

# 10 Biggest Myths About Immigrants and the Law in S.C.

By The Immigration Subcommittee, Access to Justice Committee

## MYTH 1

Undocumented workers are not protected by South Carolina or United States laws.

### Truth

Undocumented workers *are* protected, without regard to immigration status, by laws affecting wages, working conditions, on-the-job injuries and discrimination.

- The South Carolina Payment of Wages Act guarantees triple damages and attorneys' fees for unpaid wages. S.C. Code Ann. § 41-10-10
- The Federal Minimum Wage law (FLSA) guarantees workers \$5.15 per hour and overtime (if covered and not otherwise exempt). 29 U.S.C. § 201 et seq.
- The South Carolina Workers' Compensation Act covers on-the-job injuries. S.C. Code Ann. § 42-1-10
- Agricultural workers are covered by the Migrant and Seasonal Agricultural Worker Protection Act. This guarantees written disclosures at recruitment, minimal housing conditions, written pay statements and more. 29 U.S.C. §1801 et seq.
- Undocumented workers are covered by the National Labor Relations Act (NLRA). Undocumented workers therefore are able to participate in organizing, joining or voting for a union. However, they are limited from obtaining back pay under the NLRA. 29 U.S.C. §152(3); and *Sure-Tan Inc., et al. v. NLRB*, 672 F.2d 592 (1982), *rev'd on other grounds* 467 U.S. 883 (1984) (reversed the judgment of the Court of Appeals insofar as it imposed a minimum backpay award and mandated certain specifics of the reinstatement offers).
- Workers are protected against job discrimination and sexual harassment without regard to their immigration status. Title 7, Civil Rights Act of 1964.

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## MYTH II

**Immigrants are prohibited from receiving any type of public benefits.**

### Truth

**Immigrants can receive different types of assistance for themselves and/or for their U.S. citizen children.**

- Immigrants may be able to receive food stamps, Temporary Assistance For Needy Families (TANF), Medicaid and Supplemental Security Income (SSI). The immigrant would have to meet income guidelines and qualify based on legal immigration status. **Note, though, that an undocumented immigrant can apply for the above services for a U.S. citizen child.** The U.S. citizen child or children are eligible for the benefit as long as the parent meets income and other guidelines. 42 C.F.R. Part 435.406 and Personal Responsibility and Work Opportunity Act of 1996 (PRWORA)—Public Law No. 104 §400 et seq.
- All immigrants can receive emergency Medicaid if they meet certain rules. Emergency Medicaid covers conditions that put one's health or life in serious danger. 42 C.F.R. Part 435.406 and Personal Responsibility and Work Opportunity Act of 1996 (PRWORA)—Public Law No. 104 §400 et seq.
- All immigrants can get help from shelters and mental illness or drug and alcohol services. 8 U.S.C. §1611
- All immigrants can go to the emergency room for treatment. 42 U.S.C. §1395 dd
- All immigrants can receive the following (as long as other guidelines are met where required):
  1. Public health programs that give immunizations or provide testing and treatment for communicable disease symptoms. They can also receive services from community

health clinics. PRWORA § 401 or 8 U.S.C. §1611

2. Women Infants Children (WIC) food benefits. 42 U.S.C. §1786. WIC provides pregnant women and children up to age five with supplemental foods. *Id.*
3. School breakfast and lunch programs. PRWORA §403, 742 or 8 U.S.C. §1613,1615
4. Head Start. *Id.*
5. Homeless shelters and soup kitchens. PRWORA § 401 or 8 U.S.C. §1611
6. Emergency shelter/food/clothing. *Id.*
7. Soup kitchens and Meals on Wheels. *Id.*
8. Child and Adult Protective Services from DSS. PRWORA § 403, 742 or 8 U.S.C. §1613,1615
9. Police, fire, ambulance, public transportation (like buses) and sanitation services. PRWORA § 401 or 8 U.S.C. §1611
10. Other services necessary to protect life or safety that are not conditioned on the individual's income or resources. *Id.*

**But, if immigrants receive benefits, won't that make them a "public charge" (i.e. someone who**

**depends on the government for income)?** If the government decides that someone is a public charge, they may be stopped from getting a green card or entering the United States. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) Pub L. No. 104-208, 110 Stat. 3009 (1996).

- An immigrant could be a public charge if he or she receives TANF or SSI. IIRIRA
- An immigrant could be a public charge if he or she receives Medicaid to pay for a nursing home or long-term care facility. IIRIRA or 64 Fed. Reg. 28689
- An immigrant **will not** be a public charge if he or she gets help from the following: (IIRIRA or Fed. Reg. 28689, 28693)
  1. Medicaid for regular health care;
  2. food stamps;
  3. housing assistance;
  4. school breakfast and lunch;
  5. job training;
  6. childcare;
  7. homeless shelters;
  8. transitional housing;
  9. soup kitchens; or
  10. health clinics.

The government may decide an immigrant is a public charge if he or she is very old and has many health problems or if he or she has a big family to support. If the immigrant is young, healthy and has job skills or education, the government will probably decide that he or she is not a public charge. The immigration authorities will make a determination on the question of whether the immigrant is ineligible for permanent residence as a public charge at the immigrant's interview for permanent residence. The determination is made by weighing a number of factors, including the amount of benefits, how recently they were received and if restitution has been made to the governmental authority for benefits received. IIRIRA or Fed. Reg. 28689, 28693 or 8 U.S.C. §1182



### MYTH III

**Schools do not help children who are LEP (Limited English Proficient).**

#### Truth

**Under an Equal Protection argument, the Supreme Court held that undocumented immigrants have a right to public education.** *Plyler v. Doe*, 457 U.S. 202 (1982)

Schools are required by law to do certain things for children who are LEP. For example:

- The schools must have programs that teach LEP children and give them the skills they need, including bilingual/bicultural education, English as a Second Language (ESL) or structured immersion. See *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786 (1974); *Castaneda v. Pickard*, 648 F.2d 989 (1981); *Plyler v. Doe*, 457 U.S. 202 (1982)
- If the parents do not speak, read or understand English, the school must work with them. The school must send all information to the parents in a language the parents understand. May 25, 1970, Memorandum from the Department of Health, Education and Welfare.
- Schools may not require students or their parents to produce documents that speak to their immigration status as a prerequisite to enrollment. This includes documents such as a passport, visa, green card or a Social Security number. *Plyler v. Doe*, 457 U.S. 202 (1982)

### MYTH IV

**Agencies that receive money from the federal government do not have to give immigrants materials in their native language.**

#### Truth

**Under Title VI of the Civil Rights Act, agencies that receive money from the federal government must provide immigrants translated materials.** See Executive Order 13166 (2000).

- Title VI gives LEP persons the right to an interpreter who has the special skills to be an interpreter.
- Title VI gives LEP persons the right to have all important forms translated into their native language.
- Some examples of agencies who must provide the service are:
  1. law enforcement authorities;
  2. hospitals;
  3. nursing homes;
  4. mental health centers;
  5. legal services;
  6. schools;
  7. domestic violence centers; and
  8. state agencies.
- If an agency does not provide the service, people can call the Office of Civil Rights (OCR) at 1-888-TITLE-06 (1-888-848-5306) to make a complaint.

### MYTH V

**Immigrants cannot file a complaint under the Fair Housing Act for housing discrimination.**

#### Truth

**Immigrants, documented or not, are protected under this act and can file a complaint.** See Fair Housing Act, 42 U.S.C. §3601 et seq (1968).

For example:

- The law prevents people from being treated differently or unfairly in the sale, rental or financing of housing.
- People cannot be treated differently or unfairly because of race, color, national origin, religion, sex, familial status or handicap.
- Some examples of discrimination under the law are:
  1. not renting to someone, selling to someone or negotiating with someone about housing because of their race, color, national origin or because there are children in the family;
  2. stating there is no housing

available when there is;

3. setting different terms for the sale or rental of housing;
4. any effort to stop someone from renting or buying a house in an area that is racially or ethnically different from them;
5. advertising housing for sale or rent and using biased words in the ad; and
6. setting different terms for the sale or rental of land for a mobile home.

### MYTH VI

**Undocumented immigrants who are battered will be deported or removed automatically if they call the police.**

#### Truth

**There are laws to help battered immigrants. The law provides for battered immigrants to stay here temporarily until they are approved to be lawful permanent resident(s).**

For example:

- The Violence Against Women Act (VAWA) can help immigrants who are or were spouses of U.S. citizens or lawful permanent residents. It can also protect the victim's kids, even if the kids are not related to the U.S. citizen or lawful permanent resident. Violence against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902-55, 8 U.S.C §§ 1151, 1154, 1186a, 1186a note, 1254 (1994).
- There are also U-Visas that help immigrants temporarily. To get a U-Visa, an immigrant must:
  1. have suffered substantial physical or mental abuse as a result of certain crimes listed in the statute and
  2. show that they possess information concerning the criminal activity and that they are being, have been or will be helpful to an official or authority investigating or prosecuting that activity.

(U.S. Department of Homeland Security—Citizenship and

Immigration Services Memorandum of October 8, 2003. Currently, the Department of Homeland Security has no official regulations for U-Visas. Those who receive U-Visas are receiving interim U-Visas until the regulations are finalized.)

- The T-Visa gives immigrants who have been the victim of a “severe form of trafficking in persons” temporary legal status. The immigrant must help the police or government in their request for assistance in the investigation or prosecution of acts of trafficking. Persons who have filed a bona fide application for a T-Visa and their derivative beneficiaries are eligible to receive federal benefits to the same extent as a refugee can receive them. Victims of Trafficking and Violence Prevention Act of 2000, 114 Stat. 1464, Pub. L. No. 106-386 Oct. 28, 2000

#### **MYTH VII**

**All people and agencies have a duty to report undocumented immigrants.**

#### **Truth**

**Only certain agencies must report undocumented immigrants and only under certain very narrow conditions.**

For example:

- Individuals have no duty to report people even if they know they are undocumented. It is the U.S. Immigration and Customs Enforcement Office’s job to investigate and find immigrants that are here illegally. However, if a person helps someone who is here illegally by harboring them or assisting them, and should have known they were here illegally, then he or she may face charges. Immigration and Nationality Act (INA) §274A(a)(1)(A)
- Hospital staff has no duty to report undocumented immigrants. The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) Section 1011

provides funding for hospitals to serve undocumented immigrants. This implicitly implies that hospitals have no duty to report undocumented immigrants.

- Schools cannot report children unless they have the parent’s permission or are given a subpoena. *Plyler v. Doe*, 457 U.S. 202 (1982)
- The police have no duty to report undocumented immigrants. However, state and local law enforcement authorities must respond to inquiries from the U.S. Immigration agencies of the Department of Homeland Security. (They are: U.S. Citizenship and Immigration Services, or CIS; Immigration and Custom Enforcement, or ICE; and Customs and Border Protection, or CBP). *Gonzalez v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983)
- Only certain federal and state agencies must report undocumented immigrants. The agencies must report those seeking food stamps, Supplemental Security Income (SSI) benefits, Temporary Assistance for Needy Families (TANF) benefits or public housing benefits. **However, they only have to report undocumented immigrants if the following is true:**
  1. the immigrant is seeking benefits for himself/herself, not his or her children or other family members;
  2. the immigrant gives the agency papers that state he is here illegally, such as a final order of removal; and
  3. the agency makes an official decision that the immigrant is here illegally. (PRWORA § 404)
- **These agencies must report undocumented immigrants in the above narrow circumstances.**
  1. Department of Social Services (DSS)
  2. Social Security Administration (SSA)
  3. Department of Health and Human Services (DHHS)
  4. Department of Housing and Urban Development (HUD)

Agency workers have no duty to report non-applicants. A non-applicant is a person who applies for public benefits for someone else. An example would be if an undocumented mother applies for TANF benefits for her U.S. citizen child. PRWORA § 404

#### **MYTH VIII**

**Undocumented immigrants have no due process rights, and persons who are Limited English Proficient (LEP) have no right to a court interpreter.**

#### **Truth**

**The right of a person within the physical jurisdiction of the United States to have access to courts of law is well supported by legal precedent. The Due Process and Equal Protection clauses of the 14th Amendment apply to legal and illegal immigrants.**

The S.C. Code of Laws provides for interpreters:

- For Civil Court—Section 15-27-155 applies (interpreter for party or witness unable to speak English):
  1. When a party or witness to a civil legal proceeding does not sufficiently speak the English language to testify, the court may appoint a qualified interpreter to interpret the proceedings and the testimony of the party or witness.
  2. There are rules about what qualifications the interpreter must have.
- For Criminal Court—Section 17-1-50 applies (interpreters in criminal proceedings):
  1. Interpreters are available for legal proceedings in which a non-English speaking person is a party or witness. The person must have a limited ability to speak or understand the English language.
  2. There are qualifications and guidelines required for the interpreters.



## MYTH IX

**Undocumented workers do not pay taxes.**

### Truth

**Many undocumented workers *do* pay taxes.**

- Many undocumented workers receive their wages through regular payroll checks from which FICA is withheld (thus federal taxes and state taxes are withheld). The Social Security Administration (SSA) reports that \$7 billion is paid to a "suspense file" when Social Security numbers don't match up. Testimony of James B. Lockhart, Deputy Commissioner for Social Security before House Ways and Means Committee, March 10, 2004
- Social security taxes are withheld from the wages of undocumented workers, but because they are undocumented, they are not entitled to receive retirement benefits when they retire. Thus, an undocumented worker could pay into this system for a lifetime without ever receiving a benefit. SSA requires an applicant for benefits to prove citizenship or permanent resident status. [www.ssa.gov](http://www.ssa.gov)
- The Internal Revenue Service (IRS) creates identification numbers for wage-earners who are not entitled to receive a Social Security number. The number is the Individual Taxpayer Identification Number (ITIN), and while it does not grant the holder a particular immigration status or the right to be employed, it does allow the taxpayer to comply with her obligations under federal and state tax laws. [www.irs.gov](http://www.irs.gov)
- Many undocumented workers file their federal and state taxes with the IRS and their state Department of Revenue every year. According to the IRS, in 2001, as many as 530,000 Forms 1040 were filed by taxpayers using the ITIN only issued to taxpayers who do not qualify for a Social Security card. Testimony of Pamela J. Gerdiner, Acting Inspector General for Tax Administration before the House Committee on

Ways and Means (March 10, 2004)

- Undocumented workers also contribute to the economy through sales, property and other taxes that all individuals pay on a daily basis. Seven billion dollars in adjusted gross income has been reported by wage earners who have filed a Form 1040 using an ITIN. *Id.*

## MYTH X

**If you marry a U.S. citizen or permanent resident or have a child born in the United States, you can easily get legal status.**

### Truth

**It is very difficult to get legal status, even with close family ties in the United States.**

- If an immigrant entered the United States illegally (without inspection at the border), in most cases the immigrant will be unable to obtain permanent residence (the green card), even if the immigrant marries a U.S. citizen. An alien must have been "inspected and admitted or paroled into the United States ..." 8 U.S.C. §1255. By nature, this precludes cases where the alien entered the United States illegally. The immigrant will succeed only if he or she can prove that his or her spouse or parent would suffer extreme hardship without them, which is very difficult to prove. 8 U.S.C. §1182(a) (9) (B) (v)
- Young children who are U.S. citizens cannot facilitate legalization of their parents. Instead, the child must be 21 years of age before he or she may sponsor a parent for permanent residence. 8 U.S.C. §1151(b) (2) and §1154(a) (1)
- As difficult as it may be to accept on a constitutional basis, getting married without legal immigration status in South Carolina is prohibited. "All persons, except mentally incompetent persons and persons whose marriage is prohibited by this section [as incestuous], may lawfully contract matrimony." S.C. CODE ANN. §20-1-210(A). However, it is not possible to obtain a marriage license, in

order to contract such a marriage, without a Social Security number or Alien Identification number. S.C. CODE ANN. §20-1-220. The legal basis is unclear. It should be mentioned that there is a South Carolina Attorney General opinion dated June 15, 2004, that states even though the code does not allow it, undocumented immigrants should be allowed to get married.

- Even when available, the process of legalization can take years, and it has many special rules. For example, a lawful permanent resident may sponsor his or her children for a green card, but it may mean waiting for 10 years for approval ... and the son or daughter must remain unmarried throughout this time. All applicants must also establish that they have a guarantor/sponsor to assure that the applicant will have adequate financial support. 8 U.S.C. §1183a.

*The authors wish to acknowledge the assistance of M. Aurora Vasquez of the Advancement Project, Inc. and The National Immigration Law Center in helping to write and fact-check this article.*

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