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Protecting the Labor and Employment Rights of Immigrant Workers

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Betwen twenty-eight million and thirty million immigrants live in the United States. While immigrants make up less than 11 percent of the population, they are 14 percent of the nation's labor force and 20 percent of the low-wage labor force. According to the 2000 census, foreign immigration contributed significantly to both population and labor force growth in the United States during the 1990s; foreign immigration accounted for 41 percent of the population increase and 47 percent of the rise in the civilian labor force. Between 1990 and 2001 new immigrants generated all of the labor force growth in the Northeast, 50 percent of the growth in the West, 36 percent of the growth in the South, and 30 percent of the growth in the Midwest.

Despite their significant presence and contributions to the economy, immigrant workers continue to inhabit the outermost margins of U.S. society. Their marginal status renders them vulnerable to mistreatment, including workplace abuses. This is particularly true for workers who lack legal immigration status, whether they entered...
the country on a valid visa that has since expired or entered the country illegally. An estimated 9.3 million undocumented immigrants live in the United States; approximately six million of them are undocumented workers.\(^5\)

Immigrants, both documented and undocumented, work long hours at the lowest-paid and most dangerous jobs in the U.S. economy. In states with high percentages of immigrants, three of every four tailors, cooks, and textile workers are immigrants.\(^6\) Immigrants are also overrepresented among taxicab drivers, domestic workers, waiters, parking lot attendants, and sewing machine operators.\(^7\) The manufacturing sector employs nearly 1.2 million undocumented immigrant workers, the services sector employs 1.3 million, and one million to 1.4 million undocumented workers labor in our fields.\(^8\)

These industries are known for frequent violations of wage, hour, and overtime payment laws. A 2000 U.S. Department of Labor survey found that 100 percent of poultry processing plants were noncompliant with federal wage and hour laws.\(^9\) Just under half of the garment-manufacturing businesses in New York City were found to be out of compliance with the Fair Labor Standards Act (FLSA) in 2001.\(^10\) A survey in agriculture that focused on cucumbers, lettuce, and onions revealed that compliance with labor and employment laws in these industries was unacceptably low.\(^11\)

Because many of the industries in which immigrant workers are overrepresented involve dangerous working conditions, the rate of injury and death for these workers is disproportionately high. Latino immigrants in particular are far more likely to be killed on the job than their counterparts of European ancestry. A recent investigation found that every day a Mexican worker dies on the job in the United States.\(^12\)

When immigrant workers try to assert their workplace rights, many face retaliation and intimidation by employers, as well as legal and practical barriers to pursuing their claims. In 2002 the U.S. Supreme Court exacerbated these obstacles when it ruled, in *Hoffman Plastic Compounds Inc. v. National Labor Relations Board*, that an undocumented worker was not entitled to compensation for wages lost when he was illegally fired for engaging in protected union activity.\(^13\)

Unscrupulous employers have since tried to extend the *Hoffman* decision to deny immigrant workers protection under any U.S. labor or employment laws. Even after *Hoffman*, however, immigrants are generally entitled to the same labor and employment law protection provisions as their U.S. citizen counterparts. The task for advocates is to know the law and its limits, the barriers that immigrant workers face in accessing these provisions, and how to overcome these obstacles. Because immigrants toil alongside U.S. citizen workers

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\(^6\) B. Lindsay Lowell & Robert Suro, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* 7 (2002), available at www.pewhispanic.org/sites/docs/pdf/howmanyundocumented.pdf. Mexicans constitute approximately 57 percent of that group; people from other Latin American countries, 23 percent; Asians, approximately 10 percent; and people from all other parts of the world, 10 percent. Passel et al. at \(^6\)

\(^7\) Id.

\(^8\) Lowell & Suro, supra note 5, at 7-8.


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and often live with and support U.S. citizen children. Basic knowledge of immigrant workers' rights also promotes the rights and well-being of native-born Americans.14

I. State of the Law Pre-Hoffman

Workers generally have equal rights under U.S. labor and employment laws, regardless of immigration status. This basic rule has two exceptions: the Unfair Immigration-Related Employment Practices Act, which protects against discrimination based on citizenship and national origin in employment, excludes immigrants who lack work authorization, and the Migrant and Seasonal Agricultural Worker Protection Act, which is the principal federal employment law for agricultural workers, excludes the approximately 40,000 workers admitted annually as temporary nonimmigrant workers to perform agricultural work under the H-2A program.15

But while workers generally have equal rights under U.S. labor and employment laws regardless of immigration status, particularly after Hoffman immigration status may affect the available remedies. A review of the legal landscape pre-Hoffman is instructive in understanding the remedies now available to undocumented workers.

Undocumented Workers Protected as "Employees." That undocumented workers were "employees" within the meaning of federal laws (which generally contain no express exclusion of immigrant workers) was well established before Hoffman. The seminal Supreme Court case addressing the rights of immigrant workers under the National Labor Relations Act (NLRA) is Sure-Tan v. National Labor Relations Board, in which the Court held that undocumented workers were "employees" under the NLRA.16 Courts also held that federal employment antidiscrimination laws fully protected undocumented workers.17 Likewise, before Hoffman, an undocumented worker was found eligible for back pay under the FLSA.18 And the Fifth Circuit had held that the Agricultural Worker Protection Act protected undocumented farm workers.19

Similarly most state labor and employment laws do not distinguish between documented and undocumented workers. Pre-Hoffman state court decisions usually held that protective labor laws, such as state minimum wage and wage

14One in ten children in the United States lives in a mixed immigration status family in which one or both parents are noncitizens. One-fourth of all children in New York City and nearly half of all children in Los Angeles live in mixed families. MICHAEL E. FIN & WENDY DIAMENKAM, URBAN INSTITUTE, ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM (1999), available at www.urban.org/template.cfm?NavMenuID=24&template=TaggedContent/ViewPublication.cfm?id=6599.


16Sure-Tan v. National Labor Relations Board, 467 U.S. 883 (1984); see also Local 512 ILGWU (Felbro) v. National Labor Relations Board, 795 F.2d 705 (9th Cir. 1986).

17See Espinoza v. Farah Manufacturing Company, 414 U.S. 86 (1973); Equal Employment Opportunity Commission v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989); Rios v. Enterprise Association Steamfitters Local Union 638, 860 F.2d 1168, 1173 (2d Cir. 1988); Equal Employment Opportunity Commission v. Tortilleria "La Mejor," 758 F. Supp. 585 (E.D. Cal. 1991). Only the Fourth Circuit had held otherwise, at least in the hiring context. In Egbuna v. Time-Life Libraries Inc., 153 F.3d 184 (4th Cir. 1998), cert. denied, 119 S. Ct. 1034 (1999), the employee's work authorization had expired and his reapplication for employment was rejected. Without analyzing whether the employer knew of Egbuna's illegibility for employment or had a "mixed motive" for refusing to rehire him, the Fourth Circuit 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 also held that the Age Discrimination in Employment Act did not protect a 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 was not qualified for the job. Reyes-Gaona v. North Carolina Growers Association, 250 F.3d 851 (4th Cir. 2001).


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Employer Retaliation Illegal. Employer use of workers' immigration status to threaten, intimidate, or remove workers in retaliation for their union activities was also held to constitute an unfair labor practice in violation of Section 8(a)(3) of the NLRA. At least one court had also held that undocumented workers were protected by the antiretaliation provision of the FLSA.  

Back Pay Available; Reinstatement Unavailable. Both the National Labor Relations Board (NLRB), which administers the NLRA, and the Equal Employment Opportunity Commission (EEOC) allowed undocumented workers to receive "back pay," that is, pay for wages that the worker would have received, typically in an unlawful discharge, but for being fired. Employers were not allowed to use the agency proceedings as a "fishing expedition" to discover workers' status, but if status were discovered, back pay was tolled as of the date the unlawful immigration status was revealed. Both agencies held that where an employer knew a worker's status, reinstatement would conflict with the Immigration Reform and Control Act (IRCA) and was not allowed.  

II. The U.S. Supreme Court's Decision in Hoffman

The Hoffman case involved Jose Castro, a California factory worker who was fired for his union-organizing activities. The NLRB ordered the employer to cease and desist, to post a notice that it had violated the law, to reinstate Castro, and to provide him with back pay. During a hearing, Castro admitted both using false documents to establish work authorization and being undocumented. The Supreme Court held that the IRCA precluded undocumented workers from receiving back pay under the NLRA and that undocumented workers were not entitled to reinstatement.  

The Court focused on the fact that the "legal landscape [was] now significantly changed" since passage of IRCA's employer sanction provisions.  

Hoffman led to an onslaught of litigation by employers claiming that the decision limits workers' rights in almost every area of labor and employment law. Fortunately courts have rejected the most expansive views of the decision. In the following section we outline agency and court decisions in each area of the law post-Hoffman and suggest ways by which advocates can protect undocumented immigrant workers' rights.  

A. Remedies for Violation of Federal Laws post-Hoffman

Since Hoffman, the NLRB has denied back pay to undocumented workers for

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21See Sure-Tan, 467 U.S. 883, 891 (1984), Del Rey Tortilleria Inc. v. 727 NLRB 1106 (1984), enforced, 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 was an unfair labor practice).


23E.g., in National Labor Relations Board v. APRA Fuel Oil Buyers Group, 320 NLRB 408, aff'd, 159 F.3d 1345 (2d Cir. 1998), the National Labor Relations Board (NLRB) conditioned the workers' reinstatement on their being able to verify their employment eligibility as prescribed by the Immigration Reform and Control Act (IRCA) "within a reasonable time." Because the employer knew at the time of hire that the discriminatees were not work-authorized, the NLRB tolled back pay if, after a reasonable period, the discriminatees were unable to present documents necessary to comply with the IRCA. 320 NLRB 408 at 415, n.39.

24Hoffman, 535 U.S. at 147.
any period during which they lacked work authorization. Also, the NLRB has denied reinstatement to workers illegally fired, unless the workers could show current lawful employment status.\(^{25}\)

**National Labor Relations Act.** The NLRA covers undocumented workers, and an employer who discharges an employee in violation of the NLRA is liable regardless of the worker’s immigration status, the NLRB reaffirmed.

For purposes of back pay, the NLRB does not distinguish employers not knowing that their workers were undocumented, as in *Hoffman,* from employers who “knowingly employed” undocumented workers, even though the Supreme Court did not address this issue. *Hoffman* precludes back pay for “work not performed” as a remedy for undocumented workers but permits back pay “for work previously performed under unlawfully imposed terms and conditions,” the NLRB determined. The NLRB has left open the question of whether back pay is available to undocumented workers who have been demoted.

The NLRB states that “[c]onditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented discriminatees whom an employer knowingly hires.”\(^{26}\) A worker who benefits from such an order has a “reasonable period” to establish work eligibility but is not entitled to back pay during that period.

The NLRB’s approach to disclosure of status is instructive. It says 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.”\(^{27}\) In a recent case the NLRB stated that a social security no-match letter regarding a worker was not evidence that the worker was in the country unlawfully.\(^{28}\)

**Title VII and Other Antidiscrimination Laws.** The EEOC enforces the Americans with Disabilities Act, Age Discrimination in Employment Act, Equal Pay Act, and Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, national origin, gender, or religion. After *Hoffman* the EEOC rescinded its favorable guidance on the remedies available to undocumented workers but asserted 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.”\(^{29}\)

The EEOC limits inquiries into workers’ immigration status; the EEOC concludes that status, while possibly relevant in determining remedies, has no bearing on liability. The EEOC states that it does not, on its own initiative, inquire into a worker’s immigration status, nor does it consider an individual’s immigration status when examining the underlying merits of a complaint.

The first post-*Hoffman* appellate decision on the issue of inquiring into the immigration status of plaintiffs who file discrimination claims affirmed the EEOC’s position. In *Rivera v. NIBCO Inc.* the Ninth Circuit said that “the chilling effect that the disclosure of plaintiffs’ immigration status could have upon their ability to effectuate their rights . . . out-

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\(^{26}\) Id.

\(^{27}\) Id.


weighed NIBCO’s interests in obtaining the information.\textsuperscript{30} The court found that, were such discovery permitted, "countless acts of illegal and reprehensible conduct would go unreported."\textsuperscript{31} While the Rivera court did not decide whether Hoffman applied to Title VII cases, the court found it clear that Hoffman did not make immigration status relevant to a finding that an employer engaged in national-origin discrimination under Title VII and therefore did not require a court to allow discovery into plaintiffs’ immigration status.

The EEOC’s post-Hoffman statement did not address compensatory and punitive damages. However, under settled Title VII case law, these damages should remain available. Prior to Hoffman, the Second and Seventh Circuits had held that punitive damages were recoverable under Title VII even in the absence of any other damage award.\textsuperscript{32}

Fair Labor Standards Act. One of the remedies that clearly survives Hoffman is “back pay” for undocumented workers for work actually performed under the FLSA. “Back pay” under the FLSA differs from back pay under the NLRA and antidiscrimination laws, where back pay refers to payment of wages that the worker would have earned if not for the unlawful termination or other discrimination. Under the FLSA “back pay” usually refers to payment of wages that the worker actually earned but was not paid.

In the wake of Hoffman the Labor Department said that it would "fully and vigorously enforce the FLSA without regard to whether an employee is documented or undocumented."\textsuperscript{33} The statement does not address back pay for undocumented workers who suffer retaliation on the job.

In Singh v. Jutla & C.D. & R’s Oil Inc. a worker and employer settled a claim for unpaid wages; shortly thereafter the employer turned the worker in to immigration authorities.\textsuperscript{34} The worker was found eligible for compensatory and punitive damages. In Renteria v. Italia Foods the court held that compensatory damages remained available to unauthorized workers post-Hoffman, but that back pay and front pay were unavailable under the FLSA.\textsuperscript{35} Other courts have ruled in favor of post-Hoffman undocumented plaintiffs as well.\textsuperscript{36}

Other Federal Laws. The primary U.S. law that protects workers’ health and safety on the job is the Occupational Safety and Health Act (OSHA). This law does not exclude undocumented workers. The Labor Department, in its statement referred to above, stated its intent to enforce the OSHA, the FLSA, the Migrant and Seasonal Worker Protection Act, and the Mine Safety and Health Act without regard to whether an employee was documented or undocumented.\textsuperscript{37}

At least one federal court agrees that the Migrant and Seasonal Worker Protection Act continues to protect undocumented farm workers. In a case brought by a class of 300 tomato-packing shed workers in

\textsuperscript{30}Rivera v. NIBCO Inc., 364 F.3d 1057, 1063 (9th Cir. 2004).
\textsuperscript{31}Id. at 1065.

\textsuperscript{32}See Cush-Crawford v. Adchem Corp., 271 F.3d 352, 354 (2d Cir. 2001), and Timm v. Progressive Steel Plating Inc., 137 F.3d 1008, 1009 (7th Cir. 1998).


\textsuperscript{34}Singh v. Jutla & C.D. & R’s Oil Inc., 214 F. Supp. 2d 1056 (N.D. Cal. 2002).


\textsuperscript{37}Fact Sheet No. 48, supra note 33. See also Hoffman Plastic Compounds Inc. v. NLRB: Questions and Answers, supra note 33.
Florida, the judge found that Hoffman had no effect on the workers’ claims. 38

B. Remedies for Violation of State Law

The Hoffman decision has revitalized employers’ arguments that undocumented workers are unprotected by state, as well as federal, labor, and employment laws. 39 Thus far state remedies for violations of wage and employment laws are largely unaffected. Regardless of federal court decisions on back pay and other relief for workplace discrimination, a strong argument is that states are free to decide what remedies are available to undocumented workers under their own state laws. States vary in interpreting their own laws differently from the NLRA. Two states adopted administrative policies, and one of them subsequently passed a statute distinguishing Hoffman. State case law has been both positive and negative.

State Court Decisions on Back Pay. State courts have not fully addressed the availability of back pay under state discrimination laws since Hoffman. State back pay claims may remain unaffected for the same reasons that the Ninth Circuit in Rivera found that Hoffman did not affect Title VII claims, and because additional arguments support independent state policy in this area. Some case law is negative, but distinguishable.

A California court of appeal addressed incidents that preceded passage of a state law preserving remedies for undocumented workers. The plaintiff sought medical leave due to ovarian cancer; her employment was terminated. She sued for wrongful termination and for violation of California’s family leave law and was barred from claiming wrongful termination because she had given her employer fraudulent immigration documents. Because neither party cited the new California law, the court concluded that the parties had waived any argument based on that provision. 40

State Agency Statements on Anti-discrimination Remedies. Shortly after Hoffman, California’s Department of Industrial Relations clarified that it would continue to seek back pay for undocumented workers. 41 Following that statement, the legislature reaffirmed 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.” 42 Washington State’s Human Rights Commission also clarified that it would continue to seek back pay as a remedy for violation of the state’s Law Against Discrimination. 43

Claims for Wage Loss Under State Law. Although state courts continue to hold

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39Post-Hoffman, a federal district court in Illinois ruled that a worker’s suit against his coworker for injuries arising out of an automobile accident was barred by workers’ compensation law; therefore the court did not reach the defendant’s argument 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).

40Morejon v. Terry Hinge and Hardware, No. B162878, 2003 WL 22482036 (Cal. Ct. App. 2003). A New Jersey court also held that a worker claiming discriminatory termination under New Jersey’s Law Against Discrimination was not entitled to claim economic or noneconomic damages because she could not be lawfully employed. In that case the employer refused to reinstate the plaintiff following maternity leave. However, the New Jersey superior court recognized that there might be cases where “the need to vindicate the policies of the [Law Against Discrimination] ... and to compensate an aggrieved party for tangible physical or emotional harm” would lead it to conclude that an individual should be able to seek compensation for that harm. Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004). The case is on appeal.

41California Department of Industrial Relations, All California Workers Are Entitled to Workplace Protection (May 31, 2002), www.dir.ca.gov/quadoc.html.


that immigrants may claim unpaid wages under state law after Hoffman, some decisions are troubling. In the first cases to emerge, courts held, as they have in FLSA cases, that wages for work already performed should be distinguished from traditional back pay disallowed in Hoffman. California and Washington labor agencies' statements referred to above, as well as a New York attorney general opinion, also assure undocumented workers that their rights to collect unpaid wages will continue to be protected post-Hoffman.

Decisions have been uneven with respect to wage loss in tort cases since Hoffman. Courts in California and Texas held that lost wages were recoverable. A court in Kansas held that such lost wage claims were affected by Hoffman. New York courts have reached conflicting results.

C. Protecting Clients from Intrusive Discovery

Persistent attempts by employer defendants to inquire into plaintiffs' immigration status constitute perhaps the greatest obstacle that immigrant workers face in pursuing their employment and labor rights after Hoffman. Employers who hire large numbers of undocumented workers and are served with a complaint take a sudden interest in interest in compliance with immigration laws. Discovery into immigration status is likely to have a serious chilling effect on immigrant workers who contemplate filing a claim and on those who have courageously filed claims.

Advocates have access to a number of tools to protect clients in these circumstances. Clients should never disclose their status in litigation unless their attorney fully understands the implications of the disclosure on both the litigation and on the clients' future. In some cases immigrant workers have disclosed their status only to find themselves deported. It is almost never in the client's best interest to make such a disclosure voluntarily.

Interviewing. Good representation begins with good interviewing. After assuring a client that the lawyer will protect the client's status, the lawyer should ask what that status is and whether and how the employer knows the status and where the client is living. Attorneys need to know the client's precise status and what the employer knows in order to protect clients from employer harassment and extrajudicial actions such as turning in workers to U.S. Immigration and Customs Enforcement.

Informal Discovery Protection Provisions. Lawyers have a variety of informal tools available in negotiating intrusive questions about immigration status. Where status is clearly not relevant (e.g., in cases with no claim for back pay), the advocate may explain to opposing counsel that immigration status is irrelevant to the underlying

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44 See Valadez v El Agua Taco Shop, No. GIC 781170 (Cal. Super. Ct. 2002) (holding that Hoffman does not affect an undocumented worker's right to recover unpaid wages under the California Labor Code), De la Rosa v Northern Harvest Furniture, 210 F.R.D. 237 (C.D. Ill. 2002). However, one court, sitting as a small claims court in New York, limited workers' ability to recover unpaid wages after Hoffman. In Ulloa v Al's All Tree Service Inc., 768 N.Y.S.2d 556 (N.Y. Dist. Ct. 2003), the court limited a landscape worker to recovery of minimum wage, not the contract wage that the worker claimed was promised. This ruling appears to conflict with the New York attorney general's policy to continue recovering wages on behalf of undocumented workers after Hoffman (see note 45 infra).


49 Immigrant clients at first may have great difficulty understanding the attorney-client relationship and confidentiality and may mistrust the legal system and lawyers. Attorneys must establish a trustful relationship with clients before getting these details. Before delving into the details of a person's immigration status, lawyers may find it useful first to explain the protection provisions of the law "whether you are documented or not." The attorney should make sure that the focus in the interview is on the client's substantive rights, not immigration status details.
claim and that threats to turn a worker in to Immigration and Customs Enforcement constitute retaliation under many state and federal laws.\textsuperscript{50}

The advocate also may share with the employer or defense counsel that Immigration and Customs Enforcement will generally not respond if the employer attempts to retaliate. According to a policy of the Immigration and Naturalization Service, the Immigration and Customs Enforcement’s predecessor, when Immigration and Customs Enforcement receives information concerning the employment of undocumented or unauthorized aliens, officials must “consider” whether the information is being given to interfere with employees’ rights to organize or enforce other workplace rights, or whether the information is being given to retaliate against employees to interfere with those rights. If Immigration and Customs Enforcement determines that the information may have been given in order to interfere with employees’ 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.”\textsuperscript{51}

In appropriate circumstances employee representatives or advocates should consider alerting Immigration and Customs Enforcement that any received “tips” related to a workplace having labor disputes may be motivated by retaliation. Advocates may want to supply copies of charges or complaints (with information identifying particular employees redacted) and a copy of the Field Manual section cited above since Immigration and Customs Enforcement officials may be unfamiliar with or lack easy access to it. However, advocates should first make sure that they are familiar with local agency policy in this regard since agency policy does not strictly prohibit enforcement action during a labor dispute.

Similarly advocates may want to remind Labor Department officials of the department’s 1998 memorandum of understanding with the Immigration and Naturalization Service; the memorandum allows undocumented workers to file complaints with the department without fear of negative repercussions to their immigration status.\textsuperscript{52} The memorandum also states that the department will not inspect employment verification requirements in investigations arising from worker-initiated complaints.

**Formal Discovery Protection Provisions.**

An increasing number of defense attorneys are using the discovery process to inquire into a plaintiff’s immigration status, ostensibly to obtain information relevant to damages claims. But these measures clearly serve to intimidate the plaintiff into dropping the charges for fear of retaliation and immigration consequences. In many cases advocates should seek formal discovery protection. A substantial body of favorable case law supports protective orders.

The recent Ninth Circuit decision in Rivera upholding a protective order post-Hoffman suggests that at least some courts understand this dynamic. Weighing plaintiffs’ interest in nondisclosure against the employer’s argument that it “needed” disclosure of status to argue that plaintiffs were not entitled to back pay under Title VII after Hoffman, the court said:

> Granting employers the right to inquire into workers’ immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title


\textsuperscript{51}Special Agent’s Field Manual 33.14(h) (“Questioning Persons During Labor Disputes”) (on file with Rebecca Smith). The Field Manual section was originally designated an Operating Instruction and numbered 287.3.

\textsuperscript{52}See http://dol.gov/esa/whatsnew/whd/mou/nov98mou.htm.
VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.53

Another example is Flores v. Albertson's.54 There defendants used Hoffman to request immigration documents from class members, who were janitors seeking 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 and could cause them to drop out of the case rather than risk disclosure of their status. In Zeng Liu a similar case for unpaid wages, the defendant sought disclosure of plaintiff garment workers' immigration status; the federal court denied the request on the grounds that release of such information would be more harmful than relevant.55

Where a particular form of relief is not so clearly available to the undocumented, the advocate still may request a protective order to obtain a ruling on relevance before the plaintiff decides whether or not to disclose status, plead the Fifth Amendment on potential criminal violations, or modify requests for relief.

"Knowing" Employers. Where the employer knew of the worker's status from the outset of the employment relationship, the advocate could 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: "Were the Board forbidden to assess back pay against a knowing employer—a circumstance not before us today [citation omitted]—this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious."56

NLRB Process as a Guide. As noted above, the NLRB's approach is instructive for courts ruling on defense claims of need-to-know immigration status: "Regions 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."57 Thus an employer should not be allowed to raise a plaintiff's immigration status without showing that the issue is relevant and that the employer obtained the information lawfully and independently of the proceeding.

Motions in Limine. Since Hoffman, employers often argue that an immigrant worker's status is relevant in determining whether the worker properly mitigated damages. In Rodriguez v. The Texan, the plaintiff filed a motion in limine and barred the employer from arguing failure to mitigate—an affirmative defense that is waived if not pled.58 The court noted that "it surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate

53Rivera, 364 F.3d at 1065
54Flores v. Albertson's Inc., 2002 WL 1162633 (examining Hoffman and finding its holding does not support discovery of plaintiffs' immigration status).
55Zeng Liu v. Donna Karan International, 207 F. Supp. 2d 191 (S.D.N.Y. 2002); see also Topo v. Dhir, 210 F.R.D. 76 (S.D.N.Y. 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., Civ. A. No. 93-0085-H, 1994 WL 507475 (Va. D. Ct. 1994). In Escobar, 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.
56Singh, 214 F. Supp. 2d at 1061.
57National Labor Relations Board General Counsel, supra note 25.
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.”

III. Immigrant Workers and Safety Net Programs

In contrast to federal labor laws, coverage under safety net programs that protect unemployed, disabled, or retired workers often hinges on workers’ immigration status. With the exception of workers’ compensation benefits, eligibility for safety net programs is often restricted to a narrower group of immigrants than just those who are “lawfully present” in the United States.

A. Workers’ Compensation

Poverty law advocates know that immigrants, especially undocumented immigrants, work disproportionately in dangerous and low-paid jobs. When these workers go without wages due to injury or accident, they are in dire need of wage loss compensation. Nonetheless Hoffman caused an onslaught of litigation in which employers argued that injured workers, if undocumented, are not entitled to workers’ compensation.

Both before and after Hoffman, undocumented immigrants have been entitled to workers’ compensation in nearly every state; Wyoming, through an express exclusion in its workers’ compensation statute, is the sole exception. Every court that has considered whether undocumented workers are covered under a state’s workers’ compensation law, again with one exception, has answered in the affirmative. The single anomaly is a decision from Virginia. Immediately after the ruling, employers facing a prospect of tort liability convinced the legislature to reinclude undocumented workers in the state law.

Coverage and Wage Loss Benefits Post-Hoffman. In workers’ compensation cases in eleven states in less than two years, state agencies and courts have decided that immigrant workers, even those who are undocumented, continue to be entitled to workers’ compensation benefits. Most have granted undocumented immigrants the full range of benefits, including both medical benefits and lost wages. Only one case, Sanchez v. Eagle Alloy Inc., expressly limited wage

59Rodriguez, 2002 WL 31061237 at *3.


loss benefits, under a very specific exclusion in Michigan law.65

Vocational Rehabilitation. Workers injured on the job normally receive vocational rehabilitation benefits as part of the overall workers' compensation benefits package. The purpose is to retrain an injured employee to perform the same job or a different job at the same company. Courts in Nevada and California conclude that unauthorized workers are not entitled to vocational rehabilitation benefits under certain circumstances.66

Death Benefits. Workers' compensation laws in many states bar family members of workers killed on the job from receiving full benefits if the family members live outside the United States and are not U.S. citizens. States limit compensation in several ways. Some offer only a percentage of the benefits that a lawful resident would have received, generally 50 percent, while others limit the familial relationships that qualify for compensation.67 Others limit coverage based on the length of time a migrant has been a citizen (Wisconsin), the laws of the alien resident beneficiary's home country (Washington), or the cost of living in the alien resident beneficiary's home country (Oregon).68 Although these laws do not explicitly discriminate on the basis of alienage alone, they disproportionately deny benefits to nonnationals, whose beneficiaries are most likely to be nonresident aliens.

B. Unemployment Insurance

To be eligible for unemployment insurance immigrant workers must satisfy the same basic requirements as other workers. They must be unemployed through no fault of their own, have enough wages earned or hours worked to establish a claim, be able and available to work, and seek and not refuse "suitable" work.

Under federal law, immigrant workers must fall into particular immigration categories to qualify for unemployment insurance. States consider immigrants' status at both the time the work was performed (the "base year") and the time the worker applied for benefits (the "benefit year"). The basic principle, as interpreted by the Labor Department, is that an immigrant worker must have a valid employment authorization at both times. However, advocates can help more immigrant workers qualify for benefits.

Immigration Status in the "Base Year." Under federal law, immigrants may use their "base year" wages to qualify for the first twenty-six weeks of unemployment insurance benefits if they (1) were admitted for permanent residence at the time services were performed, (2) were lawfully in the United States for the purpose of performing services, or (3) were "permanently residing in the United States under color of law," a status commonly known as "prucol."69

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65Sanchez, 658 N.W.2d at 510, order vacated by Sanchez, 684 N.W.2d at 342


67See, e.g., ALA. CODE § 25-5-82 (2002) (compensation limited to dependents who were actual state residents at time of worker's death); ARK. CODE ANN. § 11-9-111 (2002) (surviving wife or children only, or parents if no wife or children; state may limit compensation to 50 percent of rate for residents); 19 DEL. CODE ANN. § 2333 (2001) (compensation limited to nonresident wife and children at 50 percent of rate for residents); IOWA CODE § 85.31 (2002) (compensation amount limited to 50 percent); KY. REV. STAT. ANN. § 342.130 (2001) (compensation limited to widows, widowers, and children at 50 percent of rate for residents); 77 Pa. CONS. STAT. § 563 (2002); S.C. CODE ANN. § 42-9-290 (2001) (compensation payable to spouse and child only).

68WI. STAT. § 102.51 (2001); WASH. REV. CODE § 51.52.140 (2002); OR. REV. STAT. § 656.232 (2001)

6926 U.S.C.A. § 3304(a)(14)(A) (2002). The first twenty-six weeks of benefits are state-funded "Extended benefits," paid during times of recession and generally after workers have been unemployed for more than twenty-six weeks, are federally funded. To qualify for these benefits, which are explicitly made "federal public benefits" under the 1995 welfare reform law, immigrants must be among the "qualified" immigrants currently eligible for welfare benefits. 8 U.S.C. § 1611(c)(1)(B) (1999)
The first two categories are self-explanatory, but the third, "permanently residing under color of law," is much broader, and the Labor Department has a series of policies to define this category. Other immigrants may also qualify for the first twenty-six weeks of unemployment benefits. The law does not directly mention these immigrants, but it generally covers people who are in the United States with the knowledge and permission of the U.S. Citizenship and Immigration Services. Advocates may be able to help an immigrant client qualify for benefits if the immigrant has applied for a particular immigration status and has some indication that the agency knows of the person's presence and does not intend to seek deportation.

"Permanently Residing" in the United States. Immigrants whose base period wages are counted for a claim under the prucol category must also show that they are "permanently residing" in the United States. "Permanence" means a relationship that is continuing or lasting. The Labor Department says that only people who have been granted some kind of unconditional permission to be in the United States qualify under this category, but this interpretation is not consistent with the usual meaning of the term "permanently residing." Advocates should argue in individual cases that an immigrant who intends to remain permanently in the United States is "permanently residing" in this country.

Under Labor Department policy, a prucol immigrant must also have work authorization in order to count base period wages toward a claim. This policy conflicts with the statute itself, which covers immigrants who have either prucol status or work authorization. Advocates should argue that prucol status in the base year is sufficient to establish a claim.

Immigration Status During the Benefit Year: "Able and Available." Under the laws of every state, a claimant must be "able and available" to work in order to receive unemployment compensation. Some immigrants have successfully argued that a person who is not legally authorized to work, but who is physically capable of doing work, should be considered "able and available." However, most

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70 According to the Labor Department the following immigrants are "permanently residing [in the United States] under color of law," or "prucol": refugees; immigrants who have been granted political asylum; immigrants who have been "paroled" into the United States ("parole" in this context is unrelated to the criminal justice system); immigrants who have received "withholding of deportation"; "conditional entrants" (a category used before 1980 to describe refugee status); Cuban and Haitians who have been granted parole, applied for asylum, or have not received a final order of deportation; immigrants who have been notified in writing that deportation action will not be taken against them or that deportation is indefinitely deferred; certain immigrants presumed to have been lawfully admitted for permanent residence under 8 C.F.R. § 101, which covers narrow categories of immigrants who entered from certain countries at different times, all prior to 1943; and immigrants who have been granted a lawful status that allows them to remain in the United States for an indefinite period. U.S. Department of Labor, Unemployment Insurance Program Letter No. 1-86, Change 1: Aliens Permanently Residing in the United States Under Color of Law (Feb. 16, 1989), available at www.ows.doleta.gov/dmstree/uip/up86c1.htm. Other groups of immigrants should also qualify for the first twenty-six weeks of benefits, even though they are not directly mentioned in Labor Department policy. These groups include Amerasians (those fathered by U.S. citizens during the conflict in southeast Asia and family members of these Amerasians), battered spouses or children approved or with applications pending under the Violence Against Women Act, and immigrants who have been granted cancellation of removal.

71 Id.
courts, and the Labor Department, say that in order to show that a claimant is "able and available" for work at the time of application, the claimant must have work authorization.\textsuperscript{74}

Some immigrants, such as refugees and asylees, have work authorization incident to their status and so can satisfy the "able and available" requirement merely by proving their status.\textsuperscript{75} Still others, such as TN visa applicants, whose status confers automatic work authorization as soon as a job is offered, have successfully argued that they are "able and available" for work and therefore have been granted unemployment benefits.\textsuperscript{76} Sometimes immigrant workers apply for renewal of work authorization, and the Citizenship and Immigration Services delays issuance of the work authorization card. Immigrants who can show that they received employment authorization in the base year and filed a timely renewal application may successfully argue that renewal is a mere formality and that they are able and available to work.

C. Social Security Benefits

Immigrants who are not "qualified aliens" are ineligible for many federal public benefits, including social security benefits.\textsuperscript{77} Even immigrants who have paid into the system by way of mandatory payroll withholding are unable to benefit from the social security system if their earnings were not properly credited due to a discrepancy, or "no match," between the worker's name and social security number. However, immigrant workers who attain "qualified alien" status may correct their wage records in order to receive social security benefits or to establish forty qualifying quarters of earnings to access other federal means-tested benefits, such as Supplemental Security Income (SSI) and food stamps.

Wage earners or their survivors may ask the Social Security Administration to correct the worker's wage record.\textsuperscript{78} Ordinarily a request should be made within three years, three months, and fifteen days after the year in which the wages were earned. A request made after this time limit may be filed and considered, but the wage earner must rebut a presumption that no wages were paid. Advocates should advise immigrant wage earners that earnings corrections made by the Social Security Administration will be reported to the Internal Revenue Service (IRS) and may have tax and immigration consequences, including tax evasion charges and good moral character questions that may be a bar to naturalization.\textsuperscript{79}

IV. Tax Issues

Immigrants and nonimmigrants generally qualify for the same tax exemptions and credits, including the child tax credit, the additional child tax credit, the child and dependent care credits (when the worker pays for child care), and tax credits for educational expenses, but must file a tax return to claim the credits.


\textsuperscript{77}For the definition of "qualified alien," see 8 U.S.C.A § 1641 (2002).


\textsuperscript{79}See Landry & Zelenske, supra note 78, at 7.
An individual tax identification number allows a worker to claim the credits listed above, but a valid social security number is necessary for a worker and anyone listed on the worker's tax return to claim the earned income credit.\(^8\)

The earned income credit allows low- and moderate-income people to reduce or eliminate their taxes and receive cash back.\(^8\) For the 2002 tax year, twenty-one million U.S. families received the credit.\(^8\) Requirements to claim it vary with whether the taxpayer has children, but generally one must have "earned" income (such as wages) and the children must reside with the earner. A working parent need not show proof of financial support for the child in order to claim the earned income credit, and a custodial parent who receives child support may claim the credit.\(^8\) Sixteen states and the District of Columbia have enacted their own earned income credits based on the federal credit.\(^8\)

Funds received through the earned income credit will not affect a family's eligibility for public benefits such as SSI, Medicaid, food stamps, or federally assisted housing programs if the family spends the funds soon after receiving them (within a month for SSI and Medicaid, and within a year for food stamps). Likewise, immigrant workers who receive the earned income credit will not have their permanent residence jeopardized by a "public charge" label, nor does the credit indicate that a worker is unable to be self-supporting.

The child tax credit refunds up to $1,000 (in the 2003 tax year) per dependent child under 17; to receive the credit immigrant families may file their tax return with either a social security number or an individual tax identification number. The child in question must be either a U.S. citizen or a U.S. "resident" for tax purposes.\(^8\)

Immigrant families who have several children and owe taxes likely also qualify for the additional child tax credit. If immigrant parents, in order to work, pay a child care provider, an after-school or preschool program, or even a license-exempt caregiver, they may claim the child and dependent tax credit.

**Individual Tax Identification Numbers.** In 1996 the IRS began issuing individual tax identification numbers to individuals who must file income tax returns but are ineligible for social security numbers. To date, seven million individual tax identification numbers have been issued; in tax year 2001 alone, over half a million income tax returns—contributing $305 million to the U.S. Treasury—were filed by using the numbers.\(^8\)

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\(^8\) For more information on tax issues affecting immigrants and sources of tax assistance for immigrants, see Iris E. Coloma-Gaines, *Tax Assistance for Immigrants*, in this issue.

\(^8\) By filing Form W-5 with the employer, a worker may also claim the earned income credit during the year, known as the advance earned income credit.\(^8\)

\(^8\) *Center on Budget and Policy Priorities, EIC Participation for Tax Year 2002, by State,* available at www.cbpp.org/eic2004/eic04-state-chart.pdf. The Center on Budget and Policy Priorities tracks the eligibility requirements and benefits of tax credits available to low-income workers and annually offers an earned income tax credit outreach kit with flyers available in eighteen languages. Advocates may copy and distribute the flyers to community groups and to their clients.

\(^8\) Internal Revenue Service Publication 596, available at www.irs.gov, explains the eligibility rules in detail.

\(^8\) The states are Colorado, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, Oregon, Rhode Island, Vermont, and Wisconsin.

\(^8\) For tax purposes, unlike for immigration purposes, an individual who meets the "substantial presence test" of physically residing in the United States for 31 days during the current calendar year or 183 days during the previous three years is considered a "resident." 26 U.S. C § 7701(b)(1)(A) (2002).

The individual tax identification number is a nine-digit number similar to the social security number, except that it starts with "9." One who is eligible for a social security number, however, is not eligible for a tax identification number; the latter is available to a range of foreign-born persons, and therefore its use does not create an inference regarding a person’s immigration status. 87

The Hoffman decision unleashed an onslaught of employer litigation on the issue of immigration status, involving attempts to force workers to disclose their immigration status and claims that antidiscrimination, wage and hour, labor, and even worker’s compensation laws no longer protect undocumented workers. Some courts are siding with employers. Workers are losing rights, and their remaining rights are being chilled. In a nation that prides itself on the principle of equality, this limitation on legal remedies must not survive.

In the meantime, with adequate information, advocates can assist immigrant workers who assert the many labor protection provisions that are still available to them; advocates can work to limit the reach of the Hoffman decision. For workers who have lost jobs in the recession, advocates can seek to ensure that unemployment compensation laws are broadly construed and that disabled immigrants have full access to safety net programs intended to benefit them.

As a nation, the United States must decide to enforce labor and employment laws and their protection provisions on an equal basis for all workers, if it intends to have an equitable immigration policy, a workable labor policy, and a credible human rights policy.

87 For more information on the mechanics, benefits, and risks of using an individual tax identification number, see Tyler Moran, Access to Identification Documents for Immigrants: Restrictions Undermine Public Policy Goals, in this issue.

More Information

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Join the program’s active immigrant worker rights listserve, now with over 450 advocates. Send a blank e-mail to nelp-employmentrights-subscribe@yahooogroups.com.