

INDIGENOUS GUATEMALAN AND MEXICAN
WORKERS IN WASHINGTON STATE: LIVING
CONDITIONS AND LEGAL ISSUES

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ABSTRACT. Indigenous workers are migrating to Washington State in increasing numbers. These workers often speak little or no Spanish or English, and instead speak pre-Hispanic languages such as Mixteco (spoken in southern Mexico) and Mam (spoken in Guatemala). Mam and Mixteco workers migrate to the U.S. due to a number of social, political and economic pressures in their countries. Once they are in the U.S., Mixteco workers generally perform difficult and poorly paid work in agriculture, while Mam workers work long days harvesting floral greens, often for less than the minimum wage. Indigenous workers face numerous legal needs, often involving immigration, wage payment, workers' compensation, housing, health care and language access, but addressing these needs is complicated by language barriers, cultural differences, and a general distrust of outsiders fostered by the history of violence and oppression in the workers' home countries. Case studies of litigation on behalf of Mam and Mixteco workers illustrate these dynamics. To address the legal needs of indigenous workers in Washington State, lawyers' associations in the home countries and in the U.S. should establish a transnational project to develop pro bono services for workers; law schools should train lawyers and students, in conjunction with community groups, to enforce workers' rights; and advocates should develop a pilot partnership project to match medical services in the U.S. with corresponding services in Mexico or Guatemala to cooperate in providing treatment and compensation to deserving workers under the Washington State workers' compensation system.

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KEY WORDS: *Indigenous, migration, immigration, Mixteco, Mam, Washington State, transnational labor, floral greens, language barriers, pro bono legal work.*

RESUMEN. *Los trabajadores indígenas están migrando al estado de Washington en un número cada vez mayor. Estos trabajadores a menudo hablan poco o nada de español o inglés, y en su lugar hablan lenguas prehispánicas, como el mixteco (hablado en el sur de México) y mam (se habla en Guatemala). Los trabajadores mixtecos y mam emigran a los Estados Unidos debido a una serie de presiones sociales, políticas y económicas en sus países. Una vez que están en los Estados Unidos, los trabajadores mixtecos en general realizan un trabajo difícil y mal pagado en la agricultura, mientras que los mam trabajan largas jornadas en la cosecha de las verduras florales, a menudo por menos del salario mínimo. Los trabajadores indígenas se enfrentan a numerosas necesidades legales, a menudo relacionadas con la inmigración, el pago de salarios, la compensación de trabajadores, la vivienda, la salud y el acceso al idioma, pero ello se complica debido a las barreras del idioma, diferencias culturales, y una desconfianza generalizada de los extranjeros promovida por la historia de violencia y opresión en los países de origen de estos trabajadores. Los estudios de casos de litigio en nombre de los trabajadores mam y mixtecos ilustran esta dinámica. Para atender las necesidades legales de los trabajadores indígenas en el estado de Washington, las asociaciones de abogados en los países de origen y en los Estados Unidos deberían establecer un proyecto transnacional para desarrollar servicios pro bono para los trabajadores; las escuelas de derecho deben capacitar a los abogados y estudiantes, en colaboración con grupos comunitarios, para hacer cumplir los derechos, y los defensores deben desarrollar un proyecto piloto de colaboración para que los servicios médicos en los Estados Unidos coincidan con los servicios correspondientes en México o Guatemala; cooperar en el suministro de tratamiento y la compensación a los trabajadores que la merecen en el estado de Washington.*

PALABRAS CLAVE: *Indígena, migración, inmigración, mixteco, mam, estado de Washington, labor transnacional, follajes para arreglos florales, barreras del idioma, asesoría jurídica pro bono.*

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I. INTRODUCTION

Indigenous Mexicans and Guatemalans facing poverty, displacement, and violent conflict are moving to the western United States in greatly increasing numbers. While indigenous workers historically headed to California and Oregon before Washington State, thousands of Washington residents now speak pre-Hispanic languages such as *Mixteco*, *Mam*, and *Purépecha*, often with limited ability to communicate in Spanish. Since the 1990s, many legal, medical, and social services providers have noted that Spanish- and English-language communication no longer suffices to meet the needs of indigenous people employed in many of the lowest-paying and most difficult jobs in these states.

One major indigenous group in Washington State is the *Mixteco* people from the Mexican state of Oaxaca,¹ who often do agricultural work throughout the state. Another is the *Mam* community from the Guatemalan department of Huehuetenango, typically employed in the floral greens industry on the Olympic Peninsula of western Washington.² Members of both indigenous groups are largely unaware of community resources and are often wary of soliciting services or asserting their legal rights. In addition to language barriers, members of these communities face considerable cultural hurdles that keep them socially and politically isolated in the United States, as they have been in their home countries. Some of these hurdles include linguistic and geographic barriers, distrust of authorities and outsiders, and systems for conveying and enforcing rights and responsibilities that vary significantly from corresponding systems in the U.S.

Non-profit groups in Washington State, including Columbia Legal Services (hereinafter “Columbia”)³ and Sea Mar Community Health Centers,⁴ collaborate to address the pressing needs of major indigenous groups in Washington State. In order to overcome cultural barriers and support the community, Columbia has hired a *Mixteco*-speaking community worker to develop a program to educate indigenous *promotores*, or community advocates,

¹ While *Mixtecos* also come from other Mexican states, including Puebla and Guerrero, immigrants from Oaxaca are most commonly found in Washington.

² Washington State is divided by the Cascade Mountain range that runs North-South. Western Washington contains the state’s capitol city and major urban centers, including Seattle, as well as agricultural and forest land. Eastern Washington is primarily agricultural and has a lower concentration of urban centers.

³ Columbia Legal Services is a nonprofit law firm that protects and defends the legal and human rights of low-income people. Columbia represents people and organizations in Washington State with critical legal needs who have no other legal assistance available to them. Columbia is engaged in efforts to conduct outreach, community education, and advocacy within communities of indigenous immigrants in Washington.

⁴ Sea Mar Community Health Center is a community-based organization committed to providing quality, comprehensive health and human services to diverse communities, specializing in service to Latinos.

regarding community resources, legal rights, and basic health issues, as well as supplement Columbia's advocacy program with grass roots input on legal needs and priorities. The long-term goal of this program is to develop *Mixteco* leaders who can educate and advocate for their community. Columbia is also working to develop a similar project with *Mam*-speaking floral greens harvesters in western Washington.

Legal workers, medical providers, and scholars in Washington State are also developing ideas for collaborations with foreign universities, attorneys, the Federal Ombudsman, and human rights organizations to serve the transnational indigenous communities. Potential projects include community education in Mexico and Guatemala on U.S. legal rights and resources as well as academic exchanges and *pro bono* legal representation for indigenous communities in the U.S., Mexico, and Guatemala. Such concerted and multi-faceted efforts are needed to assist those who are among members of the poorest, most exploited, and most culturally isolated people in Washington State.

We begin this article by introducing two major groups of indigenous workers currently in Washington: the *Mam* and the *Mixteco*. Next we highlight some barriers faced by these workers due to language, culture, and other differences between Washington State and their home communities. We then briefly examine legal problems commonly faced by Washington-based workers and summarize their rights under applicable laws. With that backdrop, we present several case studies from the *Mam* and *Mixteco* communities in Washington to help illustrate how these barriers and legal problems function in practice and how they have been addressed. Finally, we discuss lessons we have learned to date and present three proposals for improving the working and living conditions of these workers through transnational collaboration and exchange.

II. *MAM* WORKERS IN WASHINGTON STATE

1. *Mam* Origin and Current Populations

The transnational indigenous worker population in Washington includes about 1,500 Guatemalans of Maya descent, approximately 1,200 of whom are *Mam* workers and their families currently living in Shelton, Bremerton, Belfair, and Forks on the Olympic Peninsula in western Washington.⁵

Most *Mam* workers who migrated to Washington State are from Todos Santos Cuchumatán. Todos Santos is a rural community of about five thousand people located in the department of Huehuetenango in western Guate-

⁵ Columbia estimated the populations of various indigenous groups in Washington through an informal survey of community members. Columbia Legal Services, *Survey of Indigenous Immigrant Workers in Washington* (2010), available at <http://www.columbialegal.org/files/IndigenousSurvey5.pdf>.

mala. It sits in a mountain valley at 8,200 feet above sea level in a remote area not far from the Mexican border.⁶

The predominant language spoken in Todos Santos is *Mam*. Most men speak Spanish as a second language, but many women, especially older women, speak little or no Spanish. Todos Santos is one of the few Maya towns remaining in Guatemala where men, women, and children continue to wear traditional clothing. Many homes in Todos Santos are made of adobe bricks with thatch roofs, dirt floors and fire pits for cooking and heating. Indoor plumbing is relatively rare, especially in the surrounding villages. Most people subsist on corn, beans, and potatoes, sometimes supplemented with meat from chickens, turkeys, or pigs. The hillsides are planted with corn, potatoes, beans, and a few cash crops: chiefly broccoli and some coffee at the lower elevations.

Todos Santos is still very similar to the village described by the American anthropologist Maud Oakes sixty years ago in her book, *The Two Crosses of Todos Santos*.⁷ For many people there, especially the young, Todos Santos is experiencing rapid and substantial change. Banks and money-wiring services are now common; many people carry cell phones; popular music is commonly heard on the street; and several internet cafés have opened their doors. There are also numerous large, multi-story houses recently built with remittances sent from the United States, some of which have American flags painted on the sides to acknowledge the source of financing.⁸ According to the Bank of Guatemala, these remittances, or “*migra* dollars,” are now the country’s biggest source of income, exceeding every leading export crop including coffee, bananas, and sugar.⁹

2. *When, Why, and How Mam Workers Migrated from Todos Santos*

The current migration of *Mam* workers to Washington State began in the mid-1990s, about the same time as the signing of the Peace Accords that ended the Guatemalan civil war. The migration of *Mam* workers may have been facilitated by the earlier flow into the U.S. of indigenous Guatemalan

⁶ Most other indigenous workers from Guatemala are *Kanjobal* immigrants living in Belfair, Washington. *Id.* The *Kanjobal* workers migrated to Washington from an even more remote area of northern Huehuetenango to the north and east of Todos Santos. Manuela Camus, *Introducción: Huehuetenango, Mesoamérica y la ‘Frontera Sur.’* COMUNIDADES EN MOVIMIENTO: LA MIGRACIÓN EN EL NORTE DE HUEHETENANGO 22-24 (Manuela Camus ed., 2007).

⁷ MAUD OAKES, *THE TWO CROSSES OF TODOS SANTOS*, 29-36 (1951).

⁸ These observations are based on visits to Todos Santos in March 2005 and June 2010. Recent changes in Todos Santos are also discussed in Jennifer Burrell, *Migration and the Transnationalization of Fiesta Customs in Todos Santos Cuchumatán, Guatemala*, 32 *LATIN AMERICAN PERSPECTIVES* (2005).

⁹ Matthew J. Taylor et al., *Land, Ethnic and Gender Change: Transnational Migration and its Effects on Guatemalan Lives and Landscapes*, 37 *GEOFORUM* 42 (2006).

war refugees seeking asylum, including *Mam* from Todos Santos, who fled in the 1980s and early 1990s.¹⁰ Since then, the *Mam* community in Washington has grown steadily, as news of opportunities in Washington and remittances have reached Todos Santos.

Although for hundreds of years the town was relatively self-sufficient, it has recently become less so. In the past, people from Todos Santos did seasonal work picking coffee and bananas on the coastal plantations in southern Guatemala, but always returned home to Todos Santos for the remaining part of the year. Nowadays, supplemental income from a few months of seasonal work on the coast no longer provides sufficient income for most families. Although the population continues to grow, the amount of productive land has remained fixed. As a result, more and more *Todosanteros* feel forced to migrate to the United States to support themselves and their families. Almost everyone in Todos Santos has at least one family member living in the U.S. According to one estimate, almost a third of the population of Todos Santos now resides in the United States.¹¹

In most cases, *Mam* workers reach the U.S. in groups using hired guides, or *coyotes*, who escort them to the U.S. border with Mexico, and sometimes cross with them into the United States. The trip through Mexico has always been dangerous and costly, and in recent years has become even more so.¹² Workers usually borrow money to pay for the trip from relatives or money lenders at home. These debts may take years of work in Washington to pay off.¹³ In the past, this migration was often temporary, but the heightened risk and cost of the trip have led an increasing number of *Mam* immigrants to settle in Washington for the long term. Intensified border enforcement since the terrorist attacks of September 11, 2001 has contributed to a reduction in temporary or “circular” migration and has further encouraged long-term settlement.

At one time, *Mam* workers who reached Washington State were almost all young males, many of whom had fathered children in Guatemala before leaving.¹⁴ Women effectively head these households and raise their children in Todos Santos without their fathers.¹⁵ Recent census data shows that one-

¹⁰ Taylor, *supra* note 9, at 44; see also Olivia Cartescia, *TODOS SANTOS: THE SURVIVORS* (First Run/Icarus Films, 1989).

¹¹ Burrell, *supra* note 8, at 16.

¹² Central Americans traveling through Mexico face extortion, sexual abuse, kidnapping, and murder by organized crime groups such as the *Zetas*, often with the knowing participation or acquiescence of Mexican authorities. MAUREEN MEYER, *A DANGEROUS JOURNEY THROUGH MEXICO: HUMAN RIGHTS VIOLATIONS AGAINST MIGRANTS IN TRANSIT*, THE WASHINGTON OFFICE ON LATIN AMERICA 1-5 (Dec. 2010), available at http://www.wola.org/publications/a_dangerous_journey_through_mexico_human_rights_violations_against_migrants_in_transit.

¹³ *Id.*

¹⁴ KURT SPREYER, *TALES FROM THE UNDERSTORY: LABOR, RESOURCE CONTROL, AND IDENTITY IN WESTERN WASHINGTON'S FLORAL GREENERY INDUSTRY* 137-38 (2004).

¹⁵ Burrell, *supra* note 8, at 18.

third of Todos Santos households are now headed by females; in most cases, the men in these households have migrated to the United States.¹⁶ A growing number of *Mam* women have also recently arrived, either alone or accompanied by males and, sometimes even with small children. In addition, there are now a significant number of U.S.-citizen children who have been born in Washington to *Mam* parents.¹⁷ *Mam* workers were first drawn to Washington State by the opportunity to make money harvesting salal and other floral greenery, known as “brush” or *brocha*, which grows in the forests of Washington. The *Mam* workers are employed by floral greenery companies (called “brush sheds”) to gather forest brush which in turn is packaged and sold to florists all over the world. The attractive glossy green leaves and stems of the harvested greens provide structure to flower bouquets, and their durability makes them ideal for shipping. In the Pacific Northwest alone, harvesting forest greens is a \$150 million annual industry.¹⁸

Almost all *Mam* workers who harvest brush are male.¹⁹ The few women employed generally work alongside their husbands or extended family.²⁰ *Mam* women generally describe brush harvesting as a job of “last resort” because of the hardships of hiking over difficult terrain, often in extreme weather, carrying heavy brush bundles and working to keep up with teams of men.²¹ Most *Mam* women work in the home caring for children, in restaurants, as wreath-makers, or in the brush sheds cleaning, packing and sorting the floral greenery in preparation for sale.²²

The majority of *Mam* workers lack transportation to commute to where they harvest the brush. An organizer, or *railtero*, often transports them for a fee (usually a share of gas money plus a small percentage of each worker’s daily pay). In other cases, a group of workers with access to a van commute together, each paying a share of the gas, without the need for a *railtero*. Although workers occasionally enter and harvest on land without the land owner’s permission, they usually obtain permits that allow them to harvest brush on specific land for a specific period of time. *Mam* workers sometimes obtain brush harvesting permits directly from either the U.S. Forest Service or pri-

¹⁶ Burrell, *supra* note 8, at 30.

¹⁷ Some of these families are tri-lingual, with parents who speak fluent *Mam* and some Spanish, as well as school-age children who speak some *Mam*, some Spanish, and fluent English.

¹⁸ Lesley Hoare, *The Changing Work Force in Pacific Northwest Forests: Salal Harvesters*, NORTHWEST FOREST WORKER SAFETY REVIEW 7 (2007).

¹⁹ KATHRYN A. LYNCH & REBECCA J. MCLAIN, ACCESS, LABOR, AND WILD FLORAL GREENS MANAGEMENT IN WESTERN WASHINGTON’S FORESTS, U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, PACIFIC NORTHWEST RESEARCH STATION GENERAL TECHNICAL REPORT PNW-GTR-585 46 (2003).

²⁰ *Id.*

²¹ *Id.*

²² Spreyer, *supra* note 14, at 138; Lynch, et al., *supra* note 19, at 46.

vate landowners; sometimes they acquire them from the brush sheds who, in turn, obtain them from the land owners.

Brush picking work is both arduous and risky,²³ requiring long days in the forests hiking over difficult terrain, often in wet and cold weather, while carrying heavy bundles of brush along with tools needed to cut it.²⁴ Experienced workers can gather up to 300 pounds of salal during a day of work, which they must then carry out of the forest. Workers may perform this labor for ten or eleven months out of the year. To maximize wages, they often work six or seven days per week, leaving before dawn and returning to the brush sheds at the end of each day to sell the product. In many if not most cases, they earn less than the Washington State minimum wage of \$8.55 per hour.²⁵ Because the work is difficult and the pay low, brush pickers occupy the bottom rung of the economic ladder. Like other transnational indigenous groups, they often live well below the federally recognized poverty level.

III. MIXTECO WORKERS IN WASHINGTON STATE

1. Mixteco *Origin and Current Populations*

Another group of indigenous workers that migrated *en masse* to Washington State is the *Mixtecos*. Most *Mixteco* workers in Washington come from the state of Oaxaca, one of the poorest areas in Mexico. The region is home to almost 500,000 *Mixtecos*, who comprise one of the largest indigenous populations in the nation.²⁶ *Mixteco* workers typically come from small, rural com-

²³ In September, 2010, a brush picker working on the Olympic Peninsula was shot and killed by a hunter. *Hunter Arrested in Fatal Shooting Near Shelton*, SEATTLE TIMES, Oct. 1, 2010, available at http://seattletimes.nwsourc.com/html/localnews/2013048385_apwabrushpickerkilled.html.

²⁴ WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, HARVESTING WASHINGTON'S BRUSH: MONITORING COMPLIANCE WITH LABOR LAWS IN THE FLORAL GREENS INDUSTRY 5-6 (2005).

²⁵ Report from Stan Owings, MS, CDMS, Owings and Associates, to Katherine L. Mason, Casey Law Firm (Feb. 16, 2005), available at <http://www.columbialegal.org/files/OwingsRe-Ramirez.pdf>. (Board certified vocational expert found in 2004 that brush pickers in western Washington earned an average of \$55 per day for eight to nine hours of work, averaging \$6.11 to 6.88 per hour). Washington's minimum wage is tied to the consumer price index, and it can change annually. WASH. REV. CODE § 49.46.020. The 2012 minimum wage is \$9.04. Washington State Department of Labor & Industries, *History of Washington Minimum Wage*, available at <http://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/History/default.asp>. WASH. REV. CODE stands for Revised Code of Washington, which contains all Washington State statutes — laws passed by the legislature and approved by the governor or passed directly by the people.

²⁶ Gaspar Rivera-Salgado, *Mixtec Activism in Oaxacalifornia*, 42(9) AMERICAN BEHAVIORAL SCIENTIST 1446 (June/July 1999).

munities governed by customary laws from the colonial era known as *usos y costumbres*.²⁷ Many of their villages can be reached only after miles of travel over dirt roads, some of which are impassable in the rainy season.²⁸

Prior to the Spanish conquest, *Mixtecos* thrived across a large portion of southern Mexico called the *Mixteca*.²⁹ The *Mixteca* includes parts of the present-day states of Oaxaca, Guerrero, and Puebla.³⁰ The *Mixteco* civilization established trade routes between *Mixteco* villages in the highlands, lowlands, and along the coast of the *Mixteca* region, where extreme variation in geography and temperature produces microclimates and a wide range of crops and wild game.³¹ Although *Mixtecos* across the *Mixteca* have many linguistic and cultural commonalities, they tend to identify themselves by their hometowns because land disputes are common among *Mixteco* villages.³²

Mixtecos in Washington State come from various Mexican towns and speak many variants of the *Mixteco* language, including the most common dialects *Mixteco Alto* (High *Mixteco*) and *Mixteco Bajo* (Low *Mixteco*), names attributed to the altitude of towns where they are spoken.³³ *Mixteco Alto* is mostly used in the mountains of Oaxaca and Guerrero, and *Mixteco Bajo* primarily in the lowlands of Oaxaca. Dialects, however, vary significantly. The *Mixteco Alto* of one town is often different from the *Mixteco Alto* of a town just a few miles away.³⁴ In attempting to categorize the *Mixteco*-speaking population, Columbia Legal Services has designated three broad categories to represent the distinct variants spoken by *Mixteco* workers in the State of Washington: *Mixteco Alto*, *Mixteco Bajo*, and *Mixteco* from Guerrero.³⁵ Approximately 5,500 *Mixtecos* live

²⁷ Leah K. VanWey, et al., *Community Organization, Migration, and Remittances in Oaxaca*, 40(1) LATIN AMERICAN RESEARCH REVIEW 86 (2005).

²⁸ MINES, RICHARD, ET AL., CALIFORNIA'S INDIGENOUS FARMWORKERS: FINAL REPORT OF THE INDIGENOUS FARMWORKER STUDY TO THE CALIFORNIA ENDOWMENT 22-26 (Jan. 2010), available at http://www.indigenousfarmworkers.org/IFS%20Full%20Report%20_Jan2010.pdf (describing nine representative indigenous communities in the state of Oaxaca, including five *Mixteco*-speaking communities).

²⁹ Alejandra Leal, *La identidad mixteca en la migración al norte: el caso del Frente Indígena Oaxaqueño Binacional*, 2 AMÉRIQUE LATINE HISTOIRE ET MÉMOIRE (2001), available at <http://alhim.revues.org/index610.html>.

³⁰ *Id.*

³¹ John Monaghan, *Mixtec History, Culture, and Religion* in ARCHAEOLOGY OF ANCIENT MEXICO AND CENTRAL AMERICA: AN ENCYCLOPEDIA 476-77 (2001).

³² Carol Nagengast & Michael Kearney, *Mixtec Ethnicity: Social Identity, Political Consciousness and Political Activism*, 25 LATIN AMERICAN RESEARCH REVIEW 61-91, see especially 72 (1990).

³³ Monaghan, *supra* note 32, at 476-477.

³⁴ Summer Institute of Linguistics in Mexico, *Mixtecan Family*, available at <http://www.sil.org/mexico/mixteca/00i-mixteca.htm>.

³⁵ The categories "*Mixteco Alto*" and "*Mixteco Bajo*" refer to speakers who originate in Oaxaca. *Mixteco* from Guerrero, at least that we have encountered in Washington, is a form of *Mixteco Alto* that is mostly understandable to *Mixteco Alto* speakers who hail from Oaxaca. *Mixtecos* from Guerrero who are in Washington come from the region of Chimaltepec.

in Washington.³⁶ The great majority, approximately 3,500, speak *Mixteco Alto*. Of those remaining, most speak *Mixteco Bajo*, with about 100 *Mixteco* speakers from Guerrero.³⁷

Traditionally, *Mixteco* writing was a logographic system in which pictures and symbols represented complete words and ideas.³⁸ Although a modern system of *Mixteco* writing has been recognized by the Mexican Ministry of Public Education, the numerous variants of the language make it impractical; as a result, few *Mixtecos* learn how to write.³⁹

Due to extreme poverty and shortcomings in educational systems, indigenous Mexicans are more likely to quit school early and less likely to be literate than their non-indigenous counterparts.⁴⁰ Most *Mixtecos* living in Washington State have only completed a few years of formal schooling in Mexico; many, in fact, are functionally illiterate. Most speak little or no Spanish and no English.

Mixteco communities are present in many areas of the state, mostly in agricultural regions.⁴¹ Some communities, including the town of Winchester, Washington, contain as few as fifteen *Mixteco* individuals —one or two families.⁴² Others, such as the community in the Mt. Vernon-Burlington area, contain approximately 2,000 *Mixtecos*.⁴³

2. *When, Why and How Mixteco Workers Migrated to Washington State*

Economic pressures have caused many *Mixtecos* to migrate north. Soil erosion, declining crop yields, water shortages, increased competition from U.S. corn producers, and deterioration of the traditional barter economy have forced *Mixteco* workers to migrate in order to survive.⁴⁴ Surveys show that 18

³⁶ Columbia Legal Services Survey, *supra* note 5.

³⁷ *Id.*

³⁸ ELIZABETH BOONE & WALTER D. MIGNOLO, WRITING WITHOUT WORDS: ALTERNATIVE LITERACIES IN MESOAMERICA AND THE ANDES 102 (1994).

³⁹ See, e.g., Eduardo Stanley, *La casa de la lengua de lluvia. Esfuerzos por lograr que el idioma mixteco pueda escribirse* (July 18, 2003), available at <http://www.laprensa-sandiego.org/archieve/july18-03/lengua.htm>.

⁴⁰ Daniel Cortés Vargas et al., *La educación indígena en México: inconsistencias y retos*,” Observatorio Ciudadano de la Educación, available at http://www.observatorio.org/comunicados/EducDebate15_EducacionIndigena.html (noting that indigenous students are often poorer, more likely to have health problems, and more likely to attend schools with serious lack of infrastructure than their non-indigenous counterparts. They are also often unable to learn due to language barriers with Spanish-speaking teachers. As a result, illiteracy among Mexican indigenous adults is 31.6%, compared to 6.7% among non-indigenous adults).

⁴¹ Columbia Legal Services Survey, *supra* note 5.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ MINES, *supra* note 28, at 13; see also Eric Schlosser, *In the Strawberry Fields*, THE ATLANTIC (Nov. 1995).

percent of the Mexican adult population (as a whole) receives remittances from workers in the U.S.; the rate for *Mixteco* workers is at least that high if not higher.⁴⁵

In a survey of 38 *Mixtecos* living in Washington State, every individual interviewed reported leaving Mexico due to poverty or lack of work. Unsurprisingly, nearly all interviewees said they came to Washington for work opportunities. Some mentioned that they were also motivated because they had family members already living in Washington. All those surveyed arrived in Washington between 1979 and 2010, with most having done so in the last decade. All but one reported that people from their hometown were already in Washington before they immigrated. None of those we interviewed obtained permission to enter the U.S., and the majority walked across the U.S.-Mexico border.⁴⁶

Many of the interviewees did not travel directly to Washington State, having first worked in other states such as California and Arizona after entering the U.S. In several established *Mixteco* communities including Walla Walla and Othello, immigrants travelled directly to those cities to join family members.⁴⁷

A California study found that most indigenous Mexicans in the U.S. (56%) are men; among indigenous communities in Mexico, most are women (58%).⁴⁸ The same study found that 93% of indigenous Mexican men and 83% of indigenous Mexican women in the U.S. worked a month or longer in agriculture.⁴⁹ Women seemed to earn less and were generally treated worse.⁵⁰ Over half the women and a quarter of the men earned below the minimum wage.⁵¹

3. *Working and Living Conditions of Mixteco Workers in Washington State*

Mixtecos living in central and eastern Washington commonly work in the tree fruit industry, which includes cherries, pears, peaches, and apples. For approximately nine months of the year, during the different tree cycle and growth stages, there is substantial work to be performed. When the trees need care, or when it is time to harvest the fruit, there is only a short window of time to do a significant amount of work. This means that when work is available, the hours are long, the work is strenuous, and workers push themselves to make as much money as they can. Workers must build up savings to

⁴⁵ Leah K. VanWey, et al., *Community Organization, Migration, and Remittances in Oaxaca*, 40 LATIN AMERICAN RESEARCH REVIEW 84 (2005).

⁴⁶ Columbia Legal Services Survey, *supra* note 5.

⁴⁷ *Id.*

⁴⁸ MINES, *supra* note 28, at 33.

⁴⁹ *Id.* at 38.

⁵⁰ *Id.* at 61.

⁵¹ *Id.*

sustain their families through the slow winter months when few *Mixtecos* can find work.

Orchard owners have discovered that the best way to get workers to perform quickly is to pay them on a per piece basis, *e.g.*, for each tree pruned or each box of apples picked. Paying piece-rate discourages workers from taking breaks, and allows them to earn more if they can work quickly. The workers move as quickly and efficiently as possible, running up and down ladders in all weather conditions, often while carrying sharp tools or heavy loads of fruit.

For this reason, orchard work is dangerous. Workers are frequently injured by falls from ladders. Fruit on the ground, especially apples, causes falls and ankle injuries. Repetitive stress injuries are also common, as workers repeat the same motions thousands of times a day, which can damage tissue in hands, arms, and joints, causing work to become painful or impossible over time. Another hidden danger for *Mixteco* orchard workers is exposure to pesticides. Most tree fruit is grown with pesticides, and workers must wear protective clothing and handle their clothing carefully when they arrive home to avoid exposing their families to chemicals. While a large exposure to pesticides often causes immediate, dramatic results such as vomiting, skin sensitivity, or eye and throat irritation, low-level exposure over time may also harm workers and their families. *Mixtecos* working in orchards bring pesticide residue home with them on their clothes, bodies, and in their cars. One study linked pesticide exposure to a higher risk of developmental problems and delays in children.⁵²

Aside from stress and danger, the agricultural work available to *Mixtecos* is unstable and competitive. An orchard may need many workers for a week, but for the next month have no available work. After a job ends, the indigenous workers in central Washington may drive up to 100 miles to find orchards that are hiring. Employers can take their pick of the eager, available labor and often hire young men before women and older workers. If a worker does find a job, he or she must work hard and avoid displeasing supervisors. Sometimes the bosses use fear tactics to influence workers' behavior, even preventing them from reporting illegal activity. Most are naturally reluctant to speak out against mistreatment for fear of losing their jobs and being blacklisted by local farms.

IV. BARRIERS ENCOUNTERED BY INDIGENOUS WORKERS

Several significant barriers prevent indigenous immigrants from successfully utilizing community services and obtaining access to justice, including linguistic and cultural isolation, and historic oppression by majority groups.

⁵² V. A. Rauh et al., *Impact of Prenatal Chlorpyrifos Exposure on Neurodevelopment in the First 3 Years of Life Among Inner-City Children*, 118 *PEDIATRICS* 1845-59 (2006).

1. *Language Barriers*

While there has been no comprehensive study of language proficiency among indigenous immigrants in Washington, our work indicates that a vast majority of indigenous immigrants living in Washington State do not speak Spanish as a native language; even among those who can speak some Spanish, many do not read or write Spanish.⁵³ English proficiency among the indigenous populations is extremely low.

In our work with indigenous people in Washington State, we have documented the presence of at least eight Mexican and Guatemalan indigenous languages.⁵⁴ Many of these languages contain sub-groups and localized variants that are mutually unintelligible or difficult to understand for speakers of the same languages.⁵⁵ Based on our work with indigenous communities and other community organizations, we estimate that there are fewer than a dozen skilled indigenous-language interpreters in Washington State, and differences in dialect increase the difficulty of finding competent interpreters.

Because many indigenous-language speakers have not obtained the fluency necessary to communicate effectively about complex issues in Spanish, and because professional indigenous-language interpreter services are not readily available, many indigenous people find themselves unable to express or resolve problems in critical areas such as workplace rights, housing, and health care.

There may also be language barriers within the families of these indigenous workers. The United States-born children of indigenous immigrants speak English as a native language, but may communicate with their parents primarily in Spanish—a second language for both the children and their parents—rather than in the parents' native indigenous tongue. The children's lack of fluency in their parents' native indigenous language can complicate efforts by outreach workers to communicate with indigenous workers through their English-speaking children.⁵⁶

2. *Cultural Differences*

Many transnational indigenous migrants to Washington State come from native cultures which rely on unwritten customary laws and conventions rather than written statutes and contracts.⁵⁷ This fact, along with low levels of

⁵³ MINES, *supra* note 28, at 4.

⁵⁴ These languages include *Amuzgo*, *Kanjobal*, *Mam*, *Mixteco*, *Nahuatl*, *Purépecha*, *Triqui*, and *Zapoteco*.

⁵⁵ Monaghan, *supra* note 31, at 476-477; MINES, *supra* note 28, at 21.

⁵⁶ *Id.* at 43.

⁵⁷ *Id.* at 45; JOHN M. WATANABE, *MAYA SAINTS & SOULS IN A CHANGING WORLD* 106-25 (1992).

literacy in Spanish, may make it difficult for indigenous immigrants to understand the importance of written agreements and documents.

These indigenous cultures also perceive disease, health, and healing in a vastly different way than the mainstream United States medical establishment.⁵⁸ As discussed below, these differences can significantly affect indigenous patients' access to effective medical care.

3. *History of Genocide, Violence, and Oppression*

As is true of indigenous peoples throughout the Americas, Mexican and Guatemalan indigenous peoples have experienced hundreds of years of oppression, discrimination and exploitation at the hands of majority groups. Countless people have been expelled from their lands⁵⁹ and have been the targets of brutal violence.⁶⁰ In many cases, governments have actively tried to eliminate indigenous languages and cultures.⁶¹ The history of violence and oppression is particularly extreme in the case of indigenous Guatemalans, including the *Mam* community in Todos Santos, who suffered the consequences of 36-years of civil war, arguably the worst and bloodiest conflict in recent Latin American history.⁶² During this extended period, 200,000 people were killed or disappeared; 150,000 became refugees; and 1.5 million were internally displaced, the majority of indigenous Guatemalans caught in the middle or targeted by the Guatemalan military.⁶³ In 1999, the United Nations Commission for Historical Clarification concluded that violence by the Guatemalan government against indigenous groups in the 1980s constituted genocide.⁶⁴

⁵⁸ MINES, *supra* note 28, at 83-85.

⁵⁹ *Id.* at 10-11; Christopher H. Lutz & W. George Lovell, *Survivors on the Move: Maya Migration in Time and Space*, in THE MAYA DIASPORA 13-34 (2000); Alejandra Leal, *La Identidad Mixteca en la Migración al Norte: el Caso del Frente Indígena Oaxaqueño Binacional*, 2 AMÉRIQUE LATINE HISTORIE ET MÉMOIRE (2001), available at <http://alhim.revues.org/index610.html#text>.

⁶⁰ LUTZ & LOVELL, *supra* note 59, at 33-34; see also Catherine L. Hanlon & W. George Lovell, *Flight, Exile, Repatriation and Return: Guatemalan Refugee Scenarios, 1981-1998*, in THE MAYA DIASPORA, *supra* note 59, at 35 para. 6-8; Rufino Domínguez, Binational Ctr. for the Dev. of Oaxacan Indigenous Cmities., *Las Graves Violaciones a los Derechos Humanos de los Migrantes y Nuestras Familias* (2010), available at <http://centrobinacional.org/2010/11/las-graves-violaciones-a-los-derechos-humanos-de-los-migrantes-y-nuestras-familias/>.

⁶¹ MINES, *supra* note 28, at 11; LUTZ & LOVELL, *supra* note 59, at 23-25.

⁶² See, e.g., BEATRIZ MANZ, PARADISE IN ASHES: A GUATEMALAN JOURNEY OF COURAGE, TERROR, AND HOPE 91-182, 2004; DAVID STOLL, BETWEEN TWO ARMIES 60-164 (1993).

⁶³ Taylor, *supra* note 9, at 44; see also MANZ, *supra* note 62, at 91-182; STOLL, *supra* note 62, at 60-164.

⁶⁴ COMISIÓN DE LA ONU PARA EL ESCLARECIMIENTO HISTÓRICO [UNITED NATIONS COMMISSION FOR HISTORICAL CLARIFICATION], GUATEMALA, MEMORIA DEL SILENCIO 39-41 (1999), cited in MANZ, *supra* note 62, at 224-225.

Indigenous people in Mexico have faced racial discrimination by the government and non-indigenous peoples since the arrival of the Europeans.⁶⁵ Currently, this population suffers deprivation of public services and educational opportunities.⁶⁶ The education system, for example, fails to take into account indigenous peoples' unique cultures and languages.⁶⁷

As explained above, both Mexican and Guatemalan indigenous peoples have been subjected to severe discrimination in their home countries.⁶⁸ Unsurprisingly, indigenous immigrants do not escape discrimination when they leave Mexico or Guatemala. Instead, Spanish-speaking *mestizos*, or non-indigenous Mexicans and Guatemalans, often perpetuate the discrimination against these workers in the United States, in addition to discrimination by the mainstream U.S. population.⁶⁹ A Washington State study describes the ethnic hierarchy with white and Asian-Americans at the top, followed by Latino U.S. citizens, undocumented Latinos, and finally indigenous people at the bottom.⁷⁰

In the economic sphere, indigenous immigrants work in ethnically stratified labor markets where they occupy the least desirable levels.⁷¹ Accustomed to poor living and working conditions in Mexico, *Mixtecos* may be seen as ideal candidates for U.S. farm labor contractors because they can be housed in substandard conditions, given difficult work, and be paid low wages.⁷² This history of discrimination and violence profoundly affects indigenous immigrants' interactions with members of the Washington communities where they settle. As the authors of California's recent report on indigenous farmworkers put it, "[t]heir experience has taught them not to trust outsiders."⁷³ Distrust of outsiders and fear of governmental authorities may be even greater in the

⁶⁵ SUHAS CHAKMA & MARIANNE JENSEN, THE INT'L WORK GROUP FOR INDIGENOUS AFFAIRS & ASIAN INDIGENOUS & TRIBAL PEOPLES NETWORK, RACISM AGAINST INDIGENOUS PEOPLES, 280 (2001).

⁶⁶ *Id.*

⁶⁷ *Id.* at 282; MINES *supra* note 28, at 2.

⁶⁸ MINES, *supra* note 28, at 11; LUTZ & LOVELL, *supra* note 60, at 13-34; CAROL A. SMITH, ED., GUATEMALAN INDIANS AND THE STATE 1540 TO 1988 258-85 (1990).

⁶⁹ Our clients tell of *mestizo* foremen who order them not to speak indigenous languages at work and *mestizo* children who taunt Guatemalan indigenous children at school for being "Indian." Oregon and California indigenous farmworkers report discrimination on the basis of language in work and health care settings. Stephanie Farquhar et al., *Promoting the Occupational Health of Indigenous Farmworkers*, 9 JOURNAL OF IMMIGRANT MINORITY HEALTH, 9 (2007); MINES, *supra* note 28, at 63, 75; Seth M. Holms, *An Ethnographic Study of the Social Context of Migrant Health in the United States*, 3 PLOS MEDICINE 1776 (2006).

⁷⁰ Farquhar, *supra* note 69.

⁷¹ JONATHAN FOX & GASPART RIVERA-SALGADO, INDÍGENAS MEXICANOS MIGRANTES EN LOS ESTADOS UNIDOS 12 (2004).

⁷² MINES, *supra* note 28, at 55; FELIPE H. LÓPEZ & DAVID RUNSTEN, EL TRABAJO DE LOS MIXTECOS Y LOS ZAPOTECOS EN CALIFORNIA 288-290 (2004).

⁷³ MINES, *supra* note 28, at 4.

case of the *Mam* immigrants as a result of the horrific governmental violence they and their families suffered during Guatemala's long civil conflict.⁷⁴ Any increased level of fear and distrust is hard to discern, however, because it is masked by the universal fear of governmental authority and outsiders that all undocumented immigrants share as a result of their unauthorized immigration status. All of them —both *Mam* and *Mixteco* alike— fear interaction with individuals outside their small communities who may bring their unauthorized status to the attention of U.S. immigration authorities. As a result, legal professionals, social service providers, and government officials must work especially persistently to gain indigenous immigrants' trust before effective communication can take place.

Immigrant indigenous people's distrust of Washington's systems is further exacerbated by the fact that their communities as a whole are relative newcomers to the state, and there is little community knowledge of what customs prevail and what services are available. The majority of indigenous immigrants have been in Washington for fifteen years or fewer.⁷⁵ On the whole, these immigrants have not had time to develop connections to the larger communities, living instead in culturally and linguistically isolated groups. Due to their lack of integration and limited economic opportunities, very few of their members have attained educational levels that allow them to join the ranks of social service providers, which would facilitate understanding between indigenous communities and mainstream society.

V. LEGAL ISSUES AFFECTING INDIGENOUS WORKERS

The cultural and linguistic barriers faced by these indigenous immigrants have a profound effect on their legal situation, especially regarding immigration status, work, housing, health care, and language access.

1. *Immigration Status*

Because most indigenous workers living in Washington State have arrived recently, adults with authorized immigration status are rare. A major overhaul of U.S. immigration laws in 1996 drastically reduced the available avenues for unauthorized immigrants who perform manual labor to obtain legal status in the United States.⁷⁶ Previously, unauthorized workers had an opportunity to apply to an immigration judge (“IJ”) for legal status called “suspension

⁷⁴ Burrell, *supra* note 8, at 14.

⁷⁵ As indicated by Columbia Legal Services' survey of a small sample of Washington indigenous immigrants. Columbia Legal Services Survey, *supra* note 5.

⁷⁶ On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

of deportation” if they had resided in the U.S. for at least seven years, did not have a disqualifying criminal record, and could demonstrate that their removal (commonly known as “deportation”) would cause “extreme hardship” to themselves or qualifying family members.⁷⁷ In 1996, however, this form of relief was eliminated and replaced with a much more restrictive “cancellation of removal,” which requires ten years of continuous residence, no disqualifying criminal record, and the most onerous requirement: proof that their removal would cause “exceptional and extremely unusual hardship” to a United States citizen (“citizen”) or lawful permanent resident (“permanent resident”) spouse, parent, or child.⁷⁸ An IJ has no power to consider discretionary or humanitarian grants of relief for migrant workers who have resided in the U.S. for less than ten years or who do not have qualifying relatives (a spouse, child or parent who is either a citizen or permanent resident).

In addition to these limited exceptions, the 1996 law eliminated individuals ability to adjust their status through a U.S.-citizen or permanent-resident petitioner if the immigrant entered the U.S. without authorization.⁷⁹ Immigrants who enter the U.S. unlawfully and subsequently marry U.S. citizens are still forced to return to their home country for a consular interview.⁸⁰ In addition, they often face a ten-year bar to returning to the U.S. as a result of their prior unlawful presence.⁸¹ One exception is for survivors of domestic violence, who may apply for immigration documents from within the U.S. if the abuser is a spouse or parent with citizen or permanent resident status.⁸²

The 1996 law also made it more difficult for individuals facing persecution in their home country to obtain relief. Most importantly, the law now requires applicants for political asylum to submit their applications within one year of arrival to the U.S., or within one year of changed circumstances in their home countries that materially affect eligibility for asylum.⁸³ Political asylum continues to require that applicants demonstrate that they face a “well-founded fear of persecution” on account of race, religion, nationality, political opinion, or membership in a particular social group.⁸⁴ Given the U.S. State Department’s reports that conditions generally have been improving in Central America since the wars of the late 1980s and early 1990s, most

⁷⁷ 8 U.S.C. § 1254 (1995). U.S.C. stands for United States Code, which contains all United States federal statutes, passed by Congress and approved by the President.

⁷⁸ 8 U.S.C. § 1229b(b)(1).

⁷⁹ 8 U.S.C. § 1255.

⁸⁰ *Id.*

⁸¹ 8 U.S.C. § 1182(a)(9)(B). A waiver is available in certain situations, but the applicant must usually wait outside the country between three to 14 months to see if the discretionary waiver application is approved. 8 U.S.C. § 1182(a)(9)(B)(v).

⁸² 8 U.S.C. § 1154(a). This benefit is also available for an elderly parent who is abused by her or his adult citizen son or daughter. 8 U.S.C. § 1154(a)(1)(A)(vii).

⁸³ 8 U.S.C. § 1158(a)(2)(B), (D).

⁸⁴ 8 U.S.C. § 1101(a)(42).

applicants will have difficulty in demonstrating the well-founded fear of persecution necessary for asylum.

Despite these largely restrictive changes, some positive developments now provide certain migrant workers an opportunity to obtain legal status. For instance, Congress enacted a special visa (the “U” visa) for immigrants who are victims of certain crimes, including domestic violence, most violent crimes, and involuntary servitude and peonage, of particular importance as migrant workers are often exploited by employers seeking to avoid payment of wages.⁸⁵ In order to qualify, the victim must demonstrate that she or he cooperated with law enforcement in the investigation or prosecution of the crime.⁸⁶ In addition, Congress enacted the “T” visa for victims of human trafficking. This visa also requires victims to cooperate with law enforcement in the investigation or prosecution of the crime.⁸⁷

Migrants who are apprehended by immigration authorities and placed in removal proceedings face major obstacles to securing relief. First, many individuals are detained throughout the removal process. This process usually lasts at least a few months if the person seeks to obtain substantive relief.⁸⁸ Some are eligible to apply for release from detention in exchange for a bond, but the minimum bond is \$1,500 and it is not uncommon for detainees to be required to post \$10,000 and \$20,000 bonds.⁸⁹ Those detained often face especially difficult choices when their spouses or children rely on them for financial and emotional support. In addition, unlike in the U.S. criminal justice system, individuals in removal proceedings have no right to a government-paid lawyer.⁹⁰ Unless the person is fortunate enough to receive *pro bono* representation or has the resources to retain a private attorney, she or he is forced to face the process alone.

Finally, those who are ordered removed from the country face great peril if they attempt to re-enter. Any person who is ordered removed and unlawfully reenters the country is subject to criminal prosecution that often results in prison sentences ranging from two to twenty years.⁹¹

Fear of the authorities pervades most unauthorized immigrants’ decision-making in other areas as well. They are reluctant to complain about workplace abuses and injuries or to assert their rights to safe housing for fear of drawing attention to themselves. While civil courts, most Washington State agencies, and even many federal agencies do not participate in immigration enforcement, most indigenous immigrants do not understand the complex

⁸⁵ 8 U.S.C. § 1101(a)(15)(U)(iii).

⁸⁶ 8 U.S.C. § 1101(a)(15)(U)(i)(III). There is no requirement that law enforcement obtain a conviction against the perpetrator.

⁸⁷ 8 U.S.C. § 1101(a)(15)(T).

⁸⁸ 8 U.S.C. § 1226.

⁸⁹ 8 U.S.C. § 1226(a)(2)(A).

⁹⁰ 8 U.S.C. § 1229a(b)(4)(A).

⁹¹ 8 U.S.C. § 1326.

relationships between governmental entities, and are justifiably afraid of the severe consequences of immigration enforcement.

2. *Wage-and-Hour Issues*

A frequent legal complaint among indigenous immigrants is their employers' failure to pay wages owed.⁹² Under Washington State law, the vast majority of employees have the right to earn a minimum wage per hour.⁹³ In 2012, the minimum wage in Washington is \$9.04 per hour.⁹⁴ Most employees also have the right to overtime pay.⁹⁵ Washington law offers other protections for workers, including the right to meal and rest breaks,⁹⁶ and the requirement that employers pay on time⁹⁷ and with pay records that document required information such as wages earned and hours worked.⁹⁸ Federal law also provides specific protections for agricultural workers, including the right to enforce wage rates promised by employers and recruiters.⁹⁹

These laws protect employees regardless of their immigration status.¹⁰⁰ However, a 2002 United States Supreme Court decision denying compensation for lost wages to unauthorized workers who file unfair labor practice claims¹⁰¹ has caused employers to renew arguments that unauthorized work-

⁹² In a 2008 California survey of indigenous farmworkers, 27% of the legal complaints voiced by participants were for non-payment or underpayment of wages. MINES, *supra* note 28, at 102. For more general information on the vast scope of the problem of failure to pay wages in the United States, see ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), available at http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

⁹³ WASH. REV. CODE §§ 49.46.020; 49.46.010(4). The federal Fair Labor Standards Act also guarantees a minimum wage, 29 U.S.C. § 206(a), but that minimum wage is currently \$7.25 per hour, 29 U.S.C. § 206(a)(1)(C).

⁹⁴ See *History of Washington Minimum Wage*, *supra* note 24.

⁹⁵ WASH. REV. CODE § 49.46.130(2).

⁹⁶ WASH. ADMIN. CODE §§ 296-126-092, 296-131-020. WASH. ADMIN. CODE stands for Washington Administrative Code. It contains Washington State's regulations, implemented by state agencies under authority of statutes.

⁹⁷ WASH. ADMIN. CODE §§ 296-126-023, 296-128-035, 296-131-010.

⁹⁸ WASH. ADMIN. CODE § 296-126-040.

⁹⁹ 29 U.S.C. §§ 1822(c), & 1832(c) (the Migrant and Seasonal Agricultural Worker Protection Act or "AWPA"). These promises or "working arrangements" need not be in writing to be enforceable. *Colon v. Casco*, 716 F. Supp. 688, 693-94 (D. Mass. 1989).

¹⁰⁰ Statement of Gary Moore, Director of Washington State Department of Labor & Industries (May 1, 2002), available at <http://www.columbialegal.org/files/MooreReHoffman.pdf>; *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (holding that AWPA applies to all workers irrespective of immigration status), *cert. denied*, 487 U.S. 1235 (1988); *Galaviz-Zamorano v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-02 (W.D. Mich. 2005) (holding that immigration status was not relevant where class sought damages for work performed under AWPA and the Fair Labor Standards Act).

¹⁰¹ *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 146-47 (2002).

ers are not entitled to certain forms of compensation.¹⁰² As a result, employers sometimes succeed in inquiring into plaintiffs' immigration status in the course of lawsuits.

Two large coverage gaps in wage-and-hour protections also affect many indigenous workers. First, agricultural workers are largely exempt from the right to collect overtime pay.¹⁰³ Second, workers who are not "employees" of the people who pay them, but are instead "independent contractors" are not afforded any of the rights described above.¹⁰⁴

3. Workers' Compensation

Washington workers, including agricultural workers, who are injured at work generally have the right to industrial insurance or "workers' compensation,"¹⁰⁵ a program administered by the Washington State Department of Labor & Industries (hereinafter "the Department"). For workers injured on the job, this insurance program pays for necessary medical treatment, a portion of wages lost while the worker recovers, and benefits in cases of permanent disability or death.¹⁰⁶ Compensation is provided regardless of immigration sta-

¹⁰² See *Rivera v. NIBCO*, 364 F.3d 1057, 1065 (9th Cir. 2004). At the same time, the Inter-American Court of Human Rights has said, in the context of a discussion of non-discrimination and the rights of migrant workers with unauthorized status, that "the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment." Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. C.H.R. Advisory Opinion, Report No. 18/03, OEA/Ser.A., doc. 18 (2003).

¹⁰³ WASH. REV. CODE § 49.46.130(2)(g). The federal Fair Labor Standards Act requires overtime for workers who engage in packing agricultural products, provided that the packing facility is not on a farmer's farm or that the farmer processes products from other farms. See 29 U.S.C. §§ 203(f), 213(b)(12); *Mitchell v. Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286, 290 (5th Cir. 1959).

¹⁰⁴ The distinction between employees and independent contractors is poorly defined in Washington law, and the legal analysis is very fact-specific. See definitions of "employee" and "employer" under WASH. REV. CODE § 49.46.010 (Minimum Wage Act); WASH. REV. CODE § 49.12.005 (Industrial Welfare Act); WASH. REV. CODE § 51.07.070 (Industrial Insurance ("workers' compensation")); and WASH. REV. CODE § 49.17.020 (Washington Industrial Safety and Health Act). There is no definition of "independent contractor" in Washington statutory law. However, examples cited by courts as "independent contractors" include brush pickers (workers who gather floral greenery in the forest). *Cascade Floral Products, Inc.*, No. 01-2-00877-7, slip op. (Superior Ct. of Washington State for Mason County, April 25, 2003) available at <http://www.columbialegal.org/files/MasonCyBrushRuling.pdf>. See also discussion of *Mam* workers' employment status, Section VI.1, *infra*.

¹⁰⁵ Title 51 WASH. REV. CODE.

¹⁰⁶ Chapter 51.36 WASH. REV. CODE; WASH. REV. CODE §§ 51.32.090, 51.32.060, 51.32.067. Other benefits such as vocational counseling may also be available. WASH. REV. CODE §§ 52.32.095-.0991. To receive benefits, injured workers generally must apply within one year

tus.¹⁰⁷ However the Department may deny benefits on the grounds that the injured person is an “independent contractor” and not an “employee” of any particular business, among other reasons.¹⁰⁸ As discussed below in the *Mam* case study, this is a particular problem for the *Mam* community, whose work in “brush picking” is often considered “independent contractor” work.

A worker can appeal a decision of the Department by filing an appeal within 60 days of the decision.¹⁰⁹ However, due to their restricted educational opportunities and attendant limited literacy, indigenous workers often have difficulty with appeals and other parts of the claims process.

It is unlawful to discharge or otherwise discriminate against any employee for filing a claim for compensation or exercising any other rights under the workers’ compensation law.¹¹⁰ It is also unlawful for an employer to discourage a worker from making a claim for compensation.¹¹¹ Indigenous workers are nevertheless especially vulnerable to retaliatory behavior because linguistic and cultural barriers often make them unaware of their rights.

4. *Housing Issues*

Most indigenous transnational migrants must rent low-cost shelter when they arrive in the United States. Most people who rent housing are covered by Washington State’s Residential Landlord Tenant Act (hereinafter “RLTA”).¹¹² The RLTA outlines in detail a landlord’s duties to a tenant; including duties to keep the premises structurally sound, weather tight, and in compliance with health and safety codes; and to supply and maintain heat, water, hot water, electrical, and plumbing systems.¹¹³ The RLTA also specifies when and how a tenant can terminate tenancy¹¹⁴ and when a landlord must refund a tenant’s deposit.¹¹⁵ However, these provisions usually require written notice or other documents,¹¹⁶ and indigenous renters often have difficulty deciphering and complying with these requirements.

of injury or within two years of the discovery of an occupational disease WASH. REV. CODE § 51.28.050; WASH. REV. CODE § 51.28.055. The worker’s medical provider is required to facilitate the worker’s claim for compensation. WASH. REV. CODE § 51.28.020.

¹⁰⁷ WASH. REV. CODE § 51.32.010.

¹⁰⁸ See WASH. REV. CODE §§ 51.08.180, 51.08.195.

¹⁰⁹ WASH. REV. CODE § 51.52.060.

¹¹⁰ WASH. REV. CODE § 51.48.025.

¹¹¹ WASH. REV. CODE § 51.28.010.

¹¹² See WASH. REV. CODE § 59.18.040. Seasonal agricultural workers who live in housing in conjunction with their agricultural employment are excluded under WASH. REV. CODE § 59.18.040(6).

¹¹³ WASH. REV. CODE § 59.18.060.

¹¹⁴ See, e.g., WASH. REV. CODE §§ 59.18.200 and .090.

¹¹⁵ WASH. REV. CODE § 59.18.280.

¹¹⁶ See, e.g., WASH. REV. CODE § 59.18.070 (tenant must deliver written notice to landlord

Agricultural workers who receive seasonal housing as part of their employment are not afforded the remedies of the RLTA, but their living conditions are prescribed by federal and state standards for construction, water supply, sewage disposal, bathing facilities, cooking facilities, etc.¹¹⁷ Federal law also makes any violation of Federal and State farmworker housing standards a violation of the Federal Migrant and Seasonal Agricultural Worker Protection Act, the principal federal law protecting farmworkers.¹¹⁸

Both State and Federal law forbid discrimination in the sale or rental of housing based on race, color, and national origin, among other similar protections.¹¹⁹ While landlords cannot lawfully refuse to rent to indigenous families, they often require social security numbers, ostensibly as a means of verifying creditworthiness.¹²⁰ Because most indigenous immigrants in Washington State are unauthorized immigrants and thus lack social security numbers, this requirement is a substantial barrier to obtaining housing.

When indigenous immigrants decide to stay in Washington, many wish to purchase a home. For most agricultural workers, the only financially viable option is a used manufactured home in a manufactured home park.¹²¹ These

before exercising remedies for defective conditions on the premises); WASH. REV. CODE § 59.19.200 (written notice of 20 days required to terminate month-to-month tenancy); WASH. REV. CODE § 59.18.260 (written lease agreement required for landlord to collect deposit).

¹¹⁷ See WASH. ADMIN. CODE §§ 246-358-001 to 175; WASH. ADMIN. CODE §§ 246-361-001 to 165; 29 C.F.R. § 500.321(a)(1); 29 C.F.R. § 190.142. C.F.R. stands for Code of Federal Regulations. It contains the regulations implemented by federal agencies under authority of federal statutes.

¹¹⁸ 29 U.S.C. 1823(b)(1). This provision applies not only to employers and recruiters, but to any person who controls housing for migrant workers. *Howard v. Malcolm*, 629 F.Supp. 952, 954 (E.D.N.C. 1986). However, workers are often reluctant to complain about housing conditions for fear of workplace retaliation or fear that government agencies will close the housing altogether to enforce the standards.

¹¹⁹ See WASH. REV. CODE § 49.60.030; 42 U.S.C. § 3604.

¹²⁰ Though the authors are aware of no such claims to date, a policy of requiring social security numbers may constitute unlawful discrimination under the federal Fair Housing Act ("FHA") because it creates a disparate impact on minority groups. See 42 U.S.C. § 3604 (discrimination based on race or national origin in housing prohibited); 42 U.S.C. § 3604 (most private landlords covered by the FHA); *Oti Kaga, Inc. v. South Dakota Housing Development Authority*, 342 F.3d 871, 883 (8th Cir. 2003) (stating that a facially neutral policy that has a significant impact on a protected minority group may violate the FHA).

¹²¹ A manufactured home park is a community of two or more manufactured homes. WASH. REV. CODE 59.20.030(10). Manufactured homes are relatively inexpensive to build and are designed to be moved, either whole or in a small number of pieces, along public highways. Then they are installed semi-permanently in a manufactured housing "park," where they can be connected to utilities. The parks are owned by a landlord, and often contain up to hundreds of manufactured homes (each owned by individual homeowners) situated within a few feet of each other, with small yards. The homes are commonly known to Latin-American immigrants as "trailas," derived from the English word "trailer;" a nonmotorized vehicle designed to be hauled behind another vehicle.

homes are inexpensively constructed, ostensibly portable, and located on another's land, so the homeowner has no other option but to rent the land beneath her home from a third party. It is rare for these homes to appreciate in value, and they are often costly. Indigenous immigrants must often pay maintenance charges on old homes, a monthly home payment, and a monthly rent payment for the lot on which their home sits.

People in this situation are protected by the Mobile/Manufactured Home Landlord Tenant Act (hereinafter "MHLTA"), which governs the rental of land on which homes are built.¹²² When a homeowner rents the land for the manufactured home, the landowner is in a powerful position. Manufactured homes are very costly to move.¹²³ Some older homes cannot be moved because they are too old to transport on the streets. Consequently, if the homeowner is ordered to move the home, he or she must pay thousands of dollars to dispose of it.¹²⁴ Homeowner-renters enjoy more protections under the MHLTA than renters under the RLTA similar to this act, however, written notices and documents are often required for homeowner-renters to exercise their rights.¹²⁵

To complicate matters, the purchase and sale of manufactured homes is governed by contract law. Manufactured homes are considered chattel rather than real estate, and they can be bought and sold like automobiles.¹²⁶ Because transactions relating to these homes are mostly unregulated, there are many opportunities to take advantage of unwary purchasers. For example, we have seen cases of people selling homes for many times their value, "selling" homes that they did not own, and selling homes that were unfit for human habitation. Indigenous immigrants are easy victims because they usually lack the knowledge to investigate the home's legality and value or are unaccustomed to asking for written purchase and sale contracts, which provide important protections if the deal sours.

5. *Access to Health Care*

A vast majority of adult indigenous immigrants in Washington State lack health insurance, meaning that they have great difficulty paying for medical

¹²² WASH. REV. CODE 59.20.010 *et seq.*

¹²³ In January 2011, a Washington manufactured-home moving company estimated the minimum cost to move a home is \$5,000. That estimate is based on a moveable single-wide manufactured home with no attached structures. If a home is not moveable due to age or disrepair, does not have wheels, has attached structures like a deck or awning, or is larger (double- or triple-wide), moving costs increase.

¹²⁴ If a home is moveable, the transportation charges detailed above apply. Additional charges apply at the point of disposal based on weight. If a home is not moveable, the homeowner must employ an on-site demolisher to demolish the home and then transport it to the disposal site.

¹²⁵ See WASH. REV. CODE § 59.20.090(3) & (4).

¹²⁶ See *United States v. 19.7 Acres of Land*, 103 Wash.2d 296, 301, 692 P.2d 809 (1984); *Clevenger v. Peterson Constr. Co.*, 14 Wash. App. 424, 426, 542 P.2d 470 (1975).

care.¹²⁷ In partnership with the Federal government, Washington State provides medical benefits to certain classes of disabled and low-income adults.¹²⁸ Adults, however, must be citizens or authorized immigrants to receive these benefits.¹²⁹ The state maintains a small group of programs for low-income unauthorized immigrants, known as alien medical programs.¹³⁰ The programs cover only limited treatment for medical emergencies, cancer, and renal failure.¹³¹ Children from low-income families¹³² and low-income pregnant women¹³³ are also eligible for medical benefits regardless of immigration status.

Many indigenous people rely on local hospitals and clinics for care. Federal law requires hospitals to treat all people with emergency medical conditions, regardless of whether they have medical insurance.¹³⁴ State law, in turn, requires hospitals to provide low-income patients with free or reduced-cost care, depending on their income.¹³⁵ Many communities also have reduced-cost medical clinics which provide preventive and non-emergency care.

Most hospitals and community clinics, however, require proof of income before financially assisting patients. Because many indigenous workers earn money in cash,¹³⁶ they face difficulties in completing required paperwork. Though most hospitals and clinics will accept personal declarations of income,¹³⁷ indigenous patients often lack the knowledge and linguistic capacity to inquire into this possibility.

6. *Language Access*

Failure to provide interpreters or other services in a language that allows indigenous persons to access federally funded services may constitute national origin discrimination under Title VI of the federal Civil Rights Act of 1964.¹³⁸

¹²⁷ The United States health care system is largely private, and patients without health insurance must generally pay a fee for each service they receive. These medical services often cost much more in the United States than they do in Mexico. *See* Mines, *supra* note 28, at 80.

¹²⁸ *See* WASH. ADMIN. CODE §§ 388-503-0505, 388-450-0210, 388-478-0080.

¹²⁹ WASH. ADMIN. CODE § 388-503-0505.

¹³⁰ *See* WASH. ADMIN. CODE § 388-438-0110.

¹³¹ WASH. ADMIN. CODE §§ 388-438-0115, 388-438-0120.

¹³² WASH. ADMIN. CODE § 388-505-0210.

¹³³ WASH. ADMIN. CODE § 388-462-0015.

¹³⁴ 42 U.S.C. § 1395dd.

¹³⁵ WASH. REV. CODE § 70.170.060; WASH. ADMIN. CODE §§ 246-453-010 *et. seq.*

¹³⁶ Particularly those working in the brush picking industry.

¹³⁷ Under Washington regulation, hospitals are *required* to accept personal declarations of income. WASH. ADMIN. CODE § 246-453-030(4).

¹³⁸ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that failure to take affirmative steps to address language barriers for minority children who are excluded from effective participation in an educational program violates title VI regulations).

Title VI covers various services, including health care, education, police, and courts.¹³⁹

Title VI, however, does not require interpreters for all federally-funded services. Federal guidance requires that agencies consider four factors in deciding what “reasonable steps” they must take to ensure meaningful access to services for limited English proficient (hereinafter “LEP”) persons: (1) the number or proportion of LEP persons in the service population; (2) how often LEP individuals come into contact with the program; (3) the importance of the benefit, service, information, or encounter to the LEP person; and (4) the resources available to service providers and the costs of providing language services.¹⁴⁰ Because indigenous immigrants are usually a small proportion of the community served by the agency, and qualified indigenous interpreters are hard to find, agencies may assert that they are not required to provide interpreters.

Lack of language access can also affect indigenous immigrants’ access to quality health care. Many indigenous people find themselves struggling to communicate in Spanish with medical providers, while others make do with family members —sometimes young children—¹⁴¹ for interpretation of difficult medical concepts.

Washington State law specifically requires that courts appoint certified or qualified interpreters to LEP persons in legal proceedings.¹⁴² The government must pay for the interpreter in both criminal and civil proceedings in which the LEP individual is indigent.¹⁴³ Courts must have a “language assistance plan” that includes procedures for appointing interpreters and notifying court users of the right to an interpreter.¹⁴⁴

Under Washington State law, school districts must provide “transitional bilingual education” to LEP students.¹⁴⁵ This includes assistance in the student’s primary language “where practicable,” and may include instruction in Eng-

¹³⁹ See Department of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455- 41472 (June 18, 2002); United States Department of Health & Human Services, Office of Civil Rights *available at* <http://www.hhs.gov/ocr/civil-rights/resources/laws/reviseblep.html>.

¹⁴⁰ U.S. Department of Justice Guidance, 67 Fed. Reg. 41455, 41459 (June 18, 2002).

¹⁴¹ Even English-speaking children are not qualified interpreters for medical concepts, and they may be even less effective than expected because they do not share a native language with their parents. Some indigenous parents do not speak indigenous languages to their children (based on the figures cited herein, it would appear that most do not), and many of those children speak English as a first language. Spanish, the language these children use to interpret, is often a second language for all parties involved. MINES, *supra* note 28, at 43.

¹⁴² WASH. REV. CODE § 2.43.030 (state-certified interpreters must be appointed absent good cause, *e.g.*, lack of certified individuals).

¹⁴³ WASH. REV. CODE § 2.43.040.

¹⁴⁴ WASH. REV. CODE § 2.43.090.

¹⁴⁵ WASH. REV. CODE § 28A.180.040.

lish as a second language (hereinafter “ESL”).¹⁴⁶ Districts must also provide “appropriately bilingual” communication to parents of LEP students when feasible.¹⁴⁷ Similarly, federal law prohibits schools from failing to take appropriate action to overcome language barriers that impede equal participation in instructional programs.¹⁴⁸ While ESL instruction should be widely available, the lack of teachers and instructional assistants who speak indigenous languages is a barrier to instruction in indigenous languages.

VI. CASE STUDIES

The foregoing discussion of common barriers and legal problems faced by indigenous immigrant workers in Washington is based on knowledge gathered during years of working with members of these indigenous communities. While it is possible to analyze each barrier and legal problem discretely and in the abstract, in reality these obstacles occur simultaneously and influence one another. The true stories that follow of indigenous immigrants in Washington present a more accurate picture of the difficulties many face. We begin with a tragic Van accident in 2004 that resulted in the deaths of five *Mam* workers from Todos Santos, Guatemala.

1. Case Study: 2004 Van Accident Resulting in the Deaths of Five Mam Workers

Early in the morning on March 27, 2004, there was a head-on collision involving a vanload of eleven immigrant *Mam* workers from Todos Santos, then living in Shelton, Washington, who were going to pick brush in Lewis County. Five of the workers died and three more suffered life-threatening injuries, including one who was hospitalized for nearly a year and experienced permanent cognitive damage.¹⁴⁹ On December 19, 2005, two more *Mam* workers were killed in a similar van accident near Morton, Washington.¹⁵⁰ They were the sixth and seventh workers from Todos Santos to die in van accidents in Washington in less than two years. Hundreds turned out to grieve their deaths when their bodies were returned to Todos Santos.¹⁵¹

¹⁴⁶ WASH. REV. CODE §§ 28A.180.030 & .040.

¹⁴⁷ WASH. REV. CODE § 28A.180.040(1)(b).

¹⁴⁸ Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f).

¹⁴⁹ Jane Hodges & Tan Vinh, *8 Killed, 4 Critically Hurt in 2 Highway Crashes*, SEATTLE TIMES, Mar. 28, 2004.

¹⁵⁰ WASHINGTON DEP’T OF LABOR & INDUS., FATAL HAZARD – TRANSPORTING BRUSH PICKERS IN UNSAFE VEHICLES, Aug. 2005, available at <http://www.lni.wa.gov/WISHA/hazalerts/Brushpicker.pdf>.

¹⁵¹ Tom Knudson & Hector Amezcua, *The Pineros: Village Weeps for Lost Sons*, THE SACRAMENTO BEE, Jan. 29, 2006.

A. *Overcoming Fears and Suspicions and Developing Trust*

The first challenge in representing the injured *Mam* workers and survivors of the workers who died in this accident was to overcome their fear of authorities and suspicion of outsiders. This required a number of meetings with the *Mam* workers and family members using bilingual *Mam*-Spanish interpreters, as well as a trip to Todos Santos to meet with family members. Because the need for legal representation was so great, the *Mam* overcame their general desire to remain invisible and agreed to work with lawyers to bring claims on their behalf.¹⁵²

B. *Fitting Claims within Workers' Compensation Framework*

The next challenge was to frame the claims of the *Mam* workers and their families in a way that fit within the framework of Washington workers' compensation law. As noted in the legal summary, Washington workers' compensation law covers Washington employees who are injured at work. In order for a Washington worker to be covered by the workers' compensation law, however, the worker must be an "employee," as opposed to an "independent contractor."¹⁵³ Thus, in order to assert claims for workers' compensation arising from the van accident, the *Mam* workers had to be *employees* working for an identifiable *employer* at the time of the accident.

The brush sheds have consistently argued that the *Mam* workers are independent contractors, not employees, and, therefore, brush sheds are not required to comply with workers' compensation laws, pay minimum wage, or comply with worker safety laws. However, information gathered from brush pickers indicates that in many cases, the true economic relationship between them and the brush sheds is an employee-employer relationship. In most cases, the workers pick the brush that the brush sheds specify, in locations the brush sheds direct, using permits obtained from the brush sheds, and the workers return at the end of each day to sell the brush they have picked to the same brush sheds that provided the permits.

The Department of Labor and Industries conducted audits confirming these facts and found that "[m]any of the audits have shown that the brush pickers are employees of the packing sheds."¹⁵⁴ To our knowledge, however, the Department has never issued citations or taken any other punitive action

¹⁵² In other matters involving legal issues such as housing issues, where the *Mam* workers and family members may feel there is less at stake, workers have been more reluctant to organize and assert their rights.

¹⁵³ See Parts V.A and V.B. herein.

¹⁵⁴ WASHINGTON DEP'T OF LABOR & INDUS., PROTECTING WORKERS AND PROMOTING FAIR BUSINESS PRACTICES IN THE SPECIALTY FOREST-PRODUCTS INDUSTRY, Aug. 2005, available at <http://www.columbialegal.org/files/ProtectingWorkersSpecialtyForestProductsIndustry.pdf>.

against the brush sheds for violating worker safety or workers' compensation laws. Nor, to date, has a Washington court been presented with these facts establishing the economic reality that brush workers in Washington are employees of the brush sheds or that they are entitled to the legal protections afforded to employees.

Under existing legal standards and the limited facts in that case, it might have been difficult to hold any one of the brush sheds responsible as the employer for workers' compensation purposes.¹⁵⁵ Thus, in an effort to ensure that the injured *Mam* workers and the surviving family members of those who died received workers' compensation benefits, it was necessary to argue that the driver and owner of the van (who died in the accident and was also a *Mam* worker from Todos Santos) was the employer and that the passengers in the van were his employees. This was supported by a notebook found in the van after the accident showing that each of the other *Mam* workers paid the driver a fraction of what they received from the brush sheds (as well as gas money).¹⁵⁶ Although the driver/employer had never paid workers' compensation insurance premiums, the passengers were covered under a state fund for employees whose employers fail to pay the required premiums. Treating the driver as the employer and the passengers as his employees did not require the brush sheds to accept responsibility as the workers' employers, but was a viable way under the unusual facts of that case to convince the Department to accept the workers' and their families' claims.

C. *Establishing Workers' Earnings from Brush Picking Work*

The next challenge was to demonstrate the earnings of the *Mam* workers from their brush picking work. The Department was willing, in principle, to compensate the *Mam* workers and their families for the wages lost as a result

¹⁵⁵ In 2003, the major brush sheds in Washington brought a lawsuit in Mason County Superior Court in Shelton and obtained a ruling stating that a brush shed will not be liable as an employer when it meets five conditions. According to the court's ruling, a brush shed is not liable when it (1) sells a permit to a brush picker, (2) does not require the brush picker to sell the product back to the company, (3) does not direct or control the work of the brush picker, (4) is not in the brush picking business, but rather is in the brush buying and brush packing business, and (5) requires that brush pickers be solely responsible for their own taxes and for complying with all other business regulations. WASHINGTON DEP'T OF LABOR & INDUS., HARVESTING WASHINGTON'S BRUSH: MONITORING COMPLIANCE WITH LABOR LAWS IN THE FLORAL GREENS INDUSTRY, July 2005, available at <http://www.columbialegal.org/files/HarvestingWashingtonBrush.pdf>.

¹⁵⁶ Under Washington workers' compensation law, an employment relationship exists when the employer has a right to control the worker's conduct in the performance of his or her duties and there is consent by the worker to an employment relationship. See, e.g., *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wash.2d 550, 588 P.2d 1174 (1979). In the van accident case, the Department accepted the evidence that the driver deducted a portion of the workers' earnings as sufficient to demonstrate an employment relationship.

of the deaths and injuries caused by the accident, but it required evidence of the amount of the lost wages. Because these *Mam* workers labor in a hidden, “black market” economy, it could have been extremely difficult to quantify these lost earnings. The brush sheds do not keep permanent records of the amounts they pay to individual workers, and the workers themselves often have limited records of their earnings.

Fortunately, during the course of its investigation, the Department interviewed numerous *Mam* workers in the brush picking industry, and gathered information regarding the workers’ daily, weekly, and monthly earnings. Using that information, a vocational expert determined that the *Mam* workers earned an average of \$55 for eight to nine hours of work per day, or \$6.11 to \$6.88 per hour, well below the Washington minimum wage.¹⁵⁷ This created a dilemma for the Department, because it did not want to pay workers’ compensation benefits above the workers’ actual earnings, but it also did not want to pay benefits based on earnings below the minimum wage. As a result, the Department agreed to pay compensation to the *Mam* workers and their families based on the Washington minimum wage, but only on a four-fifths (4/5) time basis — even though, in fact, the *Mam* workers regularly worked six or seven days a week.

D. *Seeking Spousal Benefits Based on Customary Marriages*

The last major legal effort was to obtain spousal survivor’s benefits for the *Mam* women whose partners died in the van accident, based on their Maya customary marriages. The couples were never legally married in church or in civil ceremonies, but had lived together for many years, committed their lives to each other, raised and cared for their children together, and held themselves out to the community in Todos Santos as married couples. As such, they met all the requirements for a customary marriage under Guatemala’s *unión de hecho* law.¹⁵⁸

The Department agreed that Guatemalan law was the relevant law for determining whether the surviving spouses, all of whom were women, had been married to the *Mam* workers who died and qualified for spousal survivor benefits. The Department also found that the *Mam* women met all the requirements for demonstrating a customary marriage under Guatemalan law. Unfortunately, despite these findings, the Department concluded that the *Mam* women were not entitled to spousal benefits because they and their *Mam*

¹⁵⁷ Owings Report, *supra* note 25.

¹⁵⁸ A marriage under the *unión de hecho* law is similar to a common law marriage as recognized in many states in the U.S. Under both forms of customary marriage, two people are accorded the same legal treatment as formally married couples if they live together for a significant period of time, hold themselves out to the world as a married couple, and intend to be married.

husbands had not met a technical requirement under Guatemala's *unión de hecho* law requiring that a couple present themselves to a lower court in Guatemala to obtain a legal order. Compliance was impossible because the husbands had died in the van accident. As a result, the children of the deceased *Mam* workers are receiving monthly survivor's payments (and will receive the payments until they each turn 18), but the wives did not receive additional spousal benefits.

E. Lessons from the Van Accident Case Involving Mam Workers

This case provides a window into the difficult lives and dangerous work of the hundreds of *Mam* workers who have migrated to Washington from Todos Santos. As the successful representation of the *Mam* workers in this case illustrates, when circumstances are sufficiently extreme and the need for legal representation compelling, it is possible to overcome language barriers, suspicion of outsiders, distrust of authority, fear of deportation, as well as every other barrier that often prevents the effective representation of indigenous workers.

At this time, the biggest challenge for *Mam* workers and their advocates in dealing with the brush industry is to find some way to hold the brush sheds responsible for providing basic worker protections and fairer pay to these workers, on whom the entire brush industry depends. Currently, *Mam* workers are often considered, rightly or wrongly, to be unprotected under Washington minimum wage or worker safety laws, and may only obtain workers' compensation, if at all, by characterizing their co-workers—usually other *Mam* workers from Todos Santos—as their employers. The brush sheds' businesses have been structured to make these *Mam* brush picking workers appear to be independent contractors, even though the economic reality is that the workers are working as employees for the brush sheds.¹⁵⁹

At the same time, it is unclear whether a majority of *Mam* workers would prefer to be employees rather than independent contractors. As employees, for example, they would be entitled to workers' compensation, minimum wage, and protection under the worker safety laws that cover other Washington employees. On the other hand, as employees, they would also have to provide work authorization permits to the brush sheds in order to work in the U.S., something few of them have.

Generally speaking, workers' compensation cases on behalf of *Mam* workers and their families provide hope. As a result of these cases, eight *Mam* children from Todos Santos whose fathers died in the van accident now receive monthly checks from the Department, and they will continue receiving these

¹⁵⁹ See 29 C.F.R. §500.20, defining "employment" under the Agricultural Worker Protection Act under the economic reality relationship test, including the degree of the putative employer's control over the work performed, and the extent to which the services rendered is an integral part of the putative employer's business.

payments until they each reach the age of 18 (or 21 if they remain in school). In the case of the *Mam* worker who nearly died and spent almost a year in the hospital, the Department has paid well over \$1 million for his medical care, which saved his life; and it will pay him a monthly pension for the rest of his life for the permanent injuries he suffered. As a result of our work on these cases and our continuing outreach to the community, we have developed an increasing level of trust with the *Mam* community in Washington which should help in future advocacy on their behalf on issues relating to housing rights, healthcare access, language assistance, and the like.

2. *Case Study: Mixteco Workers Living in Mobile Home Park in Othello, Washington*

In 2008, Columbia Legal Services opened an office in central Washington and conducted targeted outreach to Othello, a community with approximately 800 *Mixteco* *Alto* speakers. Shortly thereafter, the office began hearing about problems in the Othello Fields Mobile Home Park.¹⁶⁰ Many of the homeowners who rent spaces in Othello Fields are *Mixtecos*. In fact, the trend in Othello among *Mixtecos* is to arrive and immediately begin renting small, run-down apartments in several locations. When they have decided to purchase a mobile home, many *Mixtecos* prefer to live in Othello Fields because many from their community already live there. In spite of familiar neighbors, however, Othello Fields is not an easy place to live. Absentee owners have delegated park management authority to two managers who are often unavailable, unhelpful, and abusive to park residents.

A. *Clash with Authority: Illegal Additions to Mobile Homes*

The first case Columbia took from the Othello Fields Mobile Home Park involved two cousin homeowners who wanted to improve their homes. Both were in the process of building larger entryways, and one was building an additional room off the entryway. Both cousins had invested substantial money in improvements, and their families had put in many hours of labor.

Unfortunately, the cousins were not familiar with state and county regulations regarding manufactured homes. One day the county inspector notified the cousins that the structures were illegal and needed to be removed. The cousins, however, were illiterate and mistakenly believed the notification tag placed on their property was the county's "seal of approval." They continued the projects until receiving an eviction notice for unauthorized construction. Eviction from a manufactured home park can be very costly for homeowners, who must either sell their home or move it to another location (assuming this can be found). Illegal additions had the added impact of invalidating the sale

¹⁶⁰ The name of the mobile home park has been changed to protect the residents.

until the cousins were able to comply with government regulations. In short, the cousins were in a difficult situation.

At the cousins' request, Columbia intervened and established communications with the park. After extensive negotiations, the latter agreed not to evict the tenants provided they comply with numerous conditions. Columbia brought in a county and state inspector to look at the homes and advise the cousins how to proceed. A *Mixteco Alto* interpreter was hired to facilitate communication. The effort to stop the eviction was painful; the cousins and their families had to face the grim fact that much time and money had been wasted. In addition, they had to invest even more time and money to tear down the construction and dispose of the materials. The county and state inspectors discovered that the roof of one home had been illegally modified by the prior owner and informed a cousin that she could not move or sell her home until the roof had been entirely rebuilt in accordance with the building code—a project well beyond her family's means. In addition, the inspector informed her that it was unsafe for anyone to live in the home since the roof could collapse at any time.

B. *A Question of Responsibility to Maintain Utilities*

Another case involved park infrastructure. In a manufactured home park, each homeowner must provide maintenance up to the point where their homes connect to the park's utilities, *e.g.*, water and electricity.¹⁶¹ The park's duty, on the other hand, is to maintain the equipment that provides utilities to the homeowners up to the point of connection to the owners' homes. For instance, the park must maintain common water pipes up to the points where the common system connects to the individual homes.

In this case, a homeowner's electricity stopped working in the dead of winter, when the temperature in eastern Washington often drops well below freezing. With difficulty due to limited Spanish, the homeowner repeatedly asked the managers (one of whom speaks Spanish) to fix the problem, but they insisted that since it was affecting his house, it was his responsibility. Finally, the homeowner retained a company to diagnose the situation. The company discovered that the park's electrical hookup, a large, metal box on an electrical pole, had burned out and needed to be replaced. They charged the homeowner \$150 for the diagnosis and a temporary repair, and then another \$1,200 to replace the electrical box. The homeowner paid the company with most of his savings that was set aside to get his family through the winter, which is when most agricultural workers are unemployed.

The homeowner then took the invoices to the managers and asked, in basic Spanish, for them to pay him back for the repair. The managers repeatedly refused the request. The homeowner could not understand their refusal

¹⁶¹ WASH. REV. CODE § 59.20.130(6).

and finally sought help from Columbia, which helped him understand how to represent himself in small claims court.

The client presented his case in small claims court through two interpreters: one who interpreted from *Mixteco Alto* to Spanish and another who interpreted from Spanish to English. The park managers defended their positions by arguing they had merely asked the homeowner, on several occasions, to provide verification that the repair was being done to park property. They said the homeowner had never done so and, for this reason, could not reimburse him. The judge quickly determined that the repair was related to park property and ordered the park to pay. After his day in court, the homeowner was elated; the judge had been fair, and he had won.

C. *Easy Money*

In this final example, the homeowner was late in paying his lot rent around the end of 2008. By contract, this made him liable to the park for a \$45 late fee once the rent was six or more days late. However, the homeowner did not realize he owed a fee and the park managers never informed him of the fact. As a result, every month thereafter, the homeowner's rent was considered late because of the unpaid late fees and, although he paid his rent on time, another \$45 each month owed was added to his account. Finally, by August 2010, late fees owed exceeded \$900, which triggered an eviction notice. This notice was the first the homeowner heard of the debt, and he was shocked and dismayed because \$900 is a fortune to his family.

After extensive negotiations, Columbia helped the homeowner reach an agreement with the park's attorney. The homeowner agreed to punctually pay half the debt along with his next month's rent. In exchange, the park agreed to stop eviction proceedings and erase the homeowner's balance. The homeowner faced an unethical business practice—this was not a procedural mistake by the landlord but rather a deceptive withholding of information—that was very difficult to prove as a legal violation.¹⁶² *Mixtecos* and other indigent immigrants are particularly vulnerable to this type of abuse because most cannot read their rental contracts, often do not understand the agreements they sign, and have few trusted resources outside of their communities. The basic reason for this is extreme pressures on this isolated community.

¹⁶² Other homeowners in parks with the same ownership have complained that the managers sometimes pick up rental payments late and mark them late (triggering late fees), though the payments were placed in the drop-box by the due date. In this case, the late payment occurred so long ago that the homeowner had no memory of when the rent had been paid. If the practice of late-pickups is an unfair or deceptive pattern of conduct affecting other renters, it may represent a violation of the Washington Consumer Protection Act, WASH. REV. CODE §§ 19.86 *et. seq.* See, e.g., *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531 (1986).

Mixtecos face discrimination from those outside of their communities, predatory practices by those who make a living by taking advantage of poor people, and live in fear because of immigration laws. Many *Mixtecos* prefer to bow their heads and take abuse as the cost of providing a better future for their children.

D. *Lessons from Working with Mixteco Manufactured Home Owners*

The dream of having one's own home is common to many *Mixtecos* in Central Washington. Although advocates see potential problems that can follow from buying a used manufactured home in a park, the solution is not to discourage *Mixtecos* from purchasing these homes. In fact, manufactured housing communities are important sources of low-income housing and, when they are well-managed, can have a positive impact on residents and on the area in which they are located.

Because people will not stop buying used manufactured homes, education is key to preventing or minimizing many problems. For instance, homeowners need to know that receipts for each monthly rent payment serve as proof that rent was paid on time. By conducting a basic investigation of manufactured homes, potential purchasers can prevent a range of common problems including whether the seller actually holds title to the home, whether the purchase price represents fair value, and whether any modifications made to the home were legal.

Community education for *Mixtecos* in central Washington is particularly challenging because of cultural isolation, language barriers, and generally low levels of education. Advocates recognized that the community's trust was essential, and therefore requested an introduction from a local organization. To ensure relevance, advocates first asked *Mixtecos* what information they could provide, then used interactive teaching techniques based on popular education theory which assumes that all people have knowledge based on their life experiences and drawing on those experiences is the best way to educate effectively. Because advocates were aware that few *Mixtecos* could read, they provided handouts with plentiful illustrations.

To maintain contact after the initial presentations, Columbia hired a full-time *Mixteco* community worker to build and maintain connections between advocates and the *Mixteco* community. The community worker produced a compact disc in *Mixteco* with illustrations and advice on five common problems faced by *Mixtecos* in Washington. The compact disc has been distributed across Washington and has helped *Mixteco* workers find statewide assistance.

Even with the best educational outreach program, problems are bound to arise. To send a strong message to Washington's *Mixtecos* that Columbia is a trustworthy organization, Columbia's office in the heart of central Washington prioritized cases that involve *Mixtecos*. After helping a few clients with

legal problems, word began to spread and, as a result, *Mixtecos* now refer family and friends to Columbia. As a result of this combination of targeted outreach, communication, and advocacy, Columbia has begun to build trust within the *Mixteco* community. Now that Columbia has represented various homeowners in Othello Fields, more homeowners think of Columbia when they have housing problems. We are optimistic that by increasing homeowners' knowledge and challenging park management when problems arise, the quality of life for all families living in the park will improve. As advocates continue to strengthen their ties to the community, trust, communication, and interaction will increase and should help *Mixtecos* enjoy the benefits of rights that belong to them under Washington State law.

VII. LESSONS LEARNED AND THE WAY FORWARD

Years of experience working directly with immigrant workers, and more recent work with Washington State's growing indigenous immigrant communities, have taught us many lessons about the effective legal representation of transnational migrants. Primary among these have been that workers are most likely to assert their legal rights when they find trusted advocates and community organizations to help them. While all immigrants face cultural, geographic and linguistic isolation, indigenous workers face a deeper level of isolation and discrimination. The traditional means of community support, such as unions, community interaction, church, neighborhood groups and bilingual media simply don't exist in most communities in which indigenous workers find work. Spanish-speaking advocates and co-nationals who cannot communicate directly with workers in their own language are hampered in their attempts to render assistance.

Workers are more likely to seek help when they have overcome isolation. For many, this means seeking the support of their community both in the United States and their place of origin. Important aspects of that support include access to advocates who understand their unique language and culture. Finding community members who understand their legal problems and work to protect their rights is also integral to that support. While the U.S. legal system has jurisdiction over these workers' legal problems, only their home communities in Mexico can provide adequate moral support.

Properly addressing legal issues fundamental to indigenous immigrants requires cross-border collaborations and building upon existing resources in both countries. Opportunities for collaboration exist at several levels. In this section, we outline three potential opportunities presented from the general to the more specific, and offered here as initial thoughts gleaned from our experiences and those of indigenous community leaders in Washington State. We present these with the caveat that while we have a fairly clear understanding of the resources that exist in Washington State as well as fair knowledge

of existing resources within the U.S., our knowledge of what is available in Mexico and Guatemala is far outweighed by what we do not know. We welcome additional ideas for collaborative projects, as well as criticism and further development of these ideas.

1. *Create a Washington State Pilot Project to Develop a Pro Bono Practice within Mexico and Guatemala*

Along with its rich tradition of publicly and privately funded legal services programs, law schools active in community projects, as well as progressive trade unions, Washington State has traditionally had a deep commitment to lawyer volunteerism. This is due in large part to the commitment made by the association of attorneys, the Washington State Bar Association.

In Washington State, all lawyers must belong to the state Bar Association.¹⁶³ The Bar Association administers the statewide test that admits lawyers to practice, and oversees yearly licensing and disciplinary processes that can result in the loss of attorneys' license to practice law. The Washington State Supreme Court sets rules that lawyers must follow in order to continue in their profession. One of the state rules governs *pro bono* practice, and states: "Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay. A lawyer should aspire to render at least thirty (30) hours of *pro bono público* service per year."¹⁶⁴

Generally, *pro bono* work means legal work that is provided without charge or at a reduced charge to individuals or religious, charitable, community, educational, or other groups. For many low income people, including indigenous immigrant workers, their only opportunity to access legal representation is through a *pro bono* attorney.

At its highest levels, the Washington Bar Association encourages and celebrates *pro bono* service. The Bar Association has a separate committee dedicated to increasing *pro bono* service by issuing yearly awards for such service, supporting a county-by-county *pro bono* recruitment network, and publicizing *pro bono* opportunities to its members.¹⁶⁵ Some larger law firms hire coordinators who recruit lawyers from within the firm to do volunteer *pro bono* work.¹⁶⁶

¹⁶³ At both the state and federal level, many voluntary associations of lawyers exist, such as the American Bar Association and the National Lawyers' Guild. Smaller voluntary affinity groups also proliferate, such as associations of labor lawyers, immigration lawyers, and the like.

¹⁶⁴ Washington State Rules of Prof'l Conduct 6, available at http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&groupName=ga&setName=RPC&pdf=1.

¹⁶⁵ See Washington State Bar Association, available at <http://www.wsba.org/Legal-Community/Volunteer-Opportunities/Public-Service-Opportunities/Pro-Bono-Opportunities>; Pro Bono Opportunities Guide, available at <http://www.advocateresourcecenter.org/oppsguide/>.

¹⁶⁶ Recent important *pro bono* legal work on behalf of indigenous workers in Washington includes the successful *pro bono* representation of a Mam woman from Todos Santos who sought

It is our understanding that such a formal *pro bono* system does not exist in Mexico or Guatemala, although lawyers in these countries certainly volunteer in their communities, and some *pro bono* services to the poor are offered through law schools as well as through Non-Governmental Organizations (“NGOs”) with lawyers on staff. A collaborative project between Washington State and Mexico lawyers and law schools—and, as the project develops, their counterparts in Guatemala— could establish a more formal system of *pro bono* service. That, in turn, could increase our mutual understanding of each country’s legal system and increase resources available to indigenous and other migrant workers when they return home.

One step towards a pilot project of this nature was a 2011 *pro bono* conference sponsored in 2011 by the University of Washington. The conference included deans and faculty of UNAM and the Universidad Michoacán del Oriente in Mexico.

2. Build a Cadre of Lawyers and Community Organizers that Can More Effectively Represent Indigenous Workers

A clinical or other law-school based program could train lawyers who have ties to indigenous communities transnationally, are knowledgeable about law and practice transnationally, and who could work together, in conjunction with community groups, to enforce indigenous workers’ rights within the United States. A law school class or clinic could focus on one particular subject—immigration, labor rights, rights of those who do not speak the dominant language, or rights of indigenous people—with sessions including international law, national law, local law, and law that arises from the customs and usages of indigenous people. Bilingual students could study for a portion of their time in Mexican or Guatemalan law schools and a portion of their time in Washington State law schools. For part of the coursework, students could spend some time in the home communities of indigenous people and the U.S. communities where indigenous people settle, working with community leaders and helping to identify legal problems for indigenous migrants and potential solutions to these problems.

The three law schools in Washington State (Seattle University, the University of Washington, and Gonzaga University) could help develop this project. Each has a vibrant clinical program. Seattle University is linked to the Jesuit university system in Mexico, and the University of Washington has signed an agreement with the National Autonomous University of Mexico (UNAM) to promote an exchange of students and legal education. UNAM

and was granted withholding of deportation by the United States Immigration Court in Seattle in April 2011 based on past gender-based violence, her well-founded fear of future gender-based violence if she returned to Guatemala, and the documented failure of Guatemalan authorities to protect rural Mayan women from gender-based violence.

operates an extensive practice project for third-year law students, its *bufetes jurídicos gratuitos*, that include labor law in their portfolio. Columbia Legal Services in Washington State, a not-for-profit law firm, has a long tradition of community-based lawyering, and has spearheaded an indigenous worker legal project. Ties are beginning to develop between Washington legal services, Washington community leaders, and NGOs that operate in communities in Oaxaca from which migrant workers come. These NGOs include the Frente Indígena de Organizaciones Binacionales (“FIOB”), the Global Workers Justice Alliance Defenders Network, and the Centro de los Derechos del Migrante, all of which work within Oaxacan communities to provide support to indigenous migrant workers.¹⁶⁷ The project could also help to identify bi- or tri-lingual community members who could work with communities in Washington State.

3. *Increasing Access to Workers’ Compensation for Indigenous Transnational Workers*

As noted earlier in this article, employees injured on the job in Washington are entitled to paid medical care and compensation in the event of lost wages, disability, or death. But many workers do not even file compensation claims because they are unaware of their rights. Apart from the dangers of retaliation, lack of knowledge of their rights, and language barriers, they face practical challenges to cross-border access to compensation. For many workers in agriculture and brush harvesting, including indigenous workers, who return to their homes as their base of care and support, workers’ compensation benefits simply end. State agencies are ill-equipped to pay compensation across borders. Access to prescription drugs out of the U.S., and the billing process for these, is problematic. Even more daunting is finding a surgeon, specialist, physical therapist, or other medical provider located near the worker in Mexico or Guatemala who is willing and able to bill a U.S. state agency for their services.

A pilot project could match medical services in the United States with medical services in Mexico or Guatemala and coordinate worker’s compensation billing and payment mechanisms in the United States with those in Mexico or Guatemala. Such a project could explore systems for accomplishing smooth handling of worker’s compensation claims across borders. The Washington State Department of Labor & Industries, which administers the state program, is amenable to processing the claims transnationally. The Secretariat of Foreign Affairs with its consulates, the Secretariat of Health, the National Commission on Human Rights, or other public or private institutions within Mexico might be conduits for identifying and training physicians to handle claims. Ongoing efforts to identify secure means of transferring

¹⁶⁷ See www.fiob.org; www.globalworkers.org; www.cdmigrante.org.

money to rural areas of Mexico and Guatemala could be applied in order to ease payments to workers and their providers.

This project would take advantage of already existing public and private legal resources identified in the U.S. —law schools, NGOs, and public agencies charged with protecting workers. It could be scaled up to other areas both in the U.S. and elsewhere, especially the six states where most foreign worker fatalities occur (California, New York, Florida, Texas, Illinois, and New Jersey).¹⁶⁸ For Mexico, it could explore linkages within the U.S. with other legal services providers, medical service providers, unions, and community groups that have a presence in these states and in Mexico, such as the National Alliance of Latin American and Caribbean Communities, and Enlace International. Migration and human-rights-focused NGOs such as the Scalabrini Casas del Migrante, the Pastoral de Movilidad Humana, and projects in Mexico of the Appleseed Foundation might also be of help. Linkages between the two countries could help establish ties to other human rights, legal, or health-focused organizations.

With nearly 10,000 indigenous Mexican and Guatemalan workers in Washington State coupled with a high rate of workplace accidents given the dangerous work in which they are involved, cross-border access to workers' compensation is an important goal. Since employers pay into the workers' compensation system for the benefit of workers, and since rates depend on their safety record, ensuring access to compensation for transnational workers can promote workplace safety within the U.S.

VIII. CONCLUSION

Indigenous migrants to Washington State face a variety of legal difficulties that intersect in complex ways and are often compounded by social and cultural barriers. Despite these barriers, however, transnational indigenous migrants from Guatemala and Mexico contribute socially and economically to the state and create increasingly settled communities. In order to effectively serve these indigenous communities, social, legal, and medical services providers must collaborate with these communities, each other, and cross-border colleagues. With greater cooperation, patience, and persistence, the lives of indigenous peoples can be improved —regardless of where they live.

¹⁶⁸ Katherine Loh & Scott Richardson, *Foreign-Born Workers: Trends in Fatal Occupational Injuries 1996-2001*, MONTHLY LABOR REVIEW 41-44 (2004).

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