PROTECTING IMMIGRANT WORKERS THROUGH INTERAGENCY COOPERATION

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INTRODUCTION

Stephen Lee's *Monitoring Immigration Enforcement*[1] offers a promising prescription for resolving the long-standing tension between the workplace enforcement priorities of the Department of Homeland Security ("DHS") and the efforts by the Department of Labor ("DOL") to protect the rights of immigrant workers. Lee convincingly describes—often with the aid of rich historical examples—the origins of the chronic imbalance of power between DHS and the DOL, and the limitations of past efforts to synchronize the work of the respective agencies. Lee's proposal for interagency coordination, in the form of ex ante monitoring by the DOL of worksite enforcement decisions, is a novel contribution to existing writings on immigrants and workplace regulation. Indeed, in the current political and historic moment, when immigration enforcement is often equated with the preservation of national security, any proposal to constrain the authority of Immigration and Customs Enforcement ("ICE") is bound to generate debate.

In this Response Essay, my objective is not to critique the core proposal that Lee advances, as I agree in principle with the concept of ex ante agency monitoring and believe that the DOL and DHS are well positioned to adopt such a framework. Rather, I seek to build on Lee's article with reflections on the following four themes: (1) the complexity of the regulatory environment in which any interagency monitoring would take place, and the inevitable politicization of regulatory bodies; (2) the broader social and political context of immigration and labor regulation, and how that might shape collaborations between the DOL and DHS; (3) the precise circumstances under which the DOL might exercise its authority to constrain worksite enforcement actions; and (4) the significance of policy initiatives—relating to the intersection of workers' rights and immigration enforcement—that have emerged during the administration of President Barack Obama.

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1. Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011).

I. ENFORCING LABOR STANDARDS: MULTIPLE ACTORS IN A TURBULENT POLITICAL SEA

In his article, Lee rightly criticizes the lack of influence by the DOL over the workplace enforcement decisions made by DHS. Building in some kind of ex ante constraint on ICE actions will certainly benefit a number of workers engaged in labor disputes. To realize its full potential, however, Lee's proposal would have to be expanded to include state and local entities that enforce labor standards, as well as federal agencies outside of the DOL.[2] Additionally, to ensure the long-term sustainability of any interagency monitoring framework, one must plan for scenarios in which federal or state workplace agencies become politicized and stray from the core mission of enforcing labor standards.

In the current regulatory environment, scores of entities apart from the DOL are charged with enforcing labor standards. These include state-level equivalents of the DOL, as well as agencies or commissions at the county or municipal level. Indeed, following the passage of landmark federal labor and employment laws throughout the 20th century, parallel statutes often emerged at the state and local levels. For example, many states have adopted analogs to the Fair Labor Standards Act of 1938 ("FLSA") in the form of state minimum wage, overtime, and wage payment and collection laws.[3] Although some of these laws simply incorporate the FLSA by reference, others establish independent, more stringent standards and are enforced by state entities that are largely independent of the DOL.[4]

In light of this broad constellation of enforcement agencies, Lee's vision would optimally be expanded to cover workplace disputes handled by *all* agencies, not just the DOL. Although the DOL has a network of regional offices that receive

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2. The importance of these related entities is reflected in Immigration and Naturalization Service Operations Instruction 287.3a. Therefore, it is fitting that they be incorporated into any affirmative oversight authority that the DOL might enjoy.

3. For example, all U.S. states, with the exception of Alabama, Louisiana, Mississippi, South Carolina, and Tennessee, have some form of minimum wage law. *See Minimum Wage Laws in the States – January 1, 2011*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR, http://www.dol.gov/whd/minwage/america.htm (last updated June 2011). Notably, several states attempted to enact minimum wage laws before the passage of the FLSA, but some were struck down as unlawful incursions on the employer's ability to negotiate wage rates with their employees. *See* William P. Quigley, *"A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum Wage*, 27 ST. MARY'S L.J. 513, 516–29 (1996) (describing the history of state and federal minimum wage legislation in the United States).

4. In the wage and hour context, the U.S. Department of Labor, Wage and Hour Division may have overlapping jurisdiction with a state agency if a given factual situation gives rise to violations of both the FLSA and state law. Where state law provides for a higher hourly wage, or more stringent payment requirements, enforcement of those standards would rest with the state. The Wage and Hour Division is focused on the enforcement of federal statutes, including the FLSA, Family and Medical Leave Act, Davis–Bacon Act, Migrant and Seasonal Agricultural Worker Protection Act, and others. *Major Laws Administered/Enforced*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR, http://www.dol.gov/whd/regs/statutes/summary.htm (last visited July 15, 2011).

complaints, workers and their advocates may simply prefer to use a state agency to resolve labor disputes. This preference may be driven by geographic convenience, familiarity with local processes and personnel, or broader statutory jurisdiction at the state level.[5] Some recent statistics from the wage and hour context underscore the relative size of federal and state enforcement efforts. In fiscal year 2008, at the federal level, the Wage and Hour Division of the DOL collected over $185 million on behalf of 228,645 workers.[6] Meanwhile, in 2009, a single state agency, the New York Department of Labor, recovered $28.8 million on behalf of 18,000 workers.[7] If, per Lee's proposal, the DOL is given ex ante authority to constrain ICE actions when a labor dispute is pending, the framework must envisage disputes registered at the state level. This may require the DOL to maintain closer links with its state-level partners, and even coordinate records and databases.[8] Indeed, a "clearinghouse" role for the DOL may be inevitable; any kind of direct monitoring arrangement between a state-level labor department and DHS seems politically unfeasible and constitutionally problematic.

In a similar fashion, Lee's proposal might integrate federal agencies *outside of* the DOL that commonly receive complaints from immigrant workers. For example, the National Labor Relations Board ("NLRB") has grappled with issues relating to immigrant workers. The U.S. Supreme Court decision in *Hoffman Plastic Compounds v. NLRB*, which limited the remedies available to undocumented workers under the National Labor Relations Act,[9] has prompted the NLRB to issue a series of memoranda emphasizing that undocumented persons continue to benefit from most (if not all) of the law's protections.[10] Historically, the shadow of a labor dispute involving the NLRB has been insufficient to forestall deportation proceedings.[11] For this reason, and also as a mild palliative for the limitations imposed by *Hoffman*, inclusion of the NLRB in an ex ante monitoring framework would be critical.

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5. Per the FLSA, state agencies are authorized to assist with the enforcement of the statute, and may even be reimbursed by the DOL for that purpose. 29 U.S.C. § 211(b) (2006).

6. *2008 Statistics Fact Sheet*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR (Dec. 2008), http://www.dol.gov/whd/statistics/2008FiscalYear.htm.

7. Press Release, N.Y. State Dep't of Labor, Governor Paterson Announces Record Level of Recovered Wages Returned to New Yorkers in 2009 (Dec. 31, 2009), *available at* http://www.labor.ny.gov/pressreleases/2009/December31_2009.htm.

8. A coordinated database of this type would not only aid the project of interagency monitoring; it would also enhance the core work of the DOL itself. With access to empirical data about complaints against employers, the DOL might begin to shift a largely *reactive* enforcement program into a *proactive* program driven by data trends relating to specific employers, industries, and geographic areas.

9. 535 U.S. 137, 140 (2002).

10. Memorandum from Arthur F. Rosenfeld, Gen. Counsel, Nat'l Labor Relations Bd. (July 19, 2002), *available at* http://www.nilc.org/immsemplymnt/emprights/Memo_GC_02-06.pdf; Memorandum from Richard A. Siegel, Assoc. Gen. Counsel, Nat'l Labor Relations Bd. (June 7, 2011), *available at* http://www.ilw.com/immigrationdaily/news/2011,0609-nlrb.pdf.

11. Montero v. INS, 124 F.3d 381, 385 (2d Cir. 1997) (permitting deportation based on evidence obtained in connection with a labor dispute).

Similarly, the U.S. Equal Employment Opportunity Commission ("EEOC") receives thousands of employment discrimination complaints each year from immigrant workers. One subset of these complaints are those alleging national origin discrimination; in 2010, the EEOC received 11,304 such charges.[12] Accordingly, any efforts to reconcile workplace disputes and immigration enforcement would ideally integrate claims brought before the EEOC. One way to ensure that disputes before the NLRB and the EEOC are brought within the fold is to deepen interagency agreements between federal entities with an interest in protecting immigrant workers.[13] In short, Lee's proposed framework should be expanded both vertically (to involve state agencies) and horizontally (to integrate parallel federal bodies).

The proposed interagency monitoring agreement must also consider the political winds that might dampen the DOL's enthusiasm to embrace an ex ante oversight role. Unlike some agencies, where bureaucratization has solidified certain core operations, the posture of the DOL has varied dramatically depending on the administration in power. For example, during the George W. Bush administration, the federal government was largely silent about the 1998 Memorandum of Understanding ("MOU") between the DOL and the Immigration and Naturalization Service ("INS"), with advocates questioning its ongoing applicability.[14] During the Bush administration, the DOL scaled back its enforcement activities.[15] Within some DOL subagencies, voluntary compliance

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12. *National Origin-Based Charges, FY 1997 – FY 2010*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/statistics/enforcement/origin.cfm (last visited July 15, 2011). "National origin" has been interpreted broadly, so a portion of these charges may have been filed by U.S. citizens. *See Compliance Manual Section 13: National Origin Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Dec. 2, 2002), http://www.eeoc.gov/policy/docs/national-origin.html (clarifying that national origin discrimination includes disparate treatment based on ethnicity, physical, linguistic, or cultural traits, or perceived ethnicity or attributes). At the same time, noncitizen workers have undoubtedly filed EEOC charges alleging sex discrimination, race discrimination, or violations of another protected category. *See, e.g.*, Press Release, U.S. Equal Emp't Opportunity Comm'n, Oregon Tree Farm Settles EEOC Lawsuit over Sexual Harassment and Retaliation (Apr. 21, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-21-11.cfm (announcing a settlement in a sexual harassment suit brought on behalf of Latina immigrant farmworkers, and noting "the abundance of sexual harassment cases involving immigrant workers"). Additionally, although undocumented workers lacking employment authorization are not likely to advance discrimination claims alleging failure to hire, such workers might certainly have valid claims stemming from other types of adverse action.

13. For example, the EEOC has entered into several memoranda of understanding with other federal agencies, particularly in areas of overlapping jurisdiction. *See Memoranda of Understanding*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://archive.eeoc.gov/abouteeoc/coordination/mou.html (last modified Sept. 1, 2004).

14. Memorandum of Understanding Between the Immigration and Naturalization Serv., Dep't of Justice, and the Employment Standards Admin., Dep't of Labor (Nov. 23, 1998), *available at* http://www.nilc.org/immsemplymnt/emprights/MOU.pdf.

15. DAVID MADLAND & KARLA WALTER, ENFORCING CHANGE: FIVE STRATEGIES FOR THE OBAMA ADMINISTRATION TO ENFORCE WORKERS' RIGHTS AT THE DEPARTMENT OF

programs began to replace the traditional enforcement protocols.[16] Ideally, any interagency monitoring agreement would be insulated from the political whims of appointees who might choose to let their oversight authority languish. This could be accomplished through the creation of an external advisory committee or by requiring periodic reports—from the DOL and DHS—that assess the effectiveness of the agreement.

The enforcement of labor rights could become just as politicized at the state level. In his article, Lee warns of the complications engendered by the enforcement of immigration laws by state and local authorities.[17] Noncitizens with pending workplace complaints may be apprehended in jurisdictions participating in the 287(g) program or could be subjected to an ICE detainer pursuant to the Secure Communities program.[18] As Lee notes, these noncitizens may land in ICE custody, and ICE may have minimal knowledge of the circumstances that led to the initial arrest.[19] Add to this mix yet another factor: a politicized state-level labor agency that is dismissive of the concerns of immigrants, or at worst, complicit in efforts to intimidate or silence workers. Although the latter scenario has not yet come to pass, the delegation of immigration enforcement authority, combined with similar delegations of labor enforcement authority, could create a perfect storm in a locality where anti-immigrant sentiment has reached its apex.[20]

For example, under the Occupational Safety and Health Act, states may submit a plan to OSHA asking for a delegation of authority to regulate safety and health matters within their jurisdiction.[21] The states must demonstrate that their own safety standards "are or will be at least as effective in providing safe and healthful employment and places of employment as the [federal] standards" and

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LABOR 7, 15 (2008), *available at* http://www.americanprogressaction.org/issues/2008/pdf/dol.pdf (noting that the DOL under Bush "has not used penalties to its full authority" and that "the number of WHD investigators per 1 million working Americans has dropped by 27 percent" since Bush took office).

16. *Id.* (describing the shift to compliance assistance programs at the Occupational Safety and Health Administration ("OSHA")).

17. Lee, *supra* note 1, at 1132–36.

18. *See id.* at 1133 n.174 (providing an overview of the Secure Communities program).

19. *Id.* at 1132–33.

20. Recent events in Hershey, Pennsylvania, demonstrate how local law enforcement officials can easily become involved in efforts to silence immigrant workers. In May and June 2011, hundreds of foreign students traveled to the United States on J-1 visas as part of an international exchange program that allows short-term employment and the opportunity to experience U.S. culture. The students were placed in jobs packing chocolates at a Hershey Company distribution center in Palmyra, Pennsylvania; soon after their arrival, they realized that the living and working conditions were not what they had been promised. COLLEEN P. BRESLIN ET AL., REPORT OF THE AUGUST 2011 HUMAN RIGHTS DELEGATION TO HERSHEY, PENNSYLVANIA 1 (2011), *available at* http://www.brandeis.edu/ethics/pdfs/internationaljustice/Hersheys.pdf. On August 17, 2011, the students staged a sit-in protest at the distribution center. *Id.* at 2. In response, an arguably "disproportionate" number of local law enforcement officers arrived on the scene. *Id.* at 21. In the experience of one labor leader, "the level of coordination between law enforcement and management was highly unusual for situations involving local labor disputes." *Id.*

21. 29 U.S.C. § 667(b) (2006).

must meet certain other requirements.[22] To date, 27 states and territories have approved OSHA state plans.[23] In recent years, the DOL itself has expressed concern about the deterioration of occupational health and safety protections in some state-plan jurisdictions.[24] In such circumstances, local officials might be deferential to employers, and perhaps even dismissive of worker complaints. Absent meaningful labor protections, unrestrained local immigration enforcement could further imperil immigrant workers, and worker grievances would go undetected under any type of monitoring framework.

II. THE UNSTEADY PARITY OF IMMIGRATION ENFORCEMENT AND PROTECTION OF LABOR STANDARDS

Despite the tensions between immigration enforcement and the protection of labor standards, it is reasonable to assume some level of parity between DHS and the DOL, as both are federal agencies with cabinet-level secretaries and responsibility for regulating the workplace.[25] I would suggest, however, that the 9/11 terrorist attacks have tacitly positioned homeland security and immigration enforcement as a superior priority—if not by operation of law, then certainly through official pronouncements and public discourse.[26] Over the last decade, immigration enforcement has been equated with the protection of national security. This trend has been reflected in, *inter alia*, government efforts to expel those

22. *Id.* § 667(c)(2).

23. *State Occupational Safety and Health Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, http://www.osha.gov/dcsp/osp/index.html (last visited July 15, 2011). Of these, five cover only public-sector employees. *Id.*

24. *See, e.g.*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, REVIEW OF THE NEVADA OCCUPATIONAL SAFETY AND HEALTH PROGRAM, at ii–iii (2009), *available at* http://www.osha.gov/dcsp/final-nevada-report.pdf (documenting a range of serious concerns with the Nevada state plan).

25. Lee, *supra* note 1, at 1095 ("[I]n theory, ICE and the DOL are empowered to jointly regulate the workplace on relatively equal terms . . . .").

26. *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement to All ICE Emps. (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf ("ICE is charged with enforcing the nation's civil immigration laws. This is a critical mission and one with direct significance for our national security, public safety, and the integrity of our border and immigration controls."); *Issues: Homeland Security*, WHITE HOUSE, http://www.whitehouse.gov/issues/homeland-security (last visited July 15, 2011) ("The President's highest priority is to keep the American people safe. . . . The President is committed to securing the homeland against 21st century threats by preventing terrorist attacks and other threats against our homeland, preparing and planning for emergencies, and investing in strong response and recovery capabilities.").

noncitizens who pose a security threat.[27] And, as homeland security has risen in importance, the primacy of other rights has been contested.[28]

In some ways, the tension between DHS and the DOL is reminiscent of the dichotomy in the international human rights law framework between civil and political rights on the one hand, and economic, social, and cultural rights on the other. Violations of civil and political rights are typically perceived as serious, whereas economic and social rights violations are often tolerated or met with ambivalence.[29] The 9/11 attacks have arguably led to a psychological retrenchment of this distinction among rights. Although no one has explicitly called for the suspension of labor standards in the name of national security, the prioritization of immigration enforcement plays out in subtle ways. In legislative debates relating to immigration reform, for example, legislators routinely emphasize the importance of "securing the borders" before any other measures are implemented.[30] Likewise, legislation relating to immigration enforcement and national security often passes with minimal scrutiny, whereas other bills, such as those relating to social or economic matters, engender much more vigorous opposition. Given these conditions, any efforts at interagency cooperation must confront the implicit challenge to agency parity in a post-9/11 environment.

Some might argue that the discourses that link immigration enforcement with national security are primarily concerned with securing the borders, regulating entry and exit, and expelling criminal or terrorist elements. According to this view, worksite enforcement is seen as an independent sphere of oversight, driven more by economic concerns as opposed to national security imperatives. While this is partly true, I fear that the two narratives—namely, "national security threat" and "undocumented worker"—are beginning to merge. For example, in discussing worksite enforcement post-9/11, ICE officials have touted their

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27. For example, on the heels of 9/11, Congress expanded the terrorism-related inadmissibility grounds in the Immigration and Nationality Act. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 411(a), 115 Stat. 272, 345–48 (codified as amended at 8 U.S.C. § 1182 (2006)).

28. *See, e.g.*, Robert N. Davis, *Striking the Balance: National Security vs. Civil Liberties*, 29 BROOK. J. INT'L L. 175, 238 (2003) (suggesting that the federal government has, indeed, struck the right balance between national security and civil liberties, arguing that "it becomes very difficult to preserve civil liberties if the survival of the nation is in the balance"); Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 284 (2006) (arguing that "labor's freedom of association, like other civil liberties, is under stress in the post-9/11 period").

29. Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social, and Cultural Rights*, 20 HUM. RTS. Q. 81, 82–83 (1998). Notwithstanding this divide, scholars and human rights advocates have continually emphasized the indivisibility of all human rights. *Id.* at 81–82.

30. Devin Dwyer, *Immigration Debate: How Secure Is Secure Enough at Border?*, ABCNEWS.COM (June 24, 2010), http://abcnews.go.com/Politics/immigration-reform-secure-border-prerequisite-reform-bill/story?id=11002367 ("'Secure the border first' has become a common refrain among lawmakers from both parties, particularly those representing southwestern states, when asked whether they'd support a comprehensive immigration reform bill.").

apprehension of "unauthorized workers at critical infrastructure facilities, including highly sensitive sites such as nuclear power plants, major international airports, seaports, and military facilities."[31] The rollout of electronic employment verification in the form of E-Verify, and discussions of a national biometric ID card, are evidence of the growing concerns about securing U.S. workplaces.

Indeed, post-9/11 fears and xenophobia, along with the broader economic decline, have created challenging conditions for immigrants. These conditions, while pushing some undocumented persons deeper into the shadows, have emboldened others to speak out against the injustices they experience. Lee writes eloquently of how ICE activity can lead immigrants to distrust government generally, thereby undermining the work of the DOL, which relies heavily on worker complaints.[32] That immigrants—especially undocumented immigrants—would tend to avoid interactions with the government is a sound proposition. Nevertheless, in our discourse about agency action and immigrant behavior, we must also contemplate undocumented persons who knowingly engage with government agencies, notwithstanding the possible repercussions.[33] Otherwise, we risk doing a dignitary disservice to immigrants, whose behavior often defies easy categorization.[34]

III. DEVELOPING AN EX ANTE MONITORING FRAMEWORK

Lee's article effectively describes the purpose and broad contours of an interagency monitoring agreement between the DOL and ICE relating to worksite enforcement. One type of arrangement that Lee describes involves "requir[ing] ICE to obtain permission from the DOL before investigating a particular workplace."[35] Lee's intriguing proposal invites additional thinking about exactly how such an arrangement would be structured. Below, I share a few initial queries and offer further content to Lee's proposal.

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31. *Priorities in Enforcing Immigration Laws and Temporary Worker Program: Hearing Before the Subcomm. on Homeland Security of the H. Comm. on Appropriations*, 109th Cong. 57 (2006) (statement of Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement). Some of these arrests have occurred in the context of specific initiatives. For example, after 9/11, federal officials launched Operation Tarmac, an initiative designed to identify unauthorized workers at U.S. airports. *See, e.g.*, Ricardo Alonso-Zaldivar, *Airport Worker Arrests Assailed as Too Sweeping*, L.A. TIMES, Nov. 19, 2002, at A12 (describing mixed opinions about the effectiveness of Operation Tarmac).

32. Lee, *supra* note 1, at 1100–04.

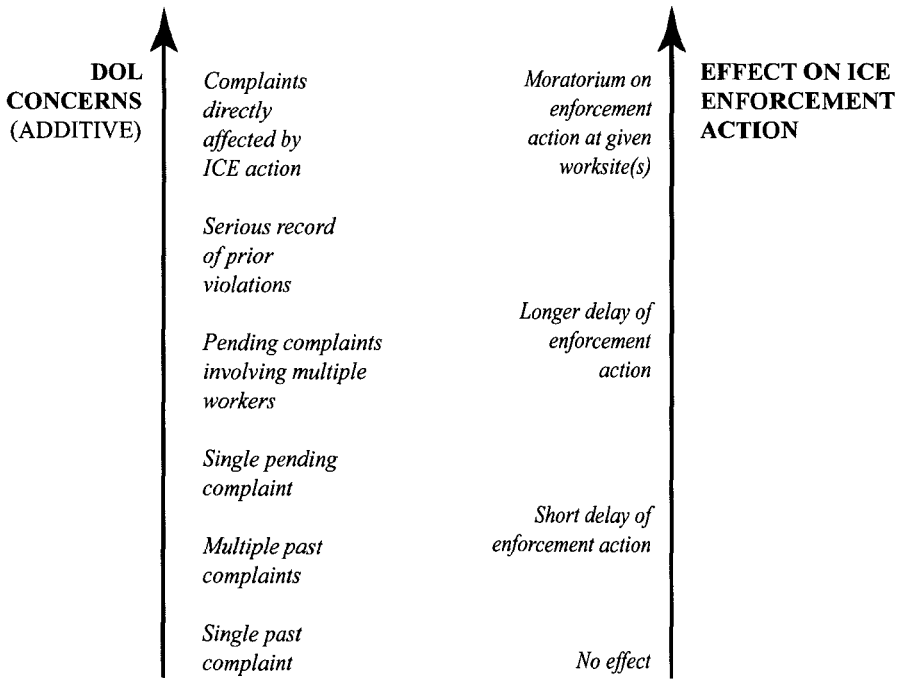
33. In recent years, in the face of heightened immigration enforcement and the lack of meaningful immigration reform, undocumented persons have been increasingly willing to speak openly about their status, speak out against government (in)action, and participate in public campaigns. *See, e.g.*, Antonio Olivo, *Several Arrested in Immigration Protests*, CHI. TRIB. (Aug. 18, 2011), http://www.chicagotribune.com/news/local/ct-met-secure-communities-protest-20110818,0,5850145.story (describing a Chicago protest against the Secure Communities initiative, at which protesters chanted "undocumented and unafraid").

34. Jayesh M. Rathod, *Beyond the Chilling Effect: Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL'Y J. 267, 292 (2010).

35. Lee, *supra* note 1, at 1125.

Let me begin with a few threshold questions. First, when exercised, what exactly would the DOL "pre-clearance power" look like? Would the DOL be able to prevent ICE enforcement actions from taking place? Or would the DOL's interests simply mean that ICE enforcement actions will be delayed for a fixed period of time? Second, what type of circumstance flagged by the DOL would be sufficient to chill action by ICE? Would a single complaint brought by an individual worker suffice? Would the complaint have to be brought by a worker or workers who are being targeted by ICE in the enforcement action? (And would such information be knowable in most cases?) Or, would the DOL speak with more authority vis-à-vis ICE if the employer had already been found to have violated certain workplace laws?

I suggest, as a way to address these complexities, that any interagency agreement be structured as a "sliding scale," where the weight of the DOL oversight would be proportionate to: (1) the gravity of the employer's prior record of workplace rights violations; (2) the certainty of that record (e.g., whether the record contains mere allegations or formal findings of fault); (3) the degree to which former or current complainants might be affected by the enforcement action; and (4) the number of workers involved in prior complaints.[36] This can be illustrated visually as follows:



36. There is one drawback to including this last criterion: Complaints emanating from smaller workplaces—for example, a complaint lodged by a single domestic worker—might appear too tenuous to justify restraint over ICE action. The ex ante monitoring framework must operate in a way that does not systematically disadvantage such workers. As suggested below, case-by-case consideration could help ameliorate this concern.

The DOL concerns listed above are not intended to correlate directly to a specific outcome. Rather, they represent a range of concerns, with the outcome to be determined on a case-by-case basis—perhaps by an interagency working group. Although this framework does not capture the full continuum of scenarios, it would allow some flexibility, given the challenges involved in such a partnership. If, as I suggest above, the DOL lacks some political capital as compared with DHS, a flexible framework would allow the DOL to take a stronger stand when the stakes for immigrant workers are highest.

IV. SOME REFLECTIONS ON RECENT DEVELOPMENTS

In the months prior to this publication, DHS and the DOL issued memoranda relating to the role of the respective agencies in worksite enforcement and labor disputes. These documents reflect, in part, the core concerns raised by Lee. At the same time, they suggest the dawn of a new approach to worksite enforcement—or at a minimum, a greater coherence in the missions of the two agencies.

Lee appropriately critiques the limited utility of the 1998 Memorandum of Understanding between the DOL and the INS, a predecessor agency of DHS.[37] On March 31, 2011, the DOL and DHS issued a revised MOU concerning enforcement activities at worksites.[38] The stated purpose of the 2011 MOU is "to set forth the ways in which the Departments will work together to ensure that their respective civil worksite enforcement activities do not conflict and to advance the mission of each Department."[39] Importantly, ICE agreed to "refrain from engaging in civil worksite enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute during the pendency of the DOL investigation and any related proceeding."[40] To that end, the MOU commits the DOL to "providing ICE with timely and accurate information to allow for identification of overlapping enforcement activity."[41]

The language of the Memorandum suggests an evolving vision of ICE's role in workplace regulation. Unlike the 1998 MOU, which was phrased in more neutral terms, the 2011 MOU acknowledges the possibility of conflicts in the work of the two agencies. Additionally, the 2011 MOU contains provisions that are specifically designed to address past practices that have harmed vulnerable immigrant workers. For example, the new MOU commits ICE to properly screen tips to ensure that the agency is not complicit in efforts to retaliate against workers.[42] Another provision forbids ICE from misrepresenting itself as the DOL,

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37. Lee, *supra* note 1, at 1121.

38. Revised Memorandum of Understanding Between U.S. Dep't of Homeland Sec. and U.S. Dep't of Labor (Mar. 31, 2011) [hereinafter 2011 MOU], *available at* http://www.dol.gov/_sec/media/reports/hispaniclaborforce/dhs-dol-mou.pdf. The 2011 MOU "voids and supersedes" the 1998 document. *Id.* at 4.

39. *Id.* at 1.

40. *Id.* at 2. ICE also carved out circumstances under which an enforcement action would move forward, notwithstanding the general agreement to refrain. *Id.* at 2–3.

41. *Id.* at 2.

42. *Id.*

hearkening to the concerns raised by the Goldsboro, North Carolina, sting in which ICE agents masqueraded as OSHA staff.[43]

Although viewed as an important development, the new MOU does not fully embrace all aspects of Lee's vision. First, it is unclear from the language of the MOU whether the DOL will be able to affirmatively invoke an ex ante constraint, or whether DHS will continue to make its own decisions but with additional information from the DOL. An additional limitation of the MOU is the temporary nature of ICE's abstention from action. According to the MOU, ICE would be free to initiate proceedings against an undocumented worker *after* the conclusion of a labor dispute.[44] Suppose, for example, that a group of undocumented workers are able to resolve a wage-claim dispute following intervention from the DOL. If ICE conducts an enforcement action just weeks or months later, Lee's concerns about mistrust of government would still be implicated.

A second development is a memorandum on prosecutorial discretion issued on June 17, 2011 by John Morton, the Director of ICE.[45] The Memorandum describes a range of circumstances under which attorneys for ICE—the attorneys that prosecute immigration removal cases—are encouraged to exercise prosecutorial discretion. Among the categories of individuals who deserve "[p]articular attention" are "individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination . . .) who may be in a non-frivolous dispute with an employer."[46] According to the Memorandum, the discretion can take many different forms—everything from refusing to issue a Notice to Appear (an immigration charging document), to temporarily closing the case, to terminating the removal proceedings.[47]

Lee appropriately flags the tendency to define agency success in terms of quantifiable results.[48] In this vein, ICE has been criticized for being numbers-driven, and for defining success by how many noncitizens have been apprehended. This type of numbers-driven culture may stand in the way of achieving less tangible goals, such as promoting a safe and healthy workplace where rights are respected. The Morton Memorandum highlights an opportunity to play to the same numbers-driven culture a few steps downstream in the process of apprehension and removal by DHS. ICE attorneys are notoriously overburdened; to the extent that

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43. *See id.* at 3; *see also* Steven Greenhouse, *Immigration Sting Puts Two Federal Agencies at Odds*, N.Y. TIMES, July 16, 2005, at A11.

44. 2011 MOU, *supra* note 38, at 2.

45. Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

46. *Id.* at 2. A successful lawsuit brought by the Jerome N. Frank Legal Services Organization at Yale Law School drove this policy change. In that matter, attorneys persuaded ICE to allow a plaintiff to remain in the United States to pursue a civil rights lawsuit. *See* Mark Spencer, *Lawsuit Spurs New Deportation Policy*, HARTFORD COURANT, July 3, 2011, at B3.

47. Memorandum from John Morton, *supra* note 45, at 2.

48. Lee, *supra* note 1, at 1116.

"cases closed" is an important metric for ICE attorneys, the Morton Memorandum may provide an opportunity to serve the interests of both ICE and the DOL. It also creates the possibility for a lasting reprieve rather than the temporary hold contemplated by the MOU.

Finally, the August 2011 announcement from the White House regarding immigration enforcement priorities is likely—over the long term—to have a neutralizing effect on worksite enforcement actions. In the announcement, the White House indicated the federal government's intent to review all pending removal cases, and to "clear out low-priority cases on a case-by-case basis and make more room to deport people who have been convicted of crimes or pose a security risk."[49] Certainly, many key details about this policy shift remain unclear. Nevertheless, any sustained effort to insulate certain undocumented persons from removal proceedings must be accompanied by a shift in the enforcement efforts that place the undocumented persons in those proceedings. And even if ICE enforcement culture is resistant to change, the announcement will enhance the DOL's persuasive power over DHS, should the DOL be given an ex ante monitoring role.

49. Cecilia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources.