

California leads the way

A look at California laws that help protect labor standards for unauthorized immigrant workers

Report • By [Daniel Costa](#) • March 22, 2018

Executive summary

California is the U.S. state that hosts the largest total number of immigrants as well as the largest number of unauthorized immigrants, and the largest number of immigrants who participate in the workforce (both authorized and unauthorized). Unauthorized immigrants make up 5 percent of the U.S. labor force and 9 percent of California's labor force. Unauthorized immigrant workers across the United States, including in California, are often subject to workplace abuse and retaliation by their employers that is based on and/or facilitated by those workers' lack of an authorized immigration status.

Unauthorized immigrants contribute to the economy in vital industries, pay billions of dollars in taxes, and contribute billions to California's economy. But unauthorized immigrant workers, who on paper have labor and employment law protections,¹ in practice are often restrained from complaining about unpaid wages and substandard working conditions because of fears—or actual threats—that their employers will retaliate by reporting their immigration status to federal immigration enforcement authorities. In California, reports of instances of such retaliation have been on the rise. From January 1 to December 22, 2017, workers in California “filed 94 immigration-related retaliation claims” with the California Labor Commissioner's Office, “up from 20 in all of 2016 and only seven” in 2015 (Khouri 2018). The threat of retaliation gives employers extraordinary power to exploit and underpay unauthorized immigrants. This power dynamic also undercuts the bargaining power of U.S. workers who work side by side with unauthorized immigrants.

The ideal solution to this problem would be federal immigration reform that provides legalization and a path to citizenship for the 11.3 million unauthorized immigrants in the United States. This would level the playing field in terms of labor standards for all workers. However, in the absence of such nationwide reform, the government of the state of California has taken measures to improve labor standards for vulnerable immigrant workers present in the state. Between 2013 and 2017 the California legislature

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considered and passed seven laws designed to protect workers in the state from retaliation and discrimination related to their immigration status: AB 263 (2013), SB 666 (2013), AB 524 (2013), AB 2751 (2014), AB 622 (2015), SB 1001 (2016), and AB 450 (2017). Another law, SB 54 (2017), includes a provision that may improve access to justice for immigrant workers seeking redress for labor violations. All were signed into law by Governor Jerry Brown and each went into effect on January 1 of the year following their passage by the legislature.

This report analyzes these laws and finds that they have provided California's labor commissioner and attorney general with new tools to combat retaliation and exploitation based on immigration status and that they have provided immigrant workers with new causes of actions for civil lawsuits to enforce their rights and recover monetary damages from employers who violate labor and employment laws. The penalties provided by the laws may also act to deter employers from engaging in unscrupulous behavior in the first place. Other states should follow California's lead and pass laws that protect immigrant workers from retaliation, wage theft, and other workplace abuses that are facilitated by virtue of their immigration status—and they should enforce those laws vigorously.

These laws are summarized below.

- **California's AB 263 (2013) prohibits employers from using threats related to immigration status to retaliate against employees who have exercised their labor rights.** For example, if an employee complains to an employer about wages owed to her, and if the employer retaliates with threats related to the worker's immigration status as an excuse to discharge or not pay the worker, the California Division of Labor Standards Enforcement (DLSE) can investigate and fine the employer, or the worker can bring a civil lawsuit against the employer. Employers guilty of retaliation based on immigration status may be subject to a civil penalty of up to \$10,000 and the employer's business license may be temporarily suspended.
- **California's SB 666 (2013) is similar and complementary to AB 263, but expands the options for penalizing bad actors and also makes it easier for immigrant workers to sue employers for damages when they are retaliated against for exercising their workplace rights.** Under SB 666, an employer's business license may be revoked (not just suspended temporarily) if the employer is found to have retaliated against an employee based on immigration status. In addition, a lawyer who participates in retaliatory activities on behalf of an employer may be suspended or disbarred. Further, while AB 263 waived the requirement to exhaust administrative remedies before filing a lawsuit for claims specifically related to unlawful discharge or discrimination, under SB 666 that requirement is waived for nearly all claims related to labor code violations.
- **California's AB 2571 (2014) modifies and clarifies provisions in AB 263** by specifying that (1) an "unfair immigration-related practice" also includes filing or threatening to file "a false report or complaint with any state or federal agency" (not just a police report, as AB 263 prohibits), and that (2) the \$10,000 civil penalty for retaliation from AB 263 be awarded to the employee who suffered the violation rather than the penalty being awarded to the state of California.

- **California’s AB 524 (2013) expands the definition of “criminal extortion” to include threats related to immigration status and provide for possible criminal penalties**—imprisonment for up to one year and/or a fine of up to \$10,000—for employers who make threats related to an employee’s immigration status.
- **California’s SB 1001 (2016) and AB 622 (2015) narrowly specify what constitutes lawful use of the employment authorization process, making it more difficult for employers to use this process to retaliate against unauthorized immigrant workers.** California’s SB 1001 and AB 622 specifically prohibit employers from using the employment authorization process in ways that are not required under federal law, with penalties up to \$10,000 per violation. Under these laws, complainants don’t have to prove that the employer’s action was specifically retaliatory (as would be required under AB 263, for example).
- **California’s AB 450 (2017) can provide due process for workers in the face of an I-9 worksite audit and discourage employers from using the I-9 audit process to retaliate against employees.** Under AB 450, employers are prohibited from providing Immigration and Customs Enforcement (ICE) with access to nonpublic areas of the workplace and employment records when ICE has not obtained a warrant or subpoena, and AB 450 requires employers to notify workers when ICE plans to conduct an audit and inform workers about the details of the audit. Employers can be fined \$2,000 to \$5,000 for the first violation, and \$5,000 to \$10,000 for each additional violation. In addition, employers are prohibited from requiring their existing employees to reverify their work authorization at a time or manner not required by federal immigration law, and may face penalties of up to \$10,000 for each violation.
- **California’s SB 54 (2017), also known as the California Values Act, includes a provision that has the potential to make courts and government buildings more accessible to unauthorized workers (by decreasing the risk of detention by ICE agents while pursuing claims for workplace violations by employers).** In light of increasing immigration enforcement activities at courthouses and state government buildings by ICE, unauthorized immigrant workers will face significant difficulties accessing the judicial system and due process. SB 54 provides for the upcoming publication (by October 2018) of model policies for ensuring that public facilities “remain safe and accessible to all California residents, regardless of immigration status.” These model policies have the potential to provide unauthorized immigrant workers with greater certainty that ICE agents will not be present in California courtrooms, thus creating a safer environment for immigrants to access the legal system and obtain due process.

Background: Immigrant workers make up a significant share of California’s workforce and are an integral part of many American families and communities

Immigrants—defined as all foreign-born persons and including all immigration statuses (temporary, permanent, and unauthorized)—are a significant and important part of California’s population and workforce. A total of 43.7 million immigrants live in the United States, representing 13.5 percent of the U.S. population (Zong, Batalova, and Hallock 2018); 10.7 million of those immigrants live in California, representing 27.3 percent of the state’s population. And 6.6 million immigrants are part of California’s workforce, accounting for a third of California’s total workforce (AIC 2017).

Of the 43.7 million immigrants living in the United States, approximately 11.3 million are unauthorized (Krogstad, Passel, and Cohn 2017); these unauthorized immigrants account for one-quarter of all immigrants in the country (López and Bialik 2017). Most unauthorized immigrants are not newcomers, but are long-term residents of the United States. Two-thirds have resided in the United States for over 10 years, while only 14 percent have resided in the United States for less than 5 years; their median duration of residence was 13.6 years in 2014, nearly double what it was in 1995 (Passel and Cohn 2016a). The Pew Research Center estimated that in 2012 there were approximately 4.5 million U.S.-born children who were younger than 18 and living with their unauthorized immigrant parents, meaning that millions of American children are in mixed-status households (Passel and Cohn 2015a).

California is the state that hosts the largest population of unauthorized immigrants by far—2.3 million, which accounts for 6 percent of California’s total population (Pew 2016). The vast majority of unauthorized immigrants in California are employed—1.7 million, which is 9.0 percent of the total labor force in the state (Passel and Cohn 2016b);² this is second only to Nevada in terms of the unauthorized *share* of the labor force, but Nevada has less than a tenth of the *number* of total unauthorized immigrants that California has (210,000 vs. 2.3 million) (Pew 2016).

Why we need to protect labor standards for unauthorized immigrant workers

Unauthorized immigrant workers contribute to the American economy

Unauthorized immigrants contribute to the economy in many industries vital to the U.S. economy (Passel and Cohn 2015b) and pay billions in state and local taxes (Gee, Gardner, and Wiehe 2016). According to California State Controller Betty Yee, unauthorized immigrants' labor "is worth more than \$180 billion per year to California's economy" (Hamilton 2017). Despite these contributions, unauthorized immigrants are often subjected to workplace abuse and retaliation by their employers that is based on, or facilitated by, their lack of an authorized immigration status—as is illustrated by numerous anecdotes reported in the media and by immigrant worker advocates.

Fear of retaliation means workers don't report lawbreaking employers

Although on paper unauthorized immigrant workers have labor and employment law protections—state labor laws and the federal Fair Labor Standards Act require that all workers be paid no less than the federal minimum wage and for overtime hours (if applicable) regardless of their immigration status—in practice, they are typically unable to complain about unpaid wages and substandard working conditions because employers can retaliate against them by taking actions that can lead to their removal by federal immigration authorities. In California, instances of this—employer retaliation against workers based on their immigration status—have been on the rise. From January 1 to December 22, 2017, workers in California "filed 94 immigration-related retaliation claims" with the California Labor Commissioner's Office, "up from 20 in all of 2016 and only seven" in 2015 (Khouri 2018).

As a result, in practice unauthorized immigrant workers have little access to labor and employment law protections under U.S. law. When unauthorized workers complain about substandard conditions or unpaid wages, or engage in protected activities like organizing to join or form a union, their employers can and often do retaliate by using their immigration status as an excuse to fire them, by threatening to call federal immigration authorities, or by actually calling immigration authorities. In some cases, employers may threaten to report (or actually report) not only an employee but also members of the employee's family. The employer's actions could ultimately lead to the removal of the unauthorized immigrant employee and/or his or her family from the United States. This

obviously has a chilling effect on employees when they are considering whether to seek redress in courts for workplace violations or to report violations to state or federal labor standards enforcement agencies. The fear of deportation also strongly discourages unauthorized immigrant employees from organizing to join or form a union.³ And even absent employer threats, unauthorized immigrant employees may be afraid to avail themselves of help from state or federal labor agencies or law enforcement out of fear that their personal information will be shared with immigration enforcement agencies like U.S. Immigration and Customs Enforcement (ICE), which is responsible for removing unauthorized immigrants from the interior of the United States.

Unauthorized immigrant workers are victims of workplace violations at a higher rate than other workers

Research, surveys, and other anecdotal evidence have established that workplace violations are common occurrences for unauthorized immigrant workers. For example, a 2009 landmark study and survey by Annette Bernhardt, Ruth Milkman, Nik Theodore, and a number of other scholars, titled *Broken Laws, Unprotected Workers*, found that 37.1 percent of unauthorized immigrant workers had been victims of minimum wage violations in the week prior to their being surveyed—meaning they had not been paid the legally required minimum wage for hours worked that week—compared with 21.3 percent for authorized immigrants and 15.6 percent for U.S.-born citizens. In terms of overtime law violations—cases where workers were not paid the legally required time-and-a-half rate for the hours worked in a week beyond 40 hours—the statistics are even more disturbing, with all workers suffering extremely high rates of violations and unauthorized workers topping the list. Among full-time unauthorized immigrant workers who reported working more than 40 hours for a single employer during the previous workweek, an astounding 84.9 percent reported not being paid time-and-a-half for their overtime hours, compared with 67.2 percent for authorized immigrants and 68.2 percent for U.S.-born citizens (Bernhardt et al. 2009).

In addition, labor inspections at the state and federal levels are infrequent, and even when workers who have been victims of wage theft succeed in winning a judgment to recover lost wages, a significant share of these victims are unable to recover the back pay they are entitled to (Levine 2018).

Workplace violations based on or facilitated by immigration status degrade labor standards for all workers

The end result of all this is that U.S. employers benefit by having an extraordinary amount of power to exploit and underpay unauthorized immigrants with impunity. This also undercuts the bargaining power of U.S. workers who work side by side with unauthorized

immigrants who are easily exploitable. When the wages and labor standards of unauthorized immigrants in the U.S. labor market are degraded, so are the wages and labor standards of U.S. workers in similar jobs.

California is leading the way in passing laws to deter employers from retaliating against unauthorized immigrant workers

In the absence of federal immigration reform that provides legalization and a path to citizenship for the 11.3 million unauthorized immigrants in the United States—which would level the playing field in terms of labor standards for all workers—the state of California has taken measures to improve labor standards for the 9.0 percent of its labor force composed of workers who lack an authorized immigration status. It is important to note that the state of California cannot stop ICE from lawfully arresting and removing any unauthorized immigrant who is present in the state. Nevertheless, in order to combat some of the most common workplace abuses that unauthorized immigrant workers face, and therefore improve labor standards for all workers, the California legislature has considered and passed seven laws designed and intended to protect all immigrant workers from retaliation and discrimination related to their immigration status. These laws are AB 263 (2013), SB 666 (2013), AB 524 (2013), AB 2751 (2014), AB 622 (2015), SB 1001 (2016), and AB 450 (2017).

California laws passed in 2013 and 2014

In 2013 and 2014, the California legislature considered and passed four laws designed and intended to protect unauthorized immigrant workers from threats related to their immigration status: AB 263, SB 666, AB 524, and AB 2751.⁴ Governor Jerry Brown signed AB 263, SB 666, and AB 524 in 2013 and the laws went into effect on January 1, 2014. AB 2751 was signed in 2014 and went into effect on January 1, 2015. This section offers a brief synopsis of the main components of these four laws.

AB 263 and SB 666

Both AB 263 and SB 666 provide workers with certain protections against retaliation by their employers that is related to their immigration status. AB 263 prohibits “unfair immigration-related practices” by an employer or any other person who takes any number of listed actions against any person for exercising a right protected in the California Labor Code (Labor Code) or any local ordinance applicable to employees. AB 263 protects persons who file a complaint against an employer, persons who investigate whether an employer has broken the law, or persons who inform others about their rights or help them assert those rights under the Labor Code. An unfair immigration-related practice can

include requesting more or different documents to verify employment authorization than are required under federal law, or refusing to honor documents to verify work authorization that on their face reasonably appear to be genuine; using the federal E-Verify system (the federal government’s web-based electronic employment authorization system)⁵ to check the employment authorization status of a person at a time or in a manner not required under federal law or not authorized under any memorandum of understanding governing the use of the federal E-Verify system; threatening to file or actually filing a false police report; or threatening to contact or actually contacting immigration authorities. AB 263 also establishes that an employer who engages “in an unfair immigration-related practice against a person within 90 days of the person’s exercise of rights” creates a rebuttable presumption that the employer retaliated against a person for exercising their rights.

AB 263 provides a private right of action for the aggrieved worker or person who has been retaliated against and waives the requirement that the worker exhaust any administrative remedies before filing a lawsuit for claims related to unlawful discharge or discrimination. AB 263 also allows the plaintiff to recover attorney’s fees and authorizes a civil penalty of up to \$10,000. If an employer has been found to have committed an unfair immigration-related practice, the business associated with the workplace violation may have its business license temporarily suspended.

SB 666 is similar and complementary to AB 263. Under SB 666, employers are prohibited from reporting or threatening to report the citizenship or immigration status of any employee or the citizenship or immigration status of an employee’s family member in retaliation for exercising a right or engaging in protected conduct. If the California Division of Labor Standards Enforcement (DLSE) or a court finds that an employer retaliated in this manner against an employee for exercising a right in the Labor Code, an employer’s business license may be revoked or suspended. In addition, if the employer’s attorney (or any other attorney) engages in this activity—e.g., reports the citizenship or immigration status of an employee or employee’s family member, or of a witness or party to a civil or administrative action to a federal, state, or local agency, for exercising a protected right—it will be “cause for suspension, disbarment, or other discipline” by the State Bar of California. SB 666 also includes a broader standard than AB 263 in terms of the exhaustion of administrative remedies: it establishes that individuals are not required to exhaust available administrative remedies or procedures before they may bring a civil action under any provision of the Labor Code (unless the section requires exhaustion of an administrative remedy).

Both AB 263 and SB 666 expand protected conduct to include a written or oral complaint by an employee that he or she is owed unpaid wages, as well as prohibit retaliation by any person acting on behalf of an employer. Under both laws, employers may face penalties of up to \$10,000 for each instance of retaliation, per employee.

AB 2571

AB 2571, signed into law a year after AB 263, modifies and clarifies provisions in AB 263. These modifications and clarifications include specifying that (1) an “unfair immigration-

related practice” also includes filing or threatening to file “a false report or complaint with any state or federal agency” (not just a police report, as AB 263 prohibits), and that (2) the \$10,000 civil penalty for retaliation from AB 263 be awarded to the employee who suffered the violation rather than the penalty being awarded to the state of California. (AB 263 did not specify who would receive the funds.)

AB 524

AB 524 expands the definition of criminal extortion to include threats related to immigration status. This law makes it criminal to threaten to report any individual’s immigration status or suspected immigration status, or that of an individual’s relative or a member of his or her family, in order to obtain property from the individual (which could include wages owed to a worker, for example). The penalty for criminal extortion under California Penal Code Section 524 is imprisonment of up to one year and/or a fine of up to \$10,000.

How AB 263, SB 666, AB 2751, and AB 524 are operating in practice

AB 263, SB 666, AB 2751, and AB 524 can be used either by DLSE in an investigation or enforcement action or by an individual worker who brings a civil lawsuit.

In general, if a worker has been the victim of a labor violation by a California employer, he or she may file a complaint with DLSE. DLSE’s Bureau of Field Enforcement (BOFE) reviews the complaint and decides whether to begin an investigation of the employer. If an inspection is undertaken by BOFE, a BOFE deputy may interview the employer about the suspected violation and review the employer’s records that are pertinent to the case as well as interview workers about wages and working conditions. If BOFE finds that a legal violation has occurred, it can penalize the guilty employer by issuing a citation that requires the employer to pay back wages or civil penalties or to remedy other violations.⁶

If a worker has filed a complaint with DLSE and the worker’s employer retaliates—for example, by withholding wages or threatening to file a report with federal immigration authorities—in response to the worker engaging in a protected activity (which includes cooperating with a DLSE investigation regarding a labor violation), then the worker may file a claim to DLSE alleging retaliation in violation of the law.⁷ The claim is then investigated by the Retaliation Complaint Investigation Unit (RCI).⁸ An RCI investigator will contact the employer and witnesses, if necessary, and may facilitate a discussion between the employer and employee to discuss a possible settlement; in the course of this, the investigator has the authority to issue subpoenas to obtain relevant evidence. If no settlement is reached between the employer and employee, the case is submitted to the labor commissioner, who reviews the case and makes a determination as to whether the employer violated the law and what is the appropriate remedy. The employer may appeal, but if the employer ultimately fails to comply with the terms of the labor commissioner’s determination, the labor commissioner may then file a court action to enforce the remedy (DLSE 2013).

As part of this process, if the RCI investigator determines that an employer retaliated against an employee with an unlawful immigration-status-related threat, the investigator may, as part of the settlement negotiations, point to the provisions of the Labor Code put in place by AB 263, SB 666, and/or AB 524 that were violated and specify what are the appropriate remedies and fines are for the violation or violations. If no settlement is reached and the case rises to the level of the labor commissioner, the labor commissioner may issue a determination to fine the employer and/or suspend or terminate their business license as allowed by law if the facts of the case warrant such fines or suspensions.

According to California Labor Commissioner Julie Su, the most common labor violation that precedes employer retaliation via threats related to immigration status is wage theft, which occurs after an employee asks to be paid wages owed to him or her, or after filing a complaint with DLSE.⁹ The ability of DLSE to threaten lawbreaking employers with a \$10,000 fine for each violation gives DLSE a significant amount of leverage in settlement negotiations and helps level the playing field in terms of power between employers and immigrant workers. The fact that the \$10,000 fine goes to the employee (as specified by AB 2751) means workers have a much better chance of recouping lost wages, because suing for lost wages and recovering them in a private civil action is much costlier, may take years, and may ultimately be unsuccessful even when a worker wins the case (for example, if an employer is unable to pay).

Workers in California who are victims of unlawful retaliation based on threats related to immigration status may also file a private lawsuit against their employer, even if they have not exhausted all of their possible administrative remedies through DLSE (unless they are seeking to enforce a claim that specifically requires exhaustion by law). While a private civil lawsuit is expensive and may take years, the attorneys who represent workers who have been the victims of retaliation may first send letters to employers notifying them of their obligations under AB 263 and SB 666, for example, and the possible fines and penalties they may be liable for if they lose in court or if the labor commissioner determines they have violated the laws. According to one attorney who spoke with the author and is familiar with California's anti-retaliation laws, such letters have acted as a valuable deterrent to further unlawful conduct by the employer and have sometimes succeeded in obtaining remedies for workers.

Additional laws passed in 2015–2017

California laws passed in 2015, 2016, and 2017 create additional barriers for employers who are attempting to retaliate against workers through means related to their immigration status.

SB 1001 and AB 622

California's SB 1001 and AB 622 further proscribe what is appropriate employer use of the employment authorization process. Employers using the system outside of these proscribed uses can be penalized without the need to prove that retaliation was the motive.

SB 1001 was signed into law in 2016 and went into effect on January 1, 2017.¹⁰ SB 1001 makes it unlawful for employers to (1) request from the employee more or different documents than are required under Section 1324a(b) of Title 8 of the United States Code; (2) refuse to honor documents tendered that on their face reasonably appear to be genuine; (3) refuse to honor documents or work authorization based upon the specific status or term of status that accompanies the authorization to work; or (4) attempt to reinvestigate or reverify an incumbent employee's authorization to work using an unfair immigration-related practice. Employees or job applicants can complain to DLSE if SB 1001 has been violated or sue the employer. Any person who violates SB 1001 is subject to penalties of up to \$10,000 that can be imposed by DLSE and are liable for equitable relief.

AB 622 was signed into law in 2015 and went into effect on January 1, 2016.¹¹ AB 622 relates to E-Verify, and expands the definition of an unlawful employment practice in the California Labor Code to prohibit an employer or any other person or entity from using E-Verify at a time or in a manner not required by federal law, or in a manner that is not required by a memorandum of understanding between an employer and the federal government, to check whether an incumbent employee or a new job applicant is authorized to be lawfully employed. Under AB 622, employers can check only the status of job applicants to whom they've offered a job but who have not yet begun working, and employers must notify job applicants promptly if E-Verify does not confirm that they are authorized to be employed. The penalty for each violation of AB 622 is \$10,000.

SB 1001 and AB 622 prohibit employers from forcing employees whom they suspect to be unauthorized immigrants from establishing whether they are authorized to be employed lawfully in the United States in retaliation for those workers asserting their labor and employment rights or engaging in any other protected activity (for example, if a worker requests an employer pay her any owed but unpaid wages, or files a complaint for unpaid wages with DLSE). Together, SB 1001 and AB 622 can deter employers from using the employment authorization process to retaliate against unauthorized immigrant workers who try to exercise their rights. The laws also provide aggrieved workers with a monetary remedy.

AB 450

AB 450, also known as the Immigrant Worker Protection Act, was signed into law in 2017 and went into effect on January 1, 2018.¹² AB 450 mandates new guidelines and requirements for all public and private employers in California when dealing with an audit of I-9 Employment Eligibility Verification forms¹³ or investigation of other employee records. AB 450 prohibits employers from permitting federal immigration enforcement agents to enter any "nonpublic areas of a place of labor"¹⁴ without a judicial warrant, and it prohibits employers from providing employment records to immigration enforcement agents without a judicial warrant or subpoena, unless a Notice of Inspection (NOI) has been provided to the employer by ICE.

AB 450 also requires that employers notify their employees and any applicable union of an upcoming immigration audit by ICE within 72 hours of receiving an NOI from ICE, and employers must also provide a copy of the NOI to any affected employee. Employers must

also provide each affected employee with written notice of the obligations of the employer and the affected employee arising from the results of the inspection of I-9 forms or other employment records. Employers who fail to comply with the requirements of AB 450 can be fined \$2,000 to \$5,000 for the first violation, and \$5,000 to \$10,000 for each additional violation.

AB 450 also includes a provision that prohibits employers from requiring their existing employees to reverify their work authorization at a time or manner not required by federal immigration law. Federal law at Section 1324a of Title 8 of the United States Code requires employers to verify employment authorization at time of hire, and Department of Homeland Security (DHS) regulations outline the specific circumstances in which employers are required to reverify,¹⁵ such as when an employment authorization document or temporary work visa has expired, or when an employer has “constructive knowledge” that an employee is not authorized to work.¹⁶ Federal law and regulations also describe specific instances in which an employer is *not* deemed to have “hired” someone, and therefore the employer is not required to reverify whether the employee is authorized to work.¹⁷ DLSE may fine employers who violate this provision up to \$10,000 for each time they reverify the employment eligibility of an incumbent employee at a time or in a manner not required by federal law.

Both DLSE and the California attorney general have authority to enforce the provisions of AB 450, and California Attorney General Xavier Becerra has stated publicly his intention to prosecute employers who do not comply with AB 450 (Hart 2018).

Thomas Homan, the Trump administration’s acting director of ICE, has recently stated his intention to increase the number of I-9 audits conducted by ICE by 400 percent (Kavilanz 2018), saying that the state of California will “see a lot more special agents, a lot more deportation officers” (Fox News 2018) and that ICE will “have no choice but to conduct at-large arrests in local neighborhoods and at worksites” (ICE 2017) in retaliation for California passing sanctuary city laws. Acting Director Homan’s comments, which reflect his intentions to focus enforcement efforts in California, combined with the fact that numerous I-9 audits have already been conducted in California by ICE in 2018 (Emslie, Small, and Muñoz 2018), makes it likely that AB 450 will be an important and useful tool to help protect labor standards for unauthorized immigrant workers and provide them with more due process protections than they currently have when their worksite is facing an ICE audit. AB 450 can do this by protecting the rights of unauthorized immigrant workers at their place of employment, especially in the case of an I-9 audit that ICE may attempt to conduct without an adequate level of reasonable suspicion that would justify the issuance of a warrant (for example, if ICE agents attempt to conduct an audit that is based on an anonymous tip, racial profiling, or any other reason not substantiated by enough evidence to justify a warrant).

In addition, as described by California Labor Commissioner Julie Su (Khouri 2018), employers sometimes go to extremes to carry out retaliation by calling ICE on themselves and requesting an I-9 audit in order to retaliate against their own workers; AB 450’s penalties may also help protect unauthorized immigrant workers by making it less likely that an employer will call ICE to request an audit as a form of retaliation against workers

the employer suspects are unauthorized. AB 450 can be beneficial for employers, too, because it provides them with clear procedures to follow in the course of a visit from ICE agents.

Access to justice and due process for unauthorized immigrant workers and the potential of the California Values Act (SB 54)

Unauthorized immigrant workers who seek to enforce their rights under California or federal labor and employment laws may either file a complaint with the federal U.S. Department of Labor or, as discussed above, file a complaint with the California labor commissioner at DLSE. Alternatively, they may file a private lawsuit. In California, the ability of unauthorized immigrant workers to access DLSE offices and courthouses is therefore of crucial importance to being able to recover stolen wages or seek redress for other legal violations and ultimately hold lawbreaking employers accountable. If unauthorized immigrant workers are too afraid to access DLSE offices or federal, state, and local courthouses, then they will not be able to access the legal system that is in place to protect the labor standards of all workers, and they will be deprived of due process.

ICE activity at courthouses

In 2017, a number of cases were reported in the media describing immigration enforcement actions taken by ICE at courthouses in the United States, including in California, where ICE was seeking unauthorized immigrants who were involved in legal proceedings in order to detain them.¹⁸ Some of the immigrants ICE has pursued in courtrooms had no criminal record and were accessing family court (Allyn 2017; Coll 2017) or seeking a restraining order against a spouse (Queally 2017), for example. The Immigrant Defense Project estimated that in New York there were 110 ICE courthouse arrests in 2017, compared with 11 arrests in 2016—a 900 percent increase (Immigrant Defense Project 2017). An increase in ICE courthouse arrests led California’s chief justice to publish an open letter to U.S. Attorney General Jeff Sessions and then-Secretary of DHS John Kelly in March 2017, urging them to refrain from pursuing and arresting immigrants in California courts (Queally 2017; Medina 2017; Cantil-Sakauye 2017).

ICE responded to the public outcry for its visits to courthouses in January 2018 by issuing new formal guidance detailing the circumstances under which agents may enter courthouses to pursue and arrest unauthorized immigrants (Rosenberg 2018). It was an addition to ICE’s “sensitive locations” policy, which did not originally include courthouses (Quesenberry 2017). The new guidance on ICE operations in courthouses allows ICE to continue targeting unauthorized immigrants in courthouses but narrows the scope of its operations. The policy states ICE should make arrests “discreetly to minimize their impact on court proceedings” and “generally avoid” making arrests in noncriminal courts. It also states that ICE enforcement actions will focus on “targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have reentered

the country illegally after being removed” and that family members or friends of the targeted alien will not be arrested “absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE’s enforcement actions” (ICE 2018). The implications of the new ICE policy are ultimately unclear: it is better than the status quo—if ICE complies with its terms—but the policy puts no real binding restrictions on ICE agents in courthouses, nor does it create a private right of action for individuals to sue ICE if agents fail to comply with it (Hallman 2018; Martelle 2018).

ICE activity at DLSE offices

ICE agents have also shown up twice at DLSE labor dispute proceedings in California, seeking to arrest unauthorized immigrant workers who brought claims against their employers. The agents “arrived [at DLSE] within a half hour of when the meetings with employers were supposed to begin,” according to Labor Commissioner Julie Su (Kitroeff 2017). The *Los Angeles Times* reporter who broke this story pointed out that “the timing of wage hearings isn’t public, and generally the worker and employer are the only ones who know that information outside of the agency.” This suggests the employers may have notified ICE about their workers’ unauthorized status and called ICE to inform them where the workers would be at the time of the meeting in the labor commissioner’s office. Commissioner Su elaborated further, noting that “we should not enable unscrupulous employers who use immigration status as a vulnerability to retaliate unlawfully against a worker who is seeking our protection”—which is what results if ICE agents are able to operate freely in DLSE offices where workers are seeking redress for wage theft and other workplace violations. These incidents led to a memo being sent to state officials “instructing staff members to refuse entry to ICE agents who visit its offices to apprehend immigrants who are in the country without authorization” (Kitroeff 2017). Commissioner Su told the *Los Angeles Times* in January 2018 that ICE agents have not returned since the two incidents that were reported in the *Los Angeles Times* in August of 2017 (Khoury 2018). However, there is no agreement between ICE and the California state government, nor is there any ICE policy statement or regulation, that would prevent ICE agents from attempting to enter state offices to pursue and arrest unauthorized immigrants.

How SB 54’s “model policies” may improve access to justice for immigrant workers

ICE arrests or attempted arrests at government offices and courthouses undermine a key element of American democracy and the ability of the government and the U.S. judicial system to protect residents from abuses by corporations, employers, or other private individuals. If immigrants do not feel safe and are too afraid to attend mediated discussions with employers in government offices or to visit courtrooms in order to seek protection or testify against someone who has harmed them or stolen their wages, the only beneficiaries will be criminals and lawbreaking employers. The impact of this is not theoretical. For example, in Denver, prosecutors were forced to drop four domestic violence cases because the victims were too afraid to testify in court for fear of deportation (Stern 2017). And a nationwide survey from the Tahirih Justice Center found that three out of four advocates “report[ed] that immigrant survivors have concerns about

going to court for a matter related to the abuser/offender” (Tahirih 2017). Workers who have been the victims of wage theft and other workplace violations or retaliation may similarly fear visiting government offices or courthouses in person to hold their employers accountable.

A number of state laws that are often referred to as “sanctuary” laws have been passed and enacted in California to help protect the rights of immigrants and unauthorized immigrants, including SB 54, the Values Act; AB 4, the TRUST Act; and AB 2792, the TRUTH Act.¹⁹ Since many of the provisions in sanctuary laws are not focused on issues related to labor violations that affect immigrant workers (rather, they primarily outline the conduct required of state and local law enforcement vis-à-vis federal immigration enforcement authorities), these provisions are not discussed in depth in this report. One provision in SB 54, however—which was signed into law in 2017 and went into effect on January 1, 2018—may have a significant impact on the ability of unauthorized immigrant workers to be able to access the court system and labor agencies in order to seek redress for workplace violations, such as wage theft, that they have suffered at the hands of employers.

SB 54 adds a new provision, numbered 7284.8, to Chapter 17.25 of Division 7 of Title 1 of California’s Government Code, which reads:

The Attorney General, by October 1, 2018, in consultation with the appropriate stakeholders, shall publish model policies limiting assistance with immigration enforcement to the fullest extent possible consistent with federal and state law at public schools, public libraries, health facilities operated by the state or a political subdivision of the state, courthouses, Division of Labor Standards Enforcement facilities, the Agricultural Labor Relations Board, the Division of Workers Compensation, and shelters, and ensuring that they remain safe and accessible to all California residents, regardless of immigration status. All public schools, health facilities operated by the state or a political subdivision of the state, and courthouses shall implement the model policy, or an equivalent policy. The Agricultural Labor Relations Board, the Division of Workers’ Compensation, the Division of Labor Standards Enforcement, shelters, libraries, and all other organizations and entities that provide services related to physical or mental health and wellness, education, or access to justice, including the University of California, are encouraged to adopt the model policy.

The state attorney general’s new model policies “limiting assistance with immigration enforcement to the fullest extent possible,” which will be published by the fall of 2018 and must be implemented by courthouses, have the potential—if adhered to—to provide unauthorized immigrant workers with greater certainty that ICE agents will not be present in courtrooms and create a safer environment for workers to access the legal system and obtain due process. The same goes for DLSE offices if DLSE adopts the model policies, which it will have the option to do.

It is unclear so far what substantive provisions the state attorney general’s model policies will contain, but one piece of proposed legislation from State Senator Ricardo Lara may

provide a hint (Ulloa 2018). Senator Lara’s legislation, SB 183 (which passed the California State Senate in January 2018), would prohibit officials at California schools, courthouses, and other state buildings from allowing federal immigration authorities to enter the premises “to perform surveillance, effectuate an arrest, or question an individual therein, without a valid federal warrant.” In addition, the activities of officials who possess a federal warrant and enter one of the listed locations in the bill “shall be limited to the individual who is subject of the warrant.”²⁰ It is also unclear whether the attorney general’s guidelines could go as far as SB 183 by strictly prohibiting access to courthouses without a warrant, but they are nevertheless likely to be a massive improvement on the status quo.

Conclusion: Other states should follow California’s lead

The Trump administration ushered in a new immigration enforcement regime in 2017 that has broken with the latter years of the Obama administration. The Obama administration had adhered to a prioritization scheme it had developed for the removal of unauthorized immigrants, focusing on those with criminal records and recent arrivals (DHS 2014). The Trump administration’s cancellation of the Obama DHS’s removal priorities (reflected in Trump’s January 2017 Executive Order on interior enforcement [White House 2017]), along with the stated priorities of Acting ICE Director Tom Homan, represent a shift toward an increased focus on federal immigration enforcement in the interior of the United States.

As ICE ramps up its enforcement under Trump’s and Homan’s leadership, we are likely to see many more worksite raids and audits, as well as more removals of unauthorized immigrants, regardless of the extent of their ties to the United States and regardless of whether they have a clean criminal record.²¹ At the same time, complaints by immigrant workers who say “their bosses are threatening to have them deported” are on the rise (Khoury 2018). It’s possible that the Trump administration’s statements and actions and a simultaneous increase in worker complaints about deportation threats are not a coincidence, since employers who have unauthorized immigrant employees may be emboldened to use an increase in immigration enforcement as a tool to keep wages low and workers in fear of reporting legal violations to labor standards enforcement agencies (Mansfield 2017).

Numerous members of the Trump administration, including President Trump himself and U.S. Attorney General Jeff Sessions, have expressed their displeasure with California’s immigration policies and sanctuary laws (Fuller and Yee 2018; Koseff 2018). On March 6, 2018, the U.S. Department of Justice (DOJ) filed a complaint against California Governor Jerry Brown and Attorney General Xavier Becerra in federal district court, seeking to overturn three California laws related to immigration on constitutional grounds (Benner and Medina 2018), including two of the laws discussed in this report, AB 450 and SB 54, claiming that they interfere with federal immigration enforcement efforts and conflict with federal law. The dispute between the federal and California governments is likely to take months, if not years, to resolve, and it is far too early to make predictions about the outcome.

California's laws intended to protect unauthorized workers from retaliation and other abuses based on immigration status are relatively new innovations; together, they constitute a groundbreaking experiment that has the capability to reduce some of the inherent vulnerabilities workers face when they are employed without work authorization. California's efforts in this area are especially valuable in an era of increased immigration enforcement at the federal level.

While it is too early to judge the success of California's laws that protect immigrant workers—or to guess how the DOJ's lawsuit against California will be resolved—these laws are a promising beginning for addressing immigration-related labor standards issues and reveal a willingness on the part of the California legislature and the Brown administration to think outside the box in order to grapple with a new, ramped-up version of immigration enforcement during the Trump era. Other states should follow California's lead and innovate with new laws that protect workers from retaliation, wage theft, and other workplace abuses that are facilitated by virtue of their immigration status—and then enforce those laws vigorously.

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Endnotes

1. State labor laws and the federal Fair Labor Standards Act do not distinguish between workers by immigration status.
2. The share of unauthorized immigrants in California's labor force has declined to 9.0 percent in 2014 from 9.7 percent in 2010 (Passel and Cohn 2011).

3. See, for example, Greenhouse and Yaccino 2012.
4. The text of these bills is available at leginfo.legislature.ca.gov: [AB-263 Employment: retaliation: immigration-related practices \(2013–2014\)](#); [SB-666 Employment: retaliation \(2013–2014\)](#); [AB-524 Immigrants: extortion \(2013–2014\)](#); [AB-2751 Retaliation \(2013–2014\)](#).
5. For more on E-Verify, see the “E-Verify” webpage on the U.S. Citizenship and Immigration Services website at www.uscis.gov/e-verify.
6. For more background on reporting a labor violation in California, see DLSE 2014.
7. For more background on filing a retaliation complaint in California, see DLSE 2013.
8. For more background and information about retaliation complaints and investigations, see the “Retaliation Complaint Investigation Unit (RCI)” webpage on the California Labor Commissioner’s Office website at www.dir.ca.gov/dlse/dlseRetaliation.html.
9. Conversation between the author and California Labor Commissioner Julie Su.
10. [SB-1001 Employment: unfair practices \(2015–2016\)](#) (text available at leginfo.legislature.ca.gov).
11. [AB-622 Employment: E-Verify system: unlawful business practices \(2015–2016\)](#) (text available at leginfo.legislature.ca.gov).
12. [AB-450 Employment regulation: immigration worksite enforcement actions \(2017–2018\)](#) (text available at leginfo.legislature.ca.gov).
13. For more background on I-9 forms, see the “I-9, Employment Eligibility Verification” webpage on the U.S. Citizenship and Immigration Services website at www.uscis.gov/i-9.
14. For more background on AB 450 and the definition of “nonpublic areas of a place of labor,” see California Labor Commissioner and California Attorney General 2017.
15. See 8 C.F.R. § 274a.2. Verification of identity and employment authorization.
16. “Constructive knowledge” means the employer has positive information such as a notice from DHS that an employee is not authorized to work. For a further discussion of constructive knowledge in the employment context, see *Aramark Facility Svs. v. SEIU Local 1877*, No. 06-56662 (9th Cir. June 16, 2008).
17. For example, when an employee is reinstated after being suspended or disciplined, he or she is continuing employment and is not considered a new hire. For a further discussion about employment verification and determining whether an employee is continuing employment or is a new hire, see *Santillan v. USA Waste of California, Inc.*, No. 15-55238 (9th Cir. April 7, 2017) (discussing 8 C.F.R. § 274a.2).
18. See, for example, García Hernández 2017, Queally 2017, Meltzer 2017, Hurowitz and de la Hoz 2017, *World* staff 2017, and Coll 2017.
19. The text of these bills is available at leginfo.legislature.ca.gov: [SB-54 Law enforcement: sharing data \(2017–2018\)](#); [AB-4 State government: federal immigration policy enforcement \(2013–2014\)](#); [AB-2792 Local law enforcement agencies: federal immigration policy enforcement: ICE access \(2015–2016\)](#). For additional background, see the ICE Out of California website at www.iceoutofca.org.
20. [SB-183 State buildings: federal immigration agents \(2017–2018\)](#) (text available at

leginfo.legislature.ca.gov).

21. The most recent data on I-9 audits shows that the number of audits increased only slightly in fiscal 2017 compared with fiscal 2016, from 1,279 to 1,360 (Francis 2018). However, fiscal 2017 included the final four months of the Obama administration, and it generally takes time for a new administration to establish new policies and implement them. As a result, it is likely that these numbers will begin to increase considerably in 2018 and throughout the remaining years of the Trump administration.

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