

**Interested Party Testimony of Emily Brown, Attorney, Agricultural Worker and Immigrant Rights Program, Advocates for Basic Legal Equality, Inc. (ABLE), to the Ohio Senate Insurance and Financial Institutions Committee**

June 13, 2017

Mr. Chairman and members of the Senate Insurance and Financial Institutions Committee, my name is Emily Brown. Thank you for the opportunity to testify today. I am an attorney with Advocates for Basic Legal Equality, or ABLE, a non-profit law firm that represents low-income individuals in civil cases, including agricultural workers statewide and other immigrants in thirty-two counties in western Ohio. ABLE's Agricultural Worker and Immigrant Rights Program focuses on employment, civil rights, and immigration cases.

I speak today in opposition to the provision of HB 27 that excludes undocumented workers from workers' compensation coverage because I believe it is bad policy and will hurt Ohio workers, Ohio businesses, and Ohio taxpayers.

**1. Harm to Workers, Employers, and Their Ohio Communities**

Workers' compensation is an administrative procedure that limits injured workers to recovery through the workers compensation system rather than through a tort system that requires protracted litigation about fault for injuries. Workers' compensation ensures that workers are treated for work injuries and receive compensation for any continuing effects of those injuries. In return, employers are generally exempt from negligence actions and are not required to go through litigation in state courts regarding their responsibility for worker injuries. Workers' compensation doesn't look at the fault of the parties. It helps secure workplace safety. It is remedial and humanitarian. Its benefits are not a penalty imposed on the employer. Passage of HB 27 would thrust the Bureau of Workers Compensation into the role of immigration enforcement, determining employers' compliance with federal immigration restrictions on employment, and whether such compliance was in good faith.

HB 27 permits an undocumented immigrant who is injured on the job to sue his employer if (1) the employer knew that the worker was an undocumented immigrant; or (2) the injury was the result of an intentional tort. If enacted, this bill will likely result in protracted litigation as

undocumented immigrants sue employers in court and attempt to show that the employer knew the worker was undocumented. Clogging the courts with workers compensation cases was exactly the result that the workers compensation system—a system designed as a compromise between business and labor—is intended to avoid.

Workers' compensation premiums paid by employers are based on the number of employees, the industry, and that employer's history. This means that employers are already paying for the coverage of all their workers whom in good faith they hired. To then tell the employer that although they paid premiums for an undocumented worker(s) the worker is not covered and the employer is on their own to defend litigation is poor policy.

All fifty states have some form of workers' compensation law, reducing the flood of litigation by giving employers fixed, knowable, and limited liability for an employee's injury. Fixed, knowable, and limited liability helps businesses grow. It allows businesses to responsibly plan for the future. Passage of this bill thus harms injured workers and employers, and it harms Ohio hospitals and taxpayers who will be forced to foot the bill for emergency medical care for injured workers who are excluded from workers' compensation.

## **2. Harm to Ohio Businesses**

There are a number of Ohio businesses with a fairly large number or percentage of immigrant workers that have no valid immigration status in the U.S., including many industries with high rates of injuries such as agriculture and food processing. These jobs include many low-wage seasonal jobs that do not provide year-round work and will therefore not support year-round residence. Agriculture is one of the best example of this phenomenon – and it is the largest industry in the state. Ohio's 75,000 farms contribute \$105 billion to Ohio's economy annually. The U.S. Department of Labor's last National Agricultural Worker Study found that more than 80% of migrant farmworkers in the U.S. are immigrants and more than 50% of migrant farmworkers lack valid immigration status. Agricultural employers in Ohio who depend on hand-harvest labor hire migrant farmworkers for different crop seasons. Some of those seasons are relatively short – for instance, six to seven weeks in northwest Ohio for the cucumber season and eight weeks for fresh market tomatoes. Some areas of the state, like Huron County and the Hartville area of Stark County, have slightly longer seasons, but still depend on

migrant farmworkers, not year-round workers, to fill their employee needs. Additionally, wages in agriculture are low and workers do not receive overtime pay.

While some say that local workers would take these jobs if employers simply paid higher wages, this is unlikely to be the case. Unfortunately, the truth is that migrant farmworkers have to string together a series of jobs to work all or most of the year – citrus in Florida, onions in Georgia, pickles and fresh market tomatoes in Ohio, apples in Michigan, and so on. Local residents could never make enough in short seasonal work in Ohio to support themselves year-round in one Ohio location, which is why it is almost exclusively migrants who seek out these jobs. Growers thus depend on a workforce that will move to jobs and then move on when the work is over. Only in states like California, with its temperate climate, can workers commute from their homes and work year-round or almost year around in agriculture.

Agricultural employers also prefer to hire employees from an agrarian or agricultural background. There is not a sufficient workforce in the U.S., and certainly not in Ohio, with this background that will move into the migrant farmworker stream to fill all the jobs at current minimum wage rates. Moreover, the current domestic agricultural worker population is aging and lower rates of undocumented migration to the United States from Mexico means fewer new immigrants are stepping in to take these jobs.

In recognition of the problems faced in recruiting and retaining an agricultural workforce, many growers, including the American Farm Bureau Federation, have called for comprehensive immigration reform that would include a path to legalization for unauthorized, experienced agricultural workers. There is pending legislation in the U.S. House of Representatives and the Senate, the Agricultural Worker Program Act of 2017, that would do just that.

Ohio is already experiencing recruiting difficulties given the distances from traditional sources of agricultural labor and the increase in enforcement activity against undocumented immigrants. Latino workers, who constitute most of Ohio's migrant farmworker work force, are already reluctant to come to Ohio due to perceived discrimination and profiling against Latinos – both documented and undocumented – by law enforcement agencies like the U.S. Border Patrol in northern Ohio. This bill, if passed, would only exacerbate the problem as more workers would stay away and crops could end up going unpicked. Ohio would be an outlier, as virtually

no other states ban undocumented workers from their workers compensation program, and HB 27 goes even further by limiting workers' access to the courts to sue employers in the case of workplace injuries. Immigrant workers will be discouraged from coming to Ohio to work and may seek out work in other Midwestern states instead.

### **3. Unintended Consequences of Passage of HB 27**

The passage of HB 27 would actually encourage unscrupulous employers to hire undocumented workers. Although most employers want to play by the rules, some employers will undoubtedly be incentivized to hire more undocumented workers if this bill is enacted, knowing that by "looking the other way" when it comes time to determine which job applicants are legally authorized to work in the United States, they can increase the number of undocumented workers in their workforce, pay lower workers' compensation rates, and skimp on safety precautions so they can make more money. An employer who knows that many or most of his workers will not be eligible for workers compensation has less incentive to ensure that the workplace is safe. This undercuts workplace safety for *all* workers, including U.S. citizens and lawful immigrant workers. Taxpayers will also be hurt by this bill, because emergency medical care and other public services that injured undocumented workers would receive will raise health care costs for everyone.

### **4. Confusing Drafting Will Make It Difficult to Determine Who Is Excluded from Coverage**

The terms "illegal alien" and "unauthorized alien" in HB 27 are poorly defined and inconsistent with federal immigration law. They will lead to confusion about who exactly is excluded from workers' compensation coverage. It makes little sense to open this can of worms, given that the sponsors of this bill have pointed to no evidence of abuse of the workers' compensation system by undocumented workers. Indeed, no one even knows how many undocumented workers in Ohio have been recipients of workers' compensation.

Federal immigration law is exceedingly complex, and the definition of "illegal alien" in this bill does not account for the many immigrant workers who may have entered the country without legal status or overstayed their visas but are currently authorized to work by United States Citizenship and Immigration Services. These workers may be considered "deportable" under the definition of "illegal alien" in HB 27, but they have been granted deferred action and a

valid work permit by USCIS. Examples of these kinds of workers include recipients of Deferred Action for Childhood Arrivals, known as DACA, applicants for U visas which are granted to crime victims who have assisted law enforcement in the investigation or prosecution of crimes, or applicants for other forms of immigration relief such as adjustment of status, cancellation of removal, or asylum. Why should such legally authorized workers be excluded from workers compensation?

I urge the committee to remove the ban on coverage of undocumented workers from this bill, because it harms workers, businesses, and taxpayers in our state.

Respectfully submitted,

*/Emily Brown/*

Emily Brown  
Advocates for Basic Legal Equality, Inc.  
1288 Highland St.  
Columbus OH 43201  
631.897.9699  
ebrown@ablelaw.org