee regrets that despite the various measures adopted by the State party to enhance its legal and institutional mechanisms aimed at combating discrimination, workers belonging to racial, ethnic and national minorities, in particular women and undocumented migrant workers, continue to face discriminatory treatment and abuse in the workplace, and to be disproportionately represented in occupations characterized by long working hours, low wages, and unsafe or dangerous conditions of work. The Committee also notes with concern that recent judicial decisions of the U.S. Supreme Court – including *Hoffman Plastics Compound, Inc. v. NLRB* (2007), ... and *Long Island Care at Home, Ltd. v. Coke* (2007) – have further eroded the ability of workers belonging to racial, ethnic and national minorities to obtain legal protection and redress in cases of discriminatory treatment at the workplace, unpaid or withheld wages, or work-related injury or illnesses (arts. 5 (e) (i) and 6).

The Committee recommends that the State party take all appropriate measures, including increasing the use of “pattern and practice” investigations, to combat de facto discrimination in the workplace and ensure the equal and effective enjoyment by persons belonging to racial, ethnic and national minorities of their rights under article 5 (e) of the Convention. The Committee further recommends that the State party take effective measures, including the enactment of legislation, such as the proposed Civil Rights Act of 2008, – to ensure the right of workers belonging to racial, ethnic and national minorities, including undocumented migrant

workers, to obtain effective protection and remedies in case of violation of their human rights by their employer.

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20. During the Universal Periodic Review of the United States, numerous Human Rights Council delegates made recommendations pertaining to workplace rights, and the right to equality and non-discrimination. (see [Report of the Working Group on the Universal Periodic Review, United States of America](#) (2011)). Those specific to the issues raised herein included:
 - i. Recognize the right to association as established by ILO, for migrant, agricultural workers and domestic workers (Bolivia) (accepted by the United States);
 - ii. Take the necessary measures in favor of the right to work and fair conditions of work so that workers belonging to minorities, in particular women and undocumented migrant workers, do not become victims of discriminatory treatment and abuse in the work place and enjoy the full protection of the labor legislation, regardless of their migratory status (Guatemala) (accepted by the United States);
 - iii. Observe international standards in the regard of migrant workers and members of their families (Egypt) (accepted by the United States); and,
 - iv. Several states recommended the U.S. take action on ratification of the UN Convention on the Rights of All Migrant Workers and their Family Members.

VII. Recommended Questions

21. Please comment on the impact labor and employment laws in the United States have on immigrant and minority workers, and provide socio-economic data (including data disaggregated by gender and national or ethnic origin) on the following: *de jure* exclusions existing labor and employment laws for agricultural and domestic workers; *de facto* exclusion from protections under the *Hoffman Plastic Compounds, Inc. v. NLRB* U.S. Supreme Court decision, and ensuing state court decisions denying compensatory remedies to non-citizens in labor, anti-discrimination and workers compensation and personal injury cases; exclusion from protection under Agricultural Worker Protection Act for temporary workers under the H-2A program; and denial of representation by legal services programs funded by the Legal Services Corporation for temporary workers under the H-2B program, as well as all unauthorized workers.
22. What measures has the United States taken to ensure the meaningful right to freedom of association, including the right to an individualized remedy to workers in an irregular status?
23. What measures has the United States taken to ensure the right to freedom of association and collective bargaining is available to agricultural workers, domestic workers, and other categories of workers statutorily excluded from protection?
24. What measures has the United States taken to ensure equal access to the courts for all workers, including those without regular immigration status and those here as temporary guestworkers under the H-2B program, in light of federal restrictions prohibiting civil legal aid organizations receiving federal funding from providing them with representation?

VIII. Suggested Recommendations

25. The U.S. should initiate a process of harmonizing national legislation and domestic laws with Article 22 by guaranteeing protection and full remedies in their labor laws to all workers, regardless of immigration status or employment category, to: (i) comply with the decisions of intergovernmental organizations and regional bodies regarding migrant workers; (ii) firmly prosecute violations of labor

law with regard to migrant workers' conditions of work; and (iii) prosecute inter alia those issues related to migrant workers' remuneration and conditions of health, safety at work and the right to freedom of association, including the right to form and join trade unions.

26. U.S. government officials should carry out impartial investigations into reports of human rights violations made by migrant workers and all low-wage workers, and to ensure workers who claim to have been abused or exploited have full access to all the rights and remedies available under domestic and international law, without discrimination.

The following organizations also join in this submission:

- a. **National Employment Law Project (NELP)**, which is a national organization that works in partnership with national, state, and local allies to promote policies and programs that create good jobs, strengthen upward mobility, enforce hard-won workplace rights, and help unemployed workers regain their footing;
- b. **New Orleans Worker Center for Racial Justice**, an organization dedicated to organizing workers across race and industry to build the power and participation of workers and communities, that is based in New Orleans but reaches across the South, in organizing day laborers, guestworkers, and homeless residents to build movement for dignity and rights in the post-Katrina landscape;
- c. **Vermont Worker Center** seeks an economically just and democratic Vermont in which all residents have living wages, decent health care, childcare, housing and transportation. Our goal is to build a human rights oriented, democratic and diverse movement of working and low-income people that is locally focused and coordinated on a statewide basis. Working with organized labor toward economic justice we empower people to exercise their right to organize. The Vermont Workers Center takes action on a full range of human rights issues and builds alliances nationally and internationally.
- d. **Migrant Justice (VT)** is building the voice, capacity and power of the migrant farmworker community and engaging community partners to organize for social and economic justice and human rights.
- e. **Border Network for Human Rights (NM, TX)** is organizing border communities through human rights education and mobilizing our members to ignite change in policy and practice. The BNHR has three ongoing campaigns--Comprehensive immigration reform; Accountable and responsible border policy; and Protection and Promotion of civil and human rights--and a membership of more than 700 families, or close to 4,000 individuals, in West Texas and Southern New Mexico

ⁱ 29 U.S.C.A. § 151 *et. seq.*

ⁱⁱ 29 U.S.C. § 152(3)

ⁱⁱⁱ 29 U.S.C. § 152(3).

^{iv} Kate Bronfenbrenner, No Holds Barred: The Intensification of Employer Opposition to Organizing (Economic Policy Institute and American Rights at Work Education Fund, May 2009), <http://www.epi.org/publications/entry/bp235/>.

^v Averages calculated from comparison of right-to-work laws compiled in U.S. Dept. of Labor, Office of Performance, Budget and Departmental Liaison, Wage and Hour Division, US Department of Labor, State Right-to-work Laws and Constitutional Amendments in Effect as of January 1, 2009 with Year of Passage, Jan 2009, <http://www.dol.gov/whd/state/righttowork.htm>; and U.S. Dept. of Labor, US Bureau of Labor Statistics, Economic News Release, Union affiliation of employed wage and salary workers by state Jan 2010, Table 5, <http://www.bls.gov/news.release/union2.t05.htm>.

^{vi} Rajesh Nayak & Paul K. Sonn, Restoring the Minimum Wage for America's Tipped Workers (Nat'l Employment Law Project, Aug 2009), http://nelp.3cdn.net/bff44d5fafbd9d2175_vem6ivjib.pdf.

^{vii} 42 U.S.C. §2000e(b).

^{viii} 8 U.S.C. §1324b(a)(3).

^{ix} Michelle Natividad Rodriguez & Maurice Emsellem, 65 Million need Not Apply (Nat'l Employment Law Project, March 2011), http://nelp.3cdn.net/c1696a4161be2c85dd_t0m62vj76.pdf

^x Sanchez v. Eagle Alloy, 658 N.W. 2d 510 (Ct. Apps. Mich 2003); The Reinforced Earth Company v. Workers' Compensation Appeal Board, 810 A.2d 99 (Pa, 2002); Doe v. Kansas Dep't of Human Resources, 90 P.3d 940 (Sup. Ct. Kansas 2004).

^{xi} See, *Morejon v. Terry Hinge and Hardware*, 2003 WL 22482036 (Cal.App, 2 Dist. 2003) A New Jersey court held that a worker claiming discriminatory termination under New Jersey's Law Against Discrimination (LAD) was not entitled to claim economic or non-economic damages because she could not be lawfully employed. In that case, the plaintiff had left work on maternity leave and her employer refused to reinstate her after the leave. In reaching its conclusion, the New Jersey Superior court recognized that there might be cases where "the need to vindicate the policies of the LAD ... and to compensate an aggrieved party for tangible physical or emotional harm" might lead to concluding that an individual should be able to seek compensation for that harm. *Crespo v. Evergo Corp.*, 841 A.2d 471 (N.J. Super. A.D. 2004), cert. denied 849 A.2d 184 (2004).

^{xii} Inter-American Court of Human Rights also addressed this right in its Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, OC-18, ¶¶ 121, 160