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Undocumented Workers: Preserving Rights and Remedies after *Hoffman Plastic Compounds v. NLRB*

Co-authored by Rebecca Smith and Amy Sugimori of the National Employment Law Project (NELP), and Ana Avendaño & Marielena Hincapié of the National Immigration Law Center (NILC)

The U.S. Supreme Court's recent decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002), that undocumented workers are not entitled to back pay awards if they are illegally fired from their jobs in retaliation for union activities, has had a devastating effect in immigrant communities nationwide. Moreover, it has emboldened employers to argue in a variety of contexts that immigrant workers simply have NO employment rights in the United States. If employers succeed in such arguments, we will have created a two-tier legal system in the United States, where employers can seek out, hire, exploit, and then fire, all with impunity, any undocumented worker who dares to assert his or her rights. This will do harm to workers themselves, to law-abiding employers, to enforcement of immigration laws, and to a society that prides itself on the principle of equality.

The following gives background information on the number and industry distribution of undocumented workers in the U.S. economy, the perverse incentive system that has been created by the employer sanctions provisions of the immigration law, and the developing law both *pre-* and *post-Hoffman*, as well as ideas for advocacy in individual cases.

I. Background: Undocumented Workers in the U.S. – A Large Part of Low-Wage, High-Risk Employment in the United States of America.

The Pew Hispanic Center estimates the numbers of undocumented immigrants in the workforce, placing the undocumented urban labor force at 5.3 million¹ and the undocumented agricultural labor force at 1.2

¹ B. Lindsay Lowell and Roberto Suro, *How many undocumented: The numbers behind the U.S.—Mexico Migration Talks*, available at < <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf> > [hereinafter PEW HISPANIC CENTER STUDY] at 7.

million.² The number of undocumented immigrants in the United States is estimated at roughly double the entire undocumented population of Europe.³

About 4.7 million of the total U.S. undocumented population of between eight and nine million people of all ages, or 55 %, come from Mexico. About 1.9 million come from other nations in Latin America, and 1.1 million come from Asia. A few hundred thousand undocumented immigrants come from Europe, Canada, and Africa.⁴

Undocumented workers in the United States work in a variety of low wage, high risk occupations. The manufacturing sector employs 1.2 million undocumented workers. The services sector employs 1.3 million undocumented workers. One million to 1.4 million undocumented workers labor in the fields. Six hundred thousand more work in construction and 700,000 work in restaurants.⁵

Many of the industries that are major employers of the undocumented are also known for low wages, dangerous conditions, and frequent violations of labor laws. A U.S. Department of Labor (DOL) survey found that in 2000, 100% of all poultry processing plants were non-compliant with federal wage and hour laws.⁶ A separate DOL survey found that in 1996, half of all garment-manufacturing businesses in New York City could be characterized as sweatshops, and a DOL survey in agriculture focused on cucumbers, lettuce, and onions revealed that compliance in these commodities was unacceptably low.⁷

Injuries and deaths of Latino workers engaged in hazardous employment are extremely high and increasing. The *Washington Post* reports that a study soon to be released by the National Academy of Sciences will find that foreign-born Latino men are now nearly 2 ½ times more likely to be killed on the job than the average U.S. worker.⁸ In the year 2000, construction fatalities involving Latino workers increased by 24%, while Latino employment was up only six percent.⁹

Thus, it is no secret that many U.S. employers are hiring undocumented workers and profiting from their labor. Both because of overt exclusions from the protection of domestic labor laws, and because of the practical and legal effects of the United States Supreme Court's recent decision in *Hoffman Plastic Compounds v. NLRB*, the task of enforcing workers' rights has become increasingly more difficult. The *Hoffman* decision has contributed to a general climate of fear among immigrant workers in the United States and a general reluctance, and often, inability, to enforce existing rights.

² *Id.* at 8.

³ Peter Stalker, *Types of Migrant*, available at < http://www.pstalker.com/migration/mg_types.htm#> . The few available estimates of the undocumented immigrant population in Canada are extremely unreliable, because of the Canadian's government's refusal to fund such research, but one 1995 report estimated "at least about 200,000." J. Samuel, *Temporary and Permanent Labour Immigration into Canada: Selected Aspects, The jobs and effects of migrant workers in northern America - Three essays* (International Labour Organization Migration for Employment Programme International Migration papers 10) 1, 22 (1995) (on file with authors).

⁴ Michael Fix and Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight*, The Urban Institute (May 1994), available at < <http://www.urban.org/pubs/immig/immig.htm> >.

⁵ PEW HISPANIC CENTER STUDY, *supra* note 2 at 7.

⁶ U.S. Department of Labor, FY 2000 Poultry Processing Compliance Report (2000).

⁷ *Labor Department: Close to Half of Garment Contractors Violating Fair Labor Standards Act*, DAILY LAB. REP. (BNA) 87 (May 6, 1996); U.S. Department of Labor, *Compliance Highlights* 1,3 (Nov. 1999).

⁸ Nurith C. Aisenman, *Harsh Reward for Hard Labor*, THE WASHINGTON POST C01(Dec. 29, 2002).

⁹ U.S. Department of Labor, Bureau of Labor Statistics, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2000 (Aug. 14, 2001).

II. The Effect of the Immigration Reform and Control Act Employer Sanctions Provisions: Sanctions Operate against Workers, not Employers.

A. Basics of the Employer Sanctions Law.

The Immigration Reform and Control Act of 1986 (IRCA) sought to make undocumented workers less attractive to U.S. employers and thereby to reduce employers' incentives to hire such workers. Notably, IRCA focuses entirely on the need to change *employers'* behavior and motivations.¹⁰

With IRCA came the introduction of "employer sanctions" as a statutory mechanism for increasing the costs of hiring undocumented workers. Employer sanctions make it illegal for employers knowingly to hire workers who are not authorized to be employed.¹¹ Under the IRCA, if an immigrant job applicant is unable to present the required documentation, she cannot legally be hired.¹² If an employer unknowingly hires an unauthorized worker, or if the person becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's unauthorized status. An employer who hires such persons is theoretically subject to an escalating series of fines, ranging from \$250 to \$10,000.¹³ Criminal penalties and additional fines may be imposed on employers who engage in a "pattern or practice" of hiring undocumented immigrants.¹⁴ Second, IRCA made it a crime for an unauthorized worker to present fraudulent documents to his or her employer.¹⁵ Unauthorized immigrants who use or attempt to use fraudulent documents to subvert the employer verification system established by IRCA are also subject to fines and criminal prosecution.¹⁶

IRCA explicitly authorized funds for the U.S. Department of Labor's Wage and Hour Division to enforce employment standards laws on behalf of undocumented workers.¹⁷ Congress recognized, as § 111(d) explicitly states, that such enforcement furthers IRCA's purpose by diminishing the incentive for employers to hire undocumented workers in order to take advantage of a more easily exploitable workforce. Section 111(d) reads:

There are authorized to be appropriated . . . such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to *deter the employment of unauthorized aliens and remove the economic incentive* for employers to exploit and use such aliens.

¹⁰The Court of Appeals for the Second Circuit recognized this in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997), writing that "IRCA . . . demonstrates Congress's intent to focus on employers, not employees, in deterring unlawful employment relationships," *id.* at 56, and that "IRCA was passed to reduce the incentives for employers to hire illegal aliens," *id.* at 55. The Court of Appeals for the Eleventh Circuit reached the same conclusion in *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989), stating that "Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens."

¹¹ See, 8 U.S.C. A. § 1324a(a)(1).

¹² *Id.*

¹³ *Id.* § 1324a(e)(4)(A).

¹⁴ *Id.* § 1324a(f).

¹⁵ 8 U.S.C.A. § 1324c.

¹⁶ 8 U.S.C.A. § 1324c; 18 U.S.C.A. § 1546(b).

¹⁷ See, IRCA § 111(d).

Id. (emphasis added). The Wage and Hour Division enforces, among other employment laws, the Fair Labor Standards Act (“FLSA”), which requires covered employers to pay their employees the federal minimum wage, and to pay employees one and one-half times their regular rate of pay for overtime hours worked.¹⁸ FLSA authorizes awards of back pay in cases of retaliation against employees who exercise their rights under the Act.¹⁹

In addition, Congress sought to deter employers from hiring undocumented workers by directing the vigorous enforcement of employment laws on behalf of those workers. The House Education and Labor Committee report makes clear that Congress intended the full panoply of the Nation’s labor and employment laws, including the National Labor Relations Act, to be enforced on behalf of undocumented workers:

[T]he committee does not intend that any provision of this Act would limit the powers of State and Federal labor standards agencies such as the . . . Wage and Hour Division of the Department of Labor, . . . the National Labor Relations Board, . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. *To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.*

H.R. Rep. No. 99-682, pt. 2, at 8-9, *reprinted* in 1986 U.S.C.C.A.N. 5662 (1986) (emphasis added).

The theory behind sanctions was that sanctions would impose substantial economic risks on employers who hire undocumented workers, thus reducing employers’ economic incentives to do so. The reality of the employer sanctions law has been that it has more often been used by employers against workers than by the U.S. government against employers.

B. Employer sanctions are not an effective deterrent to hiring undocumented workers.

Employer hiring of undocumented immigrants continues unabated after IRCA. Employers have little reason to fear that INS will sanction them for hiring undocumented immigrants, and can easily come to see hiring of the undocumented as a legitimate cost-saving decision. This is because the employer sanction system is not an effective mechanism to combat immigration..

The language of the verification requirements provides employers with a “gaping loophole” that they exploit by hiring immigrants whom they know have presented fraudulent documents.²⁰ Under IRCA, employers are only required to accept documents that appear on their face to be genuine and to relate to the individual named.²¹ This has meant that an employer can ignore documents it suspects are invalid, allow the worker to use documents that belong to another person, or even take part in procuring documents for the worker.

¹⁸ See, 29 U.S.C. §§ 202, 206, 207(a)(1).

¹⁹ See, 29 U.S.C. § 216(b).

²⁰ William J. Murphy, Note, *Immigration Reform without Control: The Need for an Integrated Immigration-Labor Policy*, 17 SUFFOLK TRANSNAT’L L. REV. 165, 177-78 (1994).

²¹ 8 U.S.C.A. § 1324a(b)(1)(A) (1994).

“In effect, employers who are willing to comply just enough to avoid appearing to disregard the law totally, but who in fact continue to rely on unauthorized labor, are insulated from the law’s sanctions provisions.”²²

Even where employers fail utterly to comply with the law, average employer sanctions fines are low and rarely assessed. In fiscal year 1999, the INS apprehended 1,714,035 aliens. Of this number, the Border Patrol made 1,579,010 apprehensions, of which 97 percent were made along the southwest border.²³ By contrast, the number of warnings to employers nationwide was 383, down 40 percent from 1998. The INS issued only 417 notices of intent to fine employers nationwide in 1999, a decrease of 59%.²⁴ In the year 2000, warnings to employers decreased another 26 percent, and notices of intent to fine decreased yet again, by 57 percent.²⁵

According to the Immigration and Naturalization Service itself, “Neither Republicans nor Democrats nor a broad range of interest groups is prepared to support an employer sanction program that actually would work.”²⁶ Thus, under the current legal scheme in the United States, employers may readily hire undocumented workers, take advantage of them, and then threaten to turn them in to the INS, all without fear of governmental action. Rather than an effective deterrent to unlawful immigration, employer sanctions operate as a club against workers.

III. Hoffman and its Progeny: Limitations on Remedies available to Undocumented Immigrants.

A. The U.S. Supreme Court’s Decision in Hoffman Plastic Compound v. NLRB, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002).

The *Hoffman* case involved a worker named Jose Castro. Mr. Castro was working in a factory in California and was fired, along with other co-workers, for his organizing activities. The National Labor Relations Board, the agency that administers the NLRA, ordered the employer to cease and desist, to post a notice that it had violated the law and to reinstate Mr. Castro, and to provide him with back pay for the time he was not working because he had been illegally fired.

During a hearing on his case, Mr. Castro admitted he had used false documents to establish work authorization and that he was an undocumented worker. The U.S. Supreme Court ultimately held that undocumented workers cannot receive back pay under the National Labor Relations Act. Under the Act, back pay is the traditional remedy awarded to a victim of an illegal anti-union firing in order to compensate him for wages he would have earned had he not been wrongfully fired. The Court also reinforced that undocumented workers are not entitled to reinstatement, which is the other traditional remedy for violations of the Act.

²² Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1998 Wis. L.REV. 955, 986 (1998).

²³ U.S. Department of Justice, U.S. Immigration and Naturalization Service, *1999 Statistical Yearbook of the Immigration and Naturalization Service* 4 (Mar. 2002) available at <<http://www.ins.gov/graphics/aboutins/statistics>>.

²⁴*Id.* at 5.

²⁵I.N.S., *Enforcement 2000*, Excerpt from *INS Statistical Yearbook 2000*, 4, available at <<http://www.ins.gov/graphics/aboutins/statistics/ENF00yrbk/ENF2000.pdf>>.

²⁶Former INS commission Doris Meissner, quoted in Jonathan Peterson, *INS Penalty System Falls Down on Job*, LOS ANGELES TIMES A1 (Aug. 6, 2001).

In reaching this decision, the Supreme Court focused on the fact that the “legal landscape [had] now significantly changed”²⁷ since Congress had enacted the IRCA, and its employer sanctions provisions. According to the Court, IRCA’s prohibition on employer hiring of undocumented workers, and on workers’ acceptance of employment without work authorization requires the National Labor Relations Board to deny back pay to these workers, because back pay would compensate these workers for work they cannot lawfully perform.

Neither the U.S. Constitution, nor any provision of IRCA or the NLRA prohibits back pay awards to undocumented workers. In fact, the NLRA gives the NLRB broad discretion to fashion appropriate remedies to effectuate the policies of the Act, and courts—including the Supreme Court—have deferred to the board’s discretion in this area. However, the Court refused to defer to the NLRA’s enforcement scheme involving undocumented workers because it reasoned that to do so would “trump” Congressional immigration policy. It is important to note that the U.S. government pursued Castro’s case and defended the position that he was entitled to back pay before the US Supreme Court.

B. Remedies for Violation of Federal Laws.²⁸

1. Remedies available to Undocumented Workers under the NLRA pre- and post-Hoffman.

a. Pre-Hoffman: Undocumented workers entitled to the same remedies as documented workers, except for reinstatement.

Prior to *Hoffman*, it was well-established that undocumented workers are “employees” within the meaning of the NLRA. *Sure-Tan v. NLRB*, 467 U.S. 883 (1984); *See also, Local 512 ILGWU (Felbro) v. NLRB*, 795 F.2d 705 (9th Cir. 1986). Although these cases involved violations that occurred prior to IRCA’s enactment, courts continued to hold that the adoption of employer sanctions in 1986 did not change the Act’s definition of “employee.” *NLRB v. Kolkka*, 170 F.3d 937, 940 (9th Cir. 1999).

Moreover, employer use of workers’ immigration status to threaten, intimidate or remove workers in retaliation for their union activities constitutes an unfair labor practice in violation of §8(a)(3) of the NLRA. *Sure-Tan v. NLRB*, 467 U.S. 883 (1984); *Del Rey Tortilleria, Inc.* 272 NLRB 1106 (1984), *enf’d.*, 787 F.2d 1118 (7th Cir. 1986) (employer’s demand that employees present social security cards and green cards two days after union filed representation petition constituted unfair labor practice).

After IRCA, Board decisions continued to reinforce the Board’s ability to order traditional make whole remedies, but conditioned reinstatement on the ability of workers to present documents showing employment eligibility. In *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB No. 53, *aff’d* 134 F.3d 50 (2d Cir. 1997), the Board conditioned the discriminatees’ reinstatement on their ability to present verification of their employment eligibility as prescribed by IRCA “within a reasonable time.” With regard to back pay, the Board ordered that back pay should be tolled as of the date of reinstatement or when, after a reasonable period of time, the discriminatees are unable to present documents necessary to comply with IRCA. The Board imposed conditions in this case because the employer knew at the time of hire that the

²⁷ *Id.* at 1282.

²⁸ E.g. *NLRB v. Food Store Employees Local 347 (Heck’s, Inc)*, 417 U.S. 1, 8 (1974)(“the congressional scheme [invested] the Board and not the courts with broad congressional power to fashion remedies that will effectuate national labor policy.”)

discriminatees were not work-authorized and ordering unconditional reinstatement would conflict with IRCA. 320 NLRB 408 at 415, n. 39.

On appeal, the Second Circuit affirmed the Board's remedial order noting that:

The lack of a back pay remedy would make undocumented workers an easy target for employers resisting union organization, and thus, frustrate the rights of lawful U.S. workers under the NLRA. An employer could intimidate United States citizens or other lawful residents by targeting undocumented workers for anti-union discharges. Or, alternatively, legal workers might be reluctant to organize in the first instance if the Board were unable to issue any remedy against illegal actions taken by employers against undocumented workers who support them. 134 F.3rd at 58.

The *A.P.R.A.* case is instructive because there the employer knew of the workers' undocumented status at the time of hire. After *Hoffman*, *A.P.R.A.* should still be considered good law, and to require a different analysis than the situation presented in *Hoffman*, where the Board did not find that the employer knew of Mr. Castro's undocumented status at the time of hire.

b. Post-Hoffman: The NLRB has determined that Hoffman leaves some remedies available to undocumented workers.

Since the *Hoffman* decision, the National Labor Relations Board has stated that undocumented workers will not be entitled to back pay for any period of time during which they lacked work authorization, or to reinstatement when they are illegally fired, unless they can show that they now have lawful employment status.²⁹ The Board's policy does not distinguish between employers who knowingly hire workers who are undocumented, in violation of U.S. law, and those who do not know of the worker's illegal status at the time of hire.

In July 2002, the general counsel (GC) of the NLRB issued guidance interpreting how *Hoffman* affects the agency's practice and procedures.³⁰ The GC reaffirmed that undocumented workers are covered by the NLRA, and that an employer who discharges an employee in violation of the NLRA is liable regardless of the worker's immigration status.

For purposes of back pay, the GC did not distinguish between cases where the employer did not know that it had hired an undocumented worker, as in *Hoffman*, and cases where the employer "knowingly employed" undocumented workers, as in *A.P.R.A.*, even though the Supreme Court did not address the latter. The GC has determined that the *Hoffman* decision precludes back pay for "work not performed" as an appropriate remedy for undocumented workers. However, back pay is permitted "for work previously performed under unlawfully imposed terms and conditions." The GC left open the question of whether back pay is available to undocumented workers who have been demoted.

As to reinstatement, the GC cites to *A.P.R.A.*, stating that "[c]onditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented discriminatees whom an employer knowingly hires."³¹ A worker who benefits from such an order will be given a "reasonable period of time" to establish work

²⁹ NLRB General Counsel, *Procedures and Remedies for Discriminatees Who May Be Unauthorized Aliens after Hoffman Plastic Compounds, Inc.* (Jul. 19, 2002) available at < <http://www.lawmemo.com/emp/nlr/gc02-06.htm>>.

³⁰ See, "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.*" GC 02-06 (July 19, 2002), available at < <http://www.nlr.gov/gcmemo/gc02-06.html>>.

³¹ *Id.*

eligibility and to comply with I-9 requirements, but they would not be entitled to back pay during that period of time.

Although the NLRB GC opinion is helpful, it does not negate the fact that workers will be deprived of the most effective remedy--and the only monetary remedy--available in the NLRA scheme. The NLRB has no authority to award punitive damages or any other other remedy that would punish employers.³² Back pay is the only out-of-pocket cost that an employer incurs by illegally firing a worker. After Hoffman, and employer who violates the Act does so without suffering any economic loss, with the result that workers will be much less likely to exercise their remaining rights, unscrupulous employers will have no reason to respect those rights, and law-abiding employers will be tempted to violate the law or face a competitive disadvantage.

Undocumented workers are not left without any remedy, however. After Hoffman, the following remedies remain available to undocumented immigrants in the U.S.: an employer who illegally fires an unauthorized worker could still be ordered to post a notice about the violations of the law, and be told to "cease and desist" violating the law. In certain cases, an employer who violates the law again, would be subject to penalties for contempt of court. Importantly, the GC has left open the possibility that "extraordinary remedies" may be available to undocumented workers. Those remedies traditionally have been available only in cases where an employer committed pervasive or outrageous unfair labor practices.³³ In those cases, the Board has required, for example, that the plant manager sign and read the cease-and-desist order directly to workers; that the employer publish the notice in local newspapers; that the employer grant the union access to the plant during an organizing campaign; that the union have equal time to respond to the employers' speeches to workers on company property, and that the employer give the union the workers' names and addresses.³⁴ Although these remedies do not equate to the economic remedy of backpay, they have been found to be effective in deterring illegal activity by employers and greatly increase workers' ability to freely exercise their rights under the Act.

2. Workers' rights to be free from discrimination based on sex, race, national origin or other factors pre- and post-Hoffman.

The *Hoffman* decision also has important implications for the remedies available to undocumented workers under the U.S. anti-discrimination laws. Title VII of the federal Civil Rights Act (Title VII) protects workers' rights to be free from discrimination based on several factors: sex, color, race, religion and national origin.³⁵ The Age Discrimination in Employment Act (ADEA) protects workers' rights to be free from discrimination based on age.³⁶ The Americans with Disabilities Act (ADA) protects workers' rights to be free from discrimination based on disabilities.³⁷ The Unfair Immigration-Related Employment Practices Act protects certain immigrants from discrimination based on national origin and citizenship.³⁸

³² Phelps Dodge Corp. v. NLRB, 397 U.S. 99 (1970).

³³ Fieldcrest Cannon v. NLRB 97 F.3d 65, 74 (4th Cir. 1996).

³⁴ See *Id.*; Three Sisters Sportswear Co., 312 NLRB 853 (1993).

³⁵ 42 U.S.C.A. § 2000e *et. seq.*

³⁶ 29 U.S.C.A. § 621 *et. seq.*

³⁷ 42 U.S.C.A. § 12101 *et. seq.*

³⁸ 8 U.S.C.A. § 1324b.

a. Title VII Pre-Hoffman: Undocumented workers entitled to the full range of remedies.

After enactment of IRCA, the courts had to take into consideration employer arguments that the relationship between an employer and an undocumented immigrant is illegal, and that undocumented immigrants are therefore not entitled either to the protection of the laws, or to the same remedies as are documented workers. Established EEOC case law largely held that undocumented workers are protected by federal employment discrimination laws. See, *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973); *EEOC v. Hacienda Hotel*, 881 F.2d 1054, 1517 (9th Cir. 1989); *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2nd Cir. 1988); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989); *EEOC v. Tortilleria "La Mejor"*, 758 F.Supp. 585 (E.D. Cal. 1991).

Prior to *Hoffman*, however, the Fourth Circuit held that pursuant to IRCA, at least in the hiring context, no one is entitled to Title VII protection unless he or she was qualified for employment. *Egbuna v. Time Life Libraries, Inc.*, 153 F.3rd 184 (4th Cir. 1998), cert. denied, 119 S.Ct. 1034 (1999). In *Egbuna*, the employee's work authorization had expired. When he re-applied for employment, he was rejected. Without analyzing whether or not the employer knew that *Egbuna* was ineligible for employment or whether their was a "mixed motive" for its failure to rehire him, the Court made a broad statement that *Egbuna* had no "cause of action" because he was not eligible to be employed in the United States. The same court had also held that the Age Discrimination in Employment Act did not protect foreign national applying for a job from outside the United States under the H-2A visa program because he was not authorized to work at the time of his job application, and therefore not qualified for the job. *Reyes-Gaona v. North Carolina Growers' Ass'n.*, 250 F.3d 861 (4th Cir. 2001).

b. Title VII Post-Hoffman: EEOC reaffirms coverage, brings into question entitlement to back pay.

Soon after the U.S. Supreme Court's ruling in *Hoffman*, the EEOC clarified that undocumented workers are entitled to the protection of the laws it enforces. However, it rescinded its former Guidance that clearly called for a back pay remedy. Entitlement to compensatory and punitive damages have not been not addressed directly by the EEOC, but these should remain available.

After the *Hoffman* decision, the EEOC rescinded its former favorable "Enforcement Guidance on Remedies Available to Undocumented Workers."³⁹ EEOC reaffirmed that it will continue to enforce its statutes⁴⁰ on behalf of all employees, including undocumented workers. The EEOC stated that "[t]he Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes."⁴¹ The Guidance does not clearly say that the

³⁹ U.S. Equal Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (Jun. 27, 2002) available at <<http://www.Eeoc.gov/docs/undoc-rescind.html>>.

⁴⁰The EEOC enforces Title VII, the ADA, the ADEA, and the Equal Pay Act.

⁴¹ *Id.*

EEOC considers the undocumented no longer eligible for back pay. It does say that the EEOC's determination that the undocumented were entitled to back pay was based on the NLRA.⁴²

No court has yet ruled on the availability of back pay in a discrimination case post-*Hoffman*. Nor has a court ruled on compensatory or punitive damages, these latter issues not being raised in the EEOC document. However, under settled Title VII case law, these damages should remain available. Since compensatory damages are not related to an individual's legal ability to work, these should not be affected by the Court's ruling in *Hoffman*. Secondly, the Second and Seventh Circuits have held that punitive damages are recoverable under Title VII even in the absence of any other damage award. See, *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 354 (2d Cir. 2001); *Timm v. Progressive Steel Plating, Inc.*, 137 F.3d 1008, 1009 (7th Cir. 1998).

c. Warning: some courts may attempt to expand Hoffman's holding to deny standing to undocumented workers.

While *Hoffman* made clear that undocumented workers are "employees" under the statute—that is, that they have standing under the NLRA—that holding does not necessarily mean that undocumented workers have standing under other employment discrimination laws. A federal court in New York recently issued a troubling decision in an ADA case, suggesting that *Hoffman* has made the issue of immigration status relevant to a worker's standing to sue for relief under the antidiscrimination laws. The ruling may well be an indicator of things to come. In denying a defendant's motion to dismiss in *Lopez v. Superflex, Ltd.*, 2002 U.S. DIST. LEXIS 15538 (S.D.N.Y. 2002), the court noted:

If *Hoffman Plastic* does deny undocumented workers the relief sought by plaintiff, then he would lack standing. As that issue is not ripe for decision, we decline to rule on it at this time. However, if plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether *Hoffman Plastic* applies to ADA claims for compensatory and punitive damages brought by undocumented aliens. *Id.* at *8.

The court further observed in a footnote: "If we do ultimately reach this issue, it could result in a judicial finding that plaintiff is illegally residing in the United States and therefore is subject to deportation." *Id.*, at n.4.

The danger, of course, is that if courts rule that, in light of *Hoffman*, undocumented workers do not have standing under the antidiscrimination laws, an entire class of workers—who are already vulnerable to exploitation—would be left with no recourse.

d. Citizenship Discrimination: Undocumented workers not entitled to protection of the law.

Immigrants without work authorization are excluded from the protection of the Unfair Immigration-Related Employment Practices Act, which protects against discrimination based on citizenship and national origin in

⁴² One court has indicated that it might distinguish back pay under the NLRB from back pay under Title VII; however, the issues was not squarely addressed and ruled on in that particular case. *De la Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002).

employment.⁴³ This Act was passed at the same time as the IRCA, and was intended to protect immigrants from discrimination that might result from the imposition of IRCA's employer sanctions provisions.

3. Workers' Rights to a Minimum Wage and Overtime Pay.

a. Eligibility of undocumented workers for relief under FLSA – Hoffman has no effect.

One of the remedies available to undocumented workers that has clearly survived *Hoffman* is the availability of "back pay" for work *actually performed* under the FLSA. "Back pay" under FLSA is different from back pay under the NLRA and the antidiscrimination laws. Under the other laws, back pay is payment of wages that the worker *would have earned* if not for the unlawful termination or other discrimination. Under FLSA, "back pay" is payment of wages the worker *actually earned* but was not paid.⁴⁴

Prior to *Hoffman*, the Eleventh Circuit had held that an undocumented worker was eligible for back pay under the FLSA in *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). The court concluded that "the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." *Id.*, at 704. Moreover, the court concluded that the plaintiff was eligible for back pay, distinguishing the situation from the one in *Sure-Tan* on the basis that the plaintiff was "not attempting to recover back pay for being unlawfully deprived of a job. Rather, he simply seeks to recover unpaid minimum wages and overtime for work *already performed*."⁴⁵

Following the Supreme Court's decision in *Hoffman*, the U.S. Department of Labor (DOL) has stated that it will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), the FLSA, the Migrant and Seasonal Worker Protection Act (AWPA), and the Mine Safety and Health Act without regard to whether an employee is documented or undocumented.⁴⁶ The DOL statement leaves unaddressed the issue of back pay for undocumented workers who suffer retaliation on the job.⁴⁷ Similarly, federal courts have held that *Hoffman* is not relevant to back pay under the FLSA or the state wage and hour laws, and have made rulings favoring plaintiffs. *Flores v. Albertson's, Inc.*, 2002 U.S. DIST. LEXIS 6171, (C.D. Cal. 2002); and *Liu, et al. v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002).⁴⁸

At least one federal court, in an action brought under the FLSA for retaliation, has held that *Hoffman* did not bar the eligibility of undocumented workers for compensatory and punitive damages. *Singh v. Jutla, et al.*, 214 F. Supp.2d 1056 (N.D. Cal. 2002).

⁴³ 8 U.S.C.A. § 1324b(a)(3).

⁴⁴ There is one form of back pay under the FLSA that more closely resembles back pay under the NLRA and the antidiscrimination laws. This form of back pay appears in the anti-retaliation provision of the FLSA – and is payment of wages that the worker would have earned if not for his or her unlawful termination by the employer in retaliation for having initiated a complaint under the FLSA. To date, no reported decision has addressed this issue post-*Hoffman*.

⁴⁶ U.S. Department of Labor, *Hoffman Plastic Compounds, Inc. v. NLRB*, Questions and Answers, (on file with authors).

⁴⁷ See also, U.S. Department of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division*, available at: <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>.

⁴⁸ See, discussion *infra*, Section IV, on protective orders.

4. Occupational Safety and Health Act -- Unauthorized workers' entitlement to back pay not clear post-*Hoffman*.

The primary U.S. law that protects workers' rights to healthy and safe conditions on the job is the Occupational Safety and Health Act. This law contains no exclusion for undocumented workers. In the same document noted above with respect to the FLSA, the US Department of Labor has stated that the Department will fully and vigorously enforce the Occupational Safety and Health Act, without regard to whether an employee is documented or undocumented.⁴⁹ The Department of Labor statement leaves open the issue of back pay for undocumented workers who suffer retaliation on the job.⁵⁰

5. Protection of the Rights of Migrant Farm workers: the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) is a federal law that protects certain agricultural workers by requiring disclosure of terms and conditions of employment, registration of farm labor contractors, and regulates safety and health in housing and work-related transportation.⁵¹ For violations of the AWPA, employers can be liable for actual damages, damages of up to \$500 per person per violation, and equitable relief. AWPA also contains an anti-discrimination provision, for which workers can recover back pay.⁵²

Prior to *Hoffman*, the Fifth Circuit in *In re Reyes* held that undocumented workers are protected under AWPA. *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987). See also, *Escobar v. Baker*, 814 F.Supp. 1491, 1493 (W.D.Wash. 1993). Courts had also certified classes that expressly contained undocumented immigrants. *Montelongo v. Meese*, 803 F.2d 1341, 1352, *cert denied*, *Martin v. Montelongo*, 481 U.S. 1048 (1987); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990).

Post-*Hoffman*, the U.S. Department of Labor has stated that it will continue to enforce the Act with respect to undocumented workers, but has not been clear about whether or not there will be any limitation on the monetary remedies available to undocumented workers under the Act.

In a case brought by a class of 300 tomato packing shed workers in Florida, the employer claimed that the *Hoffman Plastic* decision means that undocumented workers are not covered by the Migrant and Seasonal Agricultural Worker Protection Act. The judge in the case recently ruled in favor of the workers. *Martinez v. Mecca Farms* S.D. Fl. No. 01-9096, (Order granting Plaintiffs' Motion for Class Certification, November 25, 2002).

C. State Enforcement of Workers' Rights Post-*Hoffman*: Entitlement to Back pay, Wage Loss and Workers' Compensation.

⁴⁹ U.S. Department of Labor, *Hoffman Plastic Compound, Inc. v. NLRB*, Questions and Answers.

⁵⁰ See also, Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastic* decision on laws enforced by the Wage and Hour Division available at < <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>>.

⁵¹ 29 U.S.C.A. § 1801 *et. seq.*

⁵² 29 U.S.C.A. § 1855(a); § 1854(c).

While most of the litigation undertaken since *Hoffman* has been at the federal court level, it is likely that some state courts will continue to limit its impact on remedies available to undocumented workers under state employment and labor laws.

Like the federal laws, most state labor and employment laws contain no provision that distinguishes between documented and undocumented workers. Prior to *Hoffman*, courts had usually held that labor protective laws such as state minimum wage, workers' compensation, wage claims and others apply equally to undocumented workers as to workers who are working legally in the country.

For example, in *Nizmuddowlah v. Bengal Cabaret. Inc.*, 415 N. Y.S. 2d 685,686 (N.Y.S. Ct. App. Div. 2d 1979), the New York court allowed a wage claim brought by an alien to go forward, saying:

...recovery must be permitted in order to prevent the unjust enrichment of defendants. Even illegal aliens have the right to pursue civil suits in our courts (citations omitted) and the practice of hiring such aliens, using their services and disclaiming any obligation to pay wages because the workers are illegal is to be condemned. The law provides penalties for aliens who obtain employment in contravention of their visa obligations, but deprivation of compensation for labor is not warranted by any public policy considerations involving the immigrations statutes.

In a similar case from Alaska, an employee sued for wages under a contract providing that his wages be held in trust until he regularized his status. The court said:

... that the appellee [employer], who knowingly participated in an illegal transaction, should be permitted to profit thereby at the expense of the appellant is a harsh and undesirable consequence of the doctrine that illegal contracts are not to be enforced... The appellant's contract should be enforced because such an objective would not be furthered by permitting employers knowingly to employ excludable aliens, and then, with impunity, to refuse to pay them for their services. Indeed, to so hold could well have the opposite effect from the one intended, by encouraging employers to enter into the very type of contracts sought to be prevented.

Gates v. Rivers Construction, 515 P. 2d 1020, 1022 (Alaska, 1975) See also, *Montoya v. Gateway Insurance Co.*, 401 A.2d 1102 (N.J. Apps 1979) cert. denied 408 A.2d 796 (1979)(illegal status does not prevent a plaintiff from recovering medical benefits and lost wages under insurance policy); *Peterson v. Neme*, 281 S.E. 2d 869 (Va. 1981)(undocumented alien could recover lost wages as an element of damages in a negligence action despite stipulation that it would have been illegal to work).

The *Hoffman* decision has renewed employers' interest in arguing that undocumented workers are unprotected by state labor and employment laws.⁵³ The following summaries of state cases show that thus far, state remedies for violations of wage and employment laws are unaffected. On the other hand, some state decisions have limited the rights of the undocumented to certain forms of compensation under state workers' compensation laws.

⁵³ Post-*Hoffman*, an issue was raised in federal district court in Illinois, when a worker sued his co-worker for injuries arising out of an automobile accident. The Court ruled that the suit was barred by workers' compensation law, and therefore did not reach an issue, raised by the defendant, that the immigrant plaintiff would not have been entitled to lost wages after *Hoffman*. See, *Flores v. Nissen*, 213 F.Supp.2d 871 (N.D.Ill. 2002).

1. Back Pay under State Discrimination Laws post-Hoffman.

Regardless of the outcome of issues regarding back pay and other forms of damages in the federal courts, there is a strong argument that states are free to make their own policy choices under their own state laws regarding what remedies are available to undocumented workers. Of the cases litigated thus far, none has squarely addressed the issue of the continuing availability of back pay under state law. However, shortly after the *Hoffman* decision, the state agency in California clarified that it will continue to seek back pay for undocumented workers. That statement was followed by enactment of a state law that reaffirmed the entitlement to back pay and other damages.

In May, 2002, the California Department of Industrial Relations posted a statement on its website clarifying that it will “Investigate retaliation complaints and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about wages or workplace safety and health, without regard to the worker’s immigration status.”⁵⁴

The bill, SB 1818, which was signed into law by California Governor Gray Davis on September 29, 2002, was introduced as a means of protecting the employment rights of workers, regardless of immigration status, under state law. The law amends the Civil, Government, Health and Safety and Labor Codes and makes declarations of existing law. It reaffirms that “[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment who are or who have been employed, in this state.”⁵⁵ It also reaffirms that:

For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person’s immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person’s immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.⁵⁶

Washington State’s Human Rights Commission has also clarified in a letter that it will continue to seek back pay as a remedy for violation of Washington State’s Law Against Discrimination.⁵⁷

2. Claims for Wage Loss under State Law for Undocumented workers.

Of the state cases litigated thus far, only one court has addressed the issue of unpaid wages for “work performed.” The holding was the same as under the FLSA, distinguishing work already performed from traditional back pay. See, *Valadez v. El Aguila Taco Shop*, No. GIC 781170 (San Diego, Cal. Superior Ct.

⁵⁴ CALIFORNIA DEPT. OF INDUSTRIAL RELATIONS, *All California workers are entitled to workplace protection* (May 31, 2002) available at <<http://www.dir.ca.gov/gaundoc.html>>.

⁵⁵ See CAL. CIV. CODE § 3339 (2002); CAL. GOV’T CODE § 7285, *et seq.* (2002); CAL. HEALTH & SAFETY CODE § 24000, *et seq.* (2002); CAL. LAB. CODE § 1171.5 (2002). The full text of the California bill is available at <http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1801-1850/sb_1818_bill_20020929_chaptered.html>.

⁵⁶ *Id.*

⁵⁷ Letter dated October 7, 2002 from Susan Jordan, Executive Director, Washington State Human Rights Commission, to Antonio Ginatta, director, Washington State Commission on Hispanic Affairs (on file with authors).

2002) (holding that *Hoffman* does not affect an undocumented worker's right to recover unpaid wages under the California Labor Code); In *De la Rosa v. Northern Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002), a claim was pending under state law, but the court did not reach the merits of the claims. Instead, it denied the employer's motion to compel discovery of immigration status. See discussion Sec. IV *infra*.

The California and Washington labor agencies' statements outlined here also assure undocumented workers that their rights to collect unpaid wages will continue to be protected post-*Hoffman*.⁵⁸

3. Workers' Compensation benefits for Undocumented workers.

a. Pre-Hoffman: Undocumented workers covered in nearly all states.

Workers' compensation is a state system that provides remuneration for employees who have been injured while working on the job. In general, it covers the medical costs of an injured employee, and allows a worker to continue to be partially paid during the period s/he is unable to work. Workers' compensation laws also provide compensation for disabilities and for the family of an employee who dies on the job. Though workers' compensation is generally an issue of state law, and the state laws vary, generally workers receive medical payments, partial replacement of wages, pensions, death benefits, and sometimes retraining for new jobs.

The majority of the States' workers' compensation laws include "aliens" in the definition of covered employees.⁵⁹ Entitlement to lost wages under state workers' compensation laws turns on state statutes and their definition of "worker" or "employee." State courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas have specifically held that undocumented workers are covered under their state workers' compensation laws.⁶⁰ However, one state, Wyoming, explicitly denies workers' compensation benefits to undocumented immigrants.⁶¹

b. Post-Hoffman: New rulings may endanger undocumented workers' entitlement to wage loss compensation.

⁵⁸ See, *supra*, n. 50; *infra*, n. 58.

⁵⁹ See, ARIZ. REV. STAT. § 23-901(5)(b); CAL. LAB. CODE § 3351(a) FLA. STAT. ch. 440.02(14)(a); IL COMP. STAT. 820/305(1) b; KY. REV. STAT. ANN. § 342-0011(21); MICH. STAT. ANN. § 17.237(161)(1)(l); MINN. STAT. § 176.011 subd.9(1); MISS. CODE ANN. § 71-3-27; MONT. CODE ANN. § 39-71-118(1)(a); NEB. REV. STAT. § § 48-115(2), 48-144; NEV. REV. STAT. ANN. § 616A.105; N.M. STAT. ANN. 52-3-3; N.C. GEN. STAT. 97-2(2); N.D. CENT. CODE § 65-01-02(17)(a)(2); OHIO REV. CODE ANN. 4123.01(A)(1)(b); S.C. CODE ANN. § 42-1-130; TEX. LAB. CODE § § 401.011, 406.092; UTAH CODE ANN. § 34A-2-104(1)(b); VA. CODE ANN. 65.2-101.

⁶⁰ See, *Champion Auto Body v. Gallegos*, 950 P.2d 671 (Colo. Ct. App. 1997); *Gene's Harvesting v. Rodriguez*, 421 So.2d 701, 701 (Fla. Dist. Ct. App. 1982); *Pablo D. Artiga v. M.A. Patout and Son*, 671 So.2d 1138, 1139 (La. Ct. App. 1996); *Lang v. Landeros*, 1996 Ok Civ. App. 4; 918 P.2d 404 (Okla. Ct. App. 1996); *Gayton v. Gage Carolina Metals Inc.*, 560 S.E.2d 870 (N.C. Ct. App. 2002); *Ruiz v. Belk Masonry Co.*, 559 S.E.2d. 249 (N.C. Ct. App. 2002); *Rivera v. Trapp*, 519 S.E.2d 777 (N.C. Ct. App. 1999); *Mendoza v. Monmoth Recycling Corp.*, 672 A.2d 221 (N.J. Super. Ct. 1996); *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 2002 WL 31476901, 810 A.2d 99 (Pa. . 2002); *Dowling v. Slotnik*, 712 A.2d 396, 403 (Conn. 1998); *Dynasty Sample Company v. Beltrain*, 479 S.E.2d 773 (Ga. 1996); *Commercial Standard Fire and Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972); *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super 14, 20, 671 A.D.2d 1051, 1054 (N.J. Super. Ct. App. Div. 1996). See, also, *Iowa Erosion Control v. Sanchez*, 599 N.W.2d 711, 715 (Iowa, 1999) ("The employer has furnished no authority to support its view that, on grounds of policy or morality, [decendent worker's surviving mother's] immigration status has any bearing on her entitlement to benefits."); *Del Taco v. Workers' Compensation Appeals Board*, 79 Cal. App. 4th 1437, 1439-1442 (Cal. Ct. App. 2000) (holding that the California workers' compensation laws apply to aliens but do not "expressly authorize vocational rehabilitation benefits for an 'illegal worker'" who is not otherwise "medically eligible."

⁶¹ WYO. STAT. ANN. § 27-14-102 (a)(vii).

Since *Hoffman*, the Director of the Washington State Department of Labor and Industries has issued a statement that undocumented immigrants continue to be entitled to wage replacement benefits after the *Hoffman* decision:

The 1972 law that revamped Washington's workers' compensation system is explicit: All workers must have coverage. Both employers and workers contribute to the insurance fund. The Department of Labor and Industries is responsible for ... providing workers with medical care and wage replacement when an injury or an occupation disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.⁶²

However, employers in two states have challenged undocumented workers' entitlement to workers' compensation coverage, or to elements of that coverage, after *Hoffman*.

The Supreme Court of Pennsylvania has held that, while an injured undocumented worker is entitled to medical benefits, illegal immigration status would justify terminating benefits for temporary total disability (wage loss) benefits. *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A. 2d 99 (Pa, 2002). The Michigan Court of Appeals has also recently decided that wage loss benefits may be cut off to undocumented workers as of the date that the employer "discovers" that the worker is unauthorized. *Sanchez v. Eagle Alloy*, 2003 WL 57544 (Ct. Apps. Mich. 2003).

Cases like these encourage unscrupulous employers to suddenly "discover" a workers' unauthorized status as soon as he or she suffers an on the job injury, thereby lowering the employer's workers' compensation premiums. Unfortunately, they are likely to become more prevalent after *Hoffman*.

IV. Protecting Clients from Intrusive Discovery after Hoffman.

Perhaps the greatest obstacle that advocates are facing since *Hoffman* has been persistent attempts by defendants to inquire into plaintiffs' immigration status. Employers who hire large numbers of undocumented workers suddenly take an interest in compliance with immigration laws as soon as they are served with a complaint, or an accident takes place. Sometimes, this interest takes the form of threats to turn the worker in to INS, or actually turning workers in. Sometimes the employer will suddenly discover in its files a letter from the Social Security Administration indicating that the worker's social security number is not valid. In other cases, employers simply claim that the issue of plaintiffs' immigration status is relevant to the potential damages for which the employer will be liable. However, discovery into a worker's immigration status is likely to have a serious chilling effect on immigrant workers contemplating whether to file a claim and on those who have courageously filed claims.

There are a number of tools that advocates may use to protect clients in litigation in these circumstances. Clients should never be allowed to disclose their status in litigation without their attorney fully understanding the implications of such disclosure on both the litigation and on the clients' future. In many cases, immigrant workers have disclosed their status only to find themselves deported. It is almost never in the client's best interest to voluntarily make such a disclosure.

⁶² Statement dated May 21, 2002 by Gary Moore, Director, available at < <http://www.nelp.org> >.

Therefore, good representation begins with good interviewing. Attorneys need to know exactly what a client's status is, and what the employer knows, in order to protect clients from harassment and extra-judicial actions by the employer, such as turning workers in to the INS. Second, attorneys need to know the limits of the law outlined here in order to determine what remedies to seek on behalf of undocumented clients and how to guard them from disclosure of their status under the dubious rubric of "relevancy." Finally, this section contains cites to many protective orders that courts have issued on behalf of immigrant workers.

1. Interview questions

After establishing with clients the lawyers' ability and willingness to protect the clients' status, clients should be asked at interview what their status is, and whether and how their employer knows their status and where they are living.⁶³

Workers should be asked about whether or not they were asked for documents (including work authorization and Social Security cards) in order to work, what documents were shown, whether or not they were genuine, whether a copy was taken or the number written down, whether they signed any papers regarding their status, when all of this took place, and whether the same information was required of all employees. They should be asked if they ever have worked under a different name and social security number, at this employment and elsewhere, and whether they have ever been formally deported or convicted of a crime related to undocumented status. They should be asked whether, to their knowledge, the employer has ever received a social security no-match letter, and whether they have ever been given the chance to respond to such a letter.

Workers should be very carefully interviewed concerning whether or not their employer knew their status at the time of hire, in order to distinguish *Hoffman*. Where employers never complied with the law and asked about status, it is likely that the employer, and not the worker, has violated the immigration law. In such a case, it may well be possible to argue that a back pay remedy still exists under federal discrimination laws.

2. Informal Discussions with Opposing Counsel

Where status is clearly not relevant, as, for example, in cases where there is no claim for back pay, advocates may be able to head off employer inquiries with cites to the appropriate cases. Second, employers who retaliate may face additional liability under these same laws. Third, INS is unlikely to respond if the employer attempts to retaliate.

It will be helpful to explain to opposing counsel that immigration status is irrelevant to the underlying claim and that any threats to turn a worker in to INS will be considered retaliation under many state and federal laws. See, e.g., *Sure-Tan v. NLRB*, 467 U.S. 883 (1984)(NLRA); *Contreras v. Corinthian Vigor Ins. Co.*, 25 F. Supp 2d 1053 (N.D. Cal. 1998)(FLSA), and the agency statements post-*Hoffman*, noted above.

⁶³Immigrant clients may have great difficulty at first understanding the nature of the attorney client relationship and confidentiality, as well as a mistrust of the legal system and lawyers. Attorneys need to establish a trustful relationship with clients before getting these details. Often lawyers have found it useful to first explain the protections offered by the laws "whether you are documented or not," before delving into the details of a person's immigration status. The attorney should make sure that the focus in the interview is on the clients' substantive rights, not on the details of his or her immigration status. Many of the questions listed here, to which counsel must know the answer at some point, may not need to be pursued at the very first instance.

It may be helpful to share with the employer or defense counsel that INS will generally not respond if the employer attempts to retaliate. According to INS Special Agents Field Manual 33.14(h); "Questioning Persons During Labor Disputes," published in 74 Int. Releases 199 (Jan. 27, 1997), when INS receives information concerning the employment of undocumented or unauthorized aliens, officials must "consider" whether the information is being provided to interfere with employees' rights to organize or enforce other workplace rights, or whether the information is being provided to retaliate against employees to vindicate those rights.⁶⁴

Specifically, the Field Manual section requires INS to obtain the name of the informant, whether there is a labor dispute in progress, whether they are employed at the site or by a union representing workers at the site, whether they are or were employed as a manager or supervisor at the site or are related to anyone who is and whether there are pending grievances, charges or complaints at the worksite. The INS is also directed to inquire how the informant obtained information regarding the aliens' alleged unlawful status and ascertain the source and reliability of that information.

If the INS determines that the information may have been provided in order to interfere with employees' rights or to retaliate against them for the exercise of those rights, "no action should be taken on this information without the review of District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol." SAFM 33.14(h)

In appropriate circumstances, employee representatives or advocates should consider notifying INS about labor disputes at a particular workplace in order to alert them that any "tips" they receive related to that worksite may be motivated by retaliation. Advocates may want to provide copies of charges or complaints (with information identifying particular employees redacted) and a copy of the Field Manual section since INS officials may be unfamiliar with it or lack easy access to it. Before advocates consider this course, they should make sure that they are familiar with local INS practice in this regard, since the OI does not strictly prohibit enforcement action during a labor dispute.

4. Formal Discovery Protections

Defense attorneys are increasingly using the discovery process to inquire into a plaintiff's immigration status, ostensibly to obtain information that is allegedly relevant to the damages claimed. But these measures clearly serve to intimidate the plaintiff into dropping the charges altogether, for fear potential immigration consequences should she be retaliated against. For example, in *Flores, et al. v Albertsons*, 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. 2002), defendants used *Hoffman* to request immigration documents from members of a class action brought by janitors in federal court for unpaid wages under state and federal law. The court held that *Hoffman* did not apply to claims of unpaid wages and noted that allowing such discovery was certain to have a chilling effect on the plaintiffs (i.e., would cause them to drop out of the case rather than risk disclosure of their status). In a similar case for unpaid wages and overtime, *Liu, et al. v. Donna Karan International, Inc.*, 207 F.Supp2d 191 (S.D. N.Y. 2002), the defendant made a discovery request for the disclosure of plaintiff garment workers' immigration status, but the federal court denied the request on the grounds that release of such information is more harmful than relevant. In another case under Title VII, *Rivera et al., v. Nibco*, 204 F.R.D. 647 (E.D. Cal 2001), plaintiffs had secured a pre-*Hoffman* protective order, which prohibited the defendant from using the discovery process to inquire

⁶⁴ The Field Manual section was originally designated an Operating Instruction, and numbered 287.3. It was recently redesignated, but remains available on-line at <<http://www.ins.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-44009/slb-51614?f=templates&fn=document-frame.htm#slb-oi2873a>>.

into plaintiffs' immigration status. Immediately following the *Hoffman* decision, the defense moved for reconsideration of that protective order, subsequently appealing to the Ninth Circuit for an interlocutory appeal, which has been certified. The underlying case has now been stayed pending the outcome of the appeal.⁶⁵

In many cases, advocates are well-advised to seek formal discovery protections. If careful pleading for relief or the great body of case law has made status irrelevant, as in, for example, cases where workers do not seek back pay under federal law or are requesting only unpaid wages, and employers' counsel nonetheless seeks discovery of status, there is building a substantial body of case law, especially in the area of Fair Labor Standards Act cases, that grant protective orders.

The *Liu* case, noted above, is an example of a case where the court held that discovery into the plaintiffs' immigration status was irrelevant and posed a serious risk of injury to the plaintiffs, outweighing any need for disclosure. Quoting from a pre-*Hoffman* protective order case, the court in *Liu* noted: "Even if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery..., there would still remain 'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights."

Liu v. Donna Karan Int'l, Inc., 207 F.Supp.2d at 193 (quoting *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y.2001))

For other examples in the FLSA context, see, *Flores v. Albertson's, Inc.*, 2002 WL 1163623 (C.D.Cal. April 9, 2002) (examining *Hoffman Plastics* and finding its holding does not support discovery of plaintiffs' immigration status; *Topo v. Dhir*, No. 01 Civ. 10881, 2002 U.S. Dist. LEXIS 17190 (S.D.N.Y. Sept. 11, 2002); and *Flores v. Amigon*, 233 F.Supp.2d 462 (E.D. N.Y. 2002). For cases decided prior to *Hoffman*, see *In re Reyes*, 814 F.2d 168 (5th Cir. 1987), and *Romero v. Boyd Brothers Transportation Co.*, 1994 LEXIS 8609 (D Ct. Va. 1994) In addition, in *Escobar v. Baker*, 814 F. Supp. At 1493, the court noted that the plaintiffs had refused to answer questions about their status and held that the status was irrelevant to claims under the Agricultural Worker Protection Act.

Where it is less clear that a particular form of relief is now available to the undocumented, it still may be helpful to request a protective order so that a ruling on relevance can be had before the plaintiff decides whether or not to disclose status, plead the Fifth Amendment on potential criminal violations, or modify his or her requests for relief.

Finally, in cases where the employer knew of the workers' status from the outset of the employment relationship, it may well be possible to distinguish *Hoffman* and preserve a back pay remedy. The court so held in a recent Title VII case from the Northern District of California, quoting from the dissent in *Hoffman*:

However, as the dissent notes, '[w]ere the Board forbidden to assess back pay against a knowing employer--a circumstance not before us today, see 237 F.3d 639, 648 (C.A.D.C.2001)--this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious.'

⁶⁵ For additional post-*Hoffman* decisions granting plaintiffs' protective orders, see, *Cortez v. Medina's Landscaping*, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002); *Flores v. Amigon d/b/a La Flor Bakery*, 233 F.Supp.2d 462 (E.D.N.Y. 2002); and *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002).

Id. at 1287.

quoted in *Singh v. Jutla and C & D & R's Oil, Inc.*, 214 F.Supp.2d 1056, 1061 (N.D. Cal. 2002).

Again, before taking this course of action, attorneys should very carefully assess the probability of the court distinguishing *Hoffman* in this way. Attorneys should not allow clients to disclose their immigration status before they obtain a ruling on the relevance of *Hoffman* in their case.

Finally, the approach taken by the EEOC and NLRB are instructive for a process for courts to follow in ruling on immigration status raised by the defense. They have concluded that while a worker's immigration status may be relevant in determining remedies under the NLRA and the federal antidiscrimination laws, immigration status has no bearing on liability. Because remedies play a central part in the EEOC's conciliation process, the issue may arise in an earlier phase of proceedings before that agency than it would before the NLRB, where remedies are determined in a separate and distinct process.

The NLRB GC has determined that "[r]egions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue. A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented."⁶⁶

Motions in limine

A recent case from Illinois adds an additional tool for advocates seeking to assert the rights of immigrant plaintiffs. Since *Hoffman*, employers often argue that an immigrant workers' status is relevant in order to determine if s/he has properly mitigated damages, since the Supreme Court in *Hoffman* said that the undocumented worker there could not mitigate damages without violating the law. In *Rodriguez v. The Texan*, 2002 WL 31061237 (N.D.Ill. 2002), *supplemented by* 2002 WL 31103122 (N.D. Ill. 2002), an employee sued his employer under the Fair Labor Standards Act. Just before trial, the plaintiff asked for a motion in limine. The employer had never plead any issue regarding failure to mitigate damages. The plaintiff successfully barred the employer from presenting this defense, which is an affirmative defense that must be plead, or it is waived. Of note is this comment from the court:

In addition, it surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate the Fair Labor Standards Act (which this Court does not of course decide, but must assume for purposes of the present motion), for it to try to squirm out of its own liability on such grounds.

⁶⁶ See, *supra n.* The NLRB, for example, has not made clear what constitutes a "substantial immigration issue," other than stating that it is not mere speculation. Neither agency has made clear whether the method by which an employer discovers that a worker lacks work authorization will any bearing on the agency's decision to accept that information. The danger is that employers may obtain that information from workers engaged in protected activity through unlawful means (for example, by threats of deportation, which clearly violate the NLRA), and then provide it to the NLRB in an effort to avoid back pay obligations. Although the NLRB GC is allowing charging parties to respond to an employer's proffer of evidence of immigration status, that process alone does not protect workers.

To address defendants' use of the discovery process in this manner, the NLRB and the EEOC should be urged to adopt a heightened evidentiary standard. For example, the agencies should allow immigration status to become relevant only after the employer proves that it lawfully obtained that information through means independent of the underlying charge.

V. Conclusion

Back pay is the only monetary compensation afforded under the National Labor Relations Act to victims of employer wrongdoing. After the Court's decision, this remedy is unavailable to unauthorized workers, with the result that workers will be much less likely to exercise their remaining rights, unscrupulous employers will have no reason to respect those rights, and law-abiding employers will be tempted to violate the law or face a competitive disadvantage.

Like denial of the back pay remedy under the National Labor Relations Act, denial of back pay to undocumented immigrant victims of discrimination means that one of the most effective deterrents to further violations is no longer available. It remains to be seen whether certain courts may limit undocumented immigrant workers' rights to receive other forms of monetary compensation for discrimination.

In the wake of the *Hoffman* decision, employers in many court cases around the country have argued -- incorrectly -- that undocumented immigrant workers have no right to unpaid wages earned, including both minimum wages and overtime pay. It is quite clear after *Hoffman* that compensation for work actually performed will continue to be available to undocumented workers, both according to the U.S. Department of Labor and to the courts that have considered this issue. Even though most courts have thus far ruled that undocumented workers retain rights to minimum wage and back pay, workers have had to defend in court their right not to disclose their immigration status. Courts have been very willing to issue protective orders in such cases to make sure that undocumented workers are not deterred in their claims.

Strong arguments can be made that states are free to make their own policy choices under state laws regarding what remedies are available to undocumented workers. This presents an opportunity for advocates to work with their state administrative agencies to develop generous state policies that provide all workers—regardless of immigration status—with the same rights and remedies and prevent a worker's immigration status from being disclosed.

Efforts at both the federal and state levels to pass legislation which addresses the Supreme Court's *Hoffman* decision are also critical. At the federal level advocates hope to introduce legislation (which has already been drafted) in the next congressional session as a bipartisan bill to turn back the *Hoffman* decision. A federal bill would basically provide that all employees, regardless of immigration status or whether they used false documents, are entitled to the same rights and remedies under all employment and labor statutes. At the state level, advocates have begun exploring possible state legislation, such as SB 1818 in California, which Governor Davis signed into law on September 29, 2002.

As a nation, the United States must decide to enforce labor and employment laws on an equal basis for all workers, if it intends to have a meaningful immigration policy. As this report shows, the present system not only harms workers and law-abiding employers, but it undermines immigration law and enforcement. Congress needs to act immediately to clarify that undocumented workers are covered under all labor-protective laws and entitled to the same remedies as their US citizen and lawfully present immigrant co-workers. Consistent with the position taken by the Bush Administration to support the NLRB action in *Hoffman*, the White House should work with Congress to enact as quickly as possible legislation to overturn the *Hoffman* decision

