

WORKPLACE RIGHTS OF UNDOCUMENTED WORKERS: WHAT HAPPENS NOW?

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INTRODUCTION

Challenges to the enforcement of immigration law have recently attracted media attention, despite reported declines in the numbers of unauthorized immigrants living and working in the U. S. Two recent United States Supreme Court decisions, *Chamber of Commerce v. Whiting*¹ and *Arizona v. United States*,² serve as reminders that immigration is still an issue that inspires heated debate. *Whiting* involved a pre-enforcement challenge to Arizona’s “Legal Arizona Workers Act of 2007”,³ which would allow suspension or revocation of licenses for businesses that knowingly or intentionally employ unauthorized aliens, and would require the use of the E-Verify system to compare work authorization documents to information in federal databases.⁴ *Arizona*, on the other hand, directs enforcement efforts at undocumented aliens themselves, rather than persons who would employ them. The challenged state law, “Support Our Law Enforcement and Safe Neighborhoods Act”,⁵ created two state misdemeanors; one for failing to comply with alien registration laws and a second for applying for work without authorization.

Both cases addressed questions of states’ power to regulate immigration, either directly, as in *Arizona*, or indirectly through licensing laws, as in *Whiting*. While these cases resolved some state control questions, issues regarding workplace rights of unauthorized immigrants were not addressed in either decision.

Immigration continues to be a hot topic, despite the decline in the rate of illegal immigration over the past ten years.⁶ For example, candidates’ positions on immigration reform were an issue in the 2012 Presidential campaign, although one that neither candidate focused on, except in front of Hispanic audiences.⁷ While enforcement efforts have been focused penalizing employers who knowingly hire undocumented workers, there has been less concern with workplace issues for these workers. This paper will explore workplace rights, if any, for undocumented workers, under laws such as the National Labor Relations Act, the Fair Labor Standards Act, Worker’s Compensation, and Title VII, analyze the current state of the law, and give guidance to academics and practitioners regarding frequently asked questions about illegal immigrants and their rights in today’s workplace.

¹ 131 S. Ct. 1968 (2011).

² 132 S. Ct. 2492 (2012).

³ Ariz. Rev. Stat. Ann. § 23-212(B)Year.

⁴ Ariz. Rev. Stat. Ann. § 23-214(A)Year.

⁵ S.B. 1070, 49th Leg., Second Sess. (Ariz. 2010). If this is a session law then list: name, volume, page and section.

⁶ Press Release, Pew Hispanic Center, Net Migration from Mexico Falls to Zero – and Perhaps Less (April 23, 2012), http://www.pewhispanic.org/files/2012/04/general-advisory-mexican-migration_final.pdf.

⁷ Dan Balz, *Immigration*, WASH. POST, Oct. 11, 2012, at A06.

HOFFMAN PLASTIC V. NLRB

In a 5-4 decision in 2002, the Supreme Court in *Hoffman Plastic v. NLRB*⁸ determined that an illegal alien was not entitled to receive an NLRB award of back pay as a remedy for the employer's unfair labor practices. The application of this decision has not, so far, been extended much beyond the facts of that case, due to the lower courts' unwillingness either to distinguish or narrowly interpret the court's holding."⁹ An understanding of the impact of *Hoffman* on the interpretation of other employment laws and their impact on illegals is important, because the potential number of employment disputes involving illegal aliens will likely increase in the future, since the number of unauthorized immigrants living in the United States increased by an estimated 1.8 million between 2002, the year in which *Hoffman* was decided, and 2010.¹⁰ *Hoffman Plastic v. NLRB*¹¹ presented the issue of whether an alien who had used false documents in order to gain employment is eligible for backpay due to an employer unfair labor practice. Castro, an undocumented alien who was in the United States illegally, presented a fraudulent driver's license and Social Security card to obtain employment with Hoffman. While working for Hoffman, Castro participated in a union organizing campaign and was terminated by his employer because of these activities. The National Labor Relations Board determined that Hoffman had illegally selected four union organizers, including Castro, to be terminated. At an administrative hearing to determine the amount of backpay that was due to each illegally terminated employee, Castro testified that he had never been legally authorized to work in the United States. The ALJ determined that an award of backpay to Castro would be "in conflict with IRCA, which makes it unlawful for employers to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility."¹² The NLRB reversed the ALJ's decision with respect to Castro's backpay and calculated an award "from the date of Castro's termination to the date Hoffman first learned of Castro's undocumented status."¹³

On appeal, the U.S. Supreme Court in a 5-4 decision reversed the decision of the NLRB, and denied backpay to Castro. It reasoned that "awarding back pay to illegal aliens runs counter to policies underlying IRCA,"¹⁴ and that the NLRB did not have the authority to give such an award. Allowing the Board to do so would

⁸535 U.S.137 (2002). Need to be consistent with spacing between footnotes.

⁹John E. Winters, *Changing Landscape: What are the Rules After Hoffman?* TENN. B. J. June 2008, at 19.

¹⁰Jeffrey Passel and D'Vera Cohn, "Unauthorized Immigration Population: National and State Trends," Pew Hispanic Center, <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-national-and-state-trends-2010/>.

¹¹535 U.S.137 (2002).

¹²*Id.* at 141.

¹³*Id.* at 142.

¹⁴*Id.* at 149.

“unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.”¹⁵ The dissent argued that the NLRB’s order of backpay, rather than interfering with immigration law, would actually help to deter unlawful activities that “both labor laws and immigration laws seek to prevent.”¹⁶ Furthermore, the dissent maintained that, in addition to compensating victims, backpay awards also serve to deter employer violations of labor law.

IMMIGRATION REFORM AND CONTROL ACT OF 1986 (IRCA)

The Immigration and Nationality Act of 1952 (INA) is the primary federal law that regulates immigration status.¹⁷ The Immigration Reform and Control Act of 1986¹⁸ (IRCA) amended the INA. IRCA was an attempt to reduce illegal immigration by imposing new duties on employers to verify the work eligibility of all employees and making it unlawful for an employer to hire an undocumented worker. Any person “hiring, recruiting, or referring an individual for employment in the United States” must examine that individual’s documentation which establishes “both employment authorization and identity” and which “reasonably appears on its face to be genuine.”¹⁹

In addition to the duty to not hire ineligible workers, it is a violation of IRCA to continue to employ an alien "knowing the alien is (or has become) an unauthorized alien with respect to such employment."²⁰ It is this "continuing employment" prohibition that has prevented undocumented workers from receiving backpay in some circumstances under which this remedy would be available to authorized workers.²¹ Civil penalties, including cease and desist orders and monetary penalties, may be imposed on employers who violate IRCA by engaging in “hiring, recruiting, and referral violations”²² and employers may be subject to civil monetary penalties for failing to comply with requirements to verify work eligibility of their employees through the use of employee verification systems.²³

While the Immigration Reform and Control Act expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens,”²⁴ a number of states have introduced bills to

¹⁵*Id.* at 151.

¹⁶ *Id.*, at 153 (Breyer, J., dissenting).

¹⁷8 U.S.C.S. § 1101 *et seq.* (Year of code for footnotes 17-19)

¹⁸8 U.S.C.S. § 1324(a).

¹⁹8 U.S.C.S. § 1324(b).

²⁰8 U.S.C.S. § 1324a(a)(2). LexisNexis and year needs to be listed for footnotes 20-24

²¹*See Hoffman Plastic v. N.L.R.B.*, 535 U.S.137 (2002).

²²8 U.S.C.S. § 1324a(e)(4).

²³8 U.S.C.S. § 1324a(e)(5).

²⁴8 U.S.C.S. § 1324a(h)(2).

discourage employers within those states from hiring undocumented workers. As of November 2010, legislatures in South Carolina, Pennsylvania, Minnesota, Rhode Island, Michigan, and Illinois, had bills similar to Arizona's S. B. 1070, "Support Our Law Enforcement and Safe Neighborhoods Act."²⁵ In the 1976 pre-IRCA *De Canas v. Bica* decision, the Supreme Court recognized that "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."²⁶ In the absence of express preemption, courts may find that preemption is implied by inquiring into whether, under the facts of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁷

For instance, in 2011, the *Chamber of Commerce of the United States v. Whiting*²⁸ decision by the Supreme Court specifically addressed the state licensing exception to preemption referred to in *De Canas*. In this case, the plaintiffs challenged the enforceability of The Legal Arizona Workers Act of 2007, which would allow the state to revoke license of a business if it "knowingly or intentionally employs and unauthorized alien."²⁹ Additionally, the Act requires that Arizona state investigators verify work eligibility with the Federal Government rather than making that determination independently, a process which recognizes federal authority over this process. The Supreme Court held that the Arizona statute fell within the authority left to the States under IRCA and is therefore not preempted. *Whiting* also held that a state law requiring employers to use E-Verify³⁰ is consistent with federal law, and therefore not preempted.

THE NATIONAL LABOR RELATIONS ACT³¹

Six years after *Hoffman*, the U.S. Court of Appeals for the D.C. Circuit addressed the issue of whether an undocumented alien is included under the National Labor Relations Act definition of "employee." In *AgriProcessors v. NLRB*,³² an employer refused to bargain with a union, claiming that most of the employees who

²⁵ National Conference of State Legislatures, <http://www.ncsl.org/issues-research/immig/analysis-of-arizonas-immigration-law.aspx> (last visited or modified).

²⁶ *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).

²⁷ *Id.* at 363, *Jones v. Rath Packaging, Inc.*, 430 U.S. 519, 526 (1977).

²⁸ 131 S.Ct. 1968 (2011).

²⁹ *Id.*, referring to Ariz. Rev. Stat. Ann. §§ 23-211, 212, 212.01 (list the original year of the West Supp. 2010) (citing 8 U.S.C. § 1324a year). You can make this footnote less confusing by citing to the case then pinpointing to the page.

³⁰ E-Verify is an internet based system that uses data from the U.S. Department of Homeland Security and the Social Security Administration to verify work eligibility of job applicants. See information located at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD> (last visited the site?)

³¹ 29 U.S.C.S. §§ 151-169 year.

³² *Agri Processors Co., Inc. v. NLRB*, 514 F.3d 1 (D.C. Cir, 2008).

voted in favor of unionization were, in fact, undocumented aliens and were therefore not eligible to participate in the election. “The NLRA defines the term ‘employee’ expansively and lists only a few limited exceptions” and “clearly includes undocumented aliens.”³³ Moreover, IRCA does not amend the NLRA to exclude illegal aliens from its coverage. Citing the House Judiciary Committee Report on IRCA, the court found that it was “not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal...labor relations boards...”³⁴ So, while undocumented aliens are not eligible for backpay under the NLRA according to the ruling in *Hoffman*, the court held that they are, nonetheless, considered employees for the purpose of unionizing and forming a bargaining unit.

WAGE AND HOUR LAWS: FAIR LABOR STANDARDS ACT

Within three months after the Supreme Court’s decision in *Hoffman* disallowing backpay to undocumented workers, federal district courts in both California and New York addressed arguments seeking to extend the Court’s holding to cases brought under the Fair Labor Standards Act (FLSA).³⁵ The defendants in *Flores v. Albertsons, Inc.*,³⁶ a class action seeking compensation under the FLSA and the California Labor Code, sought review of a magistrate judge’s order denying discovery of documents related to the plaintiffs’ immigration status. Citing *Hoffman*, the defendants asserted that discovery of this information was relevant to the case because the plaintiffs’ status might limit defendants’ liability. Notwithstanding plaintiffs’ stipulation that many members of the class may be undocumented workers, the California trial court upheld the magistrate’s order ruling that the plaintiffs’ immigration status was not relevant to their claim.

Similarly, the a federal district court in New York denied defendant’s request for documents relating to plaintiffs’ immigration status during discovery in a suit for unpaid wages under the FLSA.³⁷ Both courts relied on *Patel v. Quality Inn South*,³⁸ an 11th Circuit federal appellate decision that predated *Hoffman*.

In *Patel*, the appellate court held that the plaintiff, an Indian national who worked in the U.S. for more than two years after expiration of his visa, was an employee for purposes of the FLSA. The court found that Congress had intended broad interpretation of the term “employee” under the FLSA and concluded, “nothing in the FLSA or its legislative history suggests that Congress intended to

³³*Id.* at 2

³⁴*Id.* at 4.

³⁵29 U.S.C.S. §§ 201 *et seq.* LexisNexis year

³⁶*Flores v. Albertsons, Inc.*, # 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. 2002).

³⁷ *Zeng Liu v. Donna Karan Co.*, 207 F. Supp. 2d 191 (S.D.N.Y.2002).

³⁸846 F.2d 700 (11th Cir. 1988), *cert denied*, 489 U.S.1001, 109 S. Ct. 1120 (1989).

exclude undocumented workers from the act's protection."³⁹ The court additionally found that FLSA protection of undocumented aliens did not contravene IRCA but rather furthered its goals:

Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens....The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.

We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job – at any wage – that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.⁴⁰

Finally, the court concluded that the plaintiffs in *Patel* were entitled to bring an action for unpaid minimum wages and overtime. Noting that illegal workers were precluded from seeking backpay, which is defined as damages encompassing pay for work that would have been performed if the employee had not been terminated, and damages encompassing pay for work that would have been performed if the employee had not been terminated. The court ruled that plaintiffs were nevertheless entitled to seek damages under FLSA for work already performed.

Citing *Patel* as precedent, the California district court in *Flores*, asserted that “Federal courts are clear that the protections of the FLSA are available to citizens and undocumented workers alike.”⁴¹ In subsequent cases, federal district courts consistently have ruled that illegal aliens are entitled to seek damages under

³⁹*Id.* at 703.

⁴⁰*Id.* at 704-05.

⁴¹*Flores v. Albertsons, Inc.*, # 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. 2002). *See also* *Galdames v. N & D Investment Corp.*, 432 Fed. Appx. 801 (11th Cir. 2011), *cert. denied*, # 2012 U.S. LEXIS 1645 (2012).

the FLSA. As in *Flores* and *Zeng Liu*, some of these cases arose in the context of a party's request for discovery of information such as tax returns, social security numbers, or work papers relating to the plaintiff's immigration status.⁴² Other cases have upheld FLSA protection of undocumented workers in denial of a motion to dismiss,⁴³ denial of judgment on the pleadings,⁴⁴ denial of summary judgment⁴⁵ and in determining damages.⁴⁶

While holding that *Hoffman* has not affected the FLSA protection afforded to undocumented workers, courts recognize that *Hoffman* limits recovery to damages for work actually performed by the workers. Because actions brought under the FLSA always relate to compensation for work previously performed, the concept of backpay as used in *Hoffman* is not relevant to FLSA actions. As summarized by one court, the federal decisions constitute a "growing chorus acknowledging the right of undocumented workers to seek relief for work already performed under the FLSA."⁴⁷ Since 2002, the Department of Labor has indicated that the Wage and Hour Division will continue to enforce the FLSA by seeking damages on behalf of undocumented workers for work performed.⁴⁸

STATE LAW

State courts that have considered the effect of *Hoffman* on state statutes regulating wages and hours also have concluded that undocumented workers are entitled to the protection of state laws. In *Coma Corporation v. Kansas Department of Labor*,⁴⁹ the Kansas Supreme Court held that the employment contract of an undocumented worker was enforceable under the Kansas Wage Payment Act, thereby allowing a claim for unpaid wages for work previously performed. The court further allowed recovery of the statutory penalty permitted if the employer's failure to pay minimum wage was willful. A California appellate court has similarly ruled

⁴²See, e.g., *Flores v. Amigon*, 233 F. Supp. 2d 462, 463-64 (E. D. N. Y. 2002); *David v. Signal Int'l, LLC.*, 2009 U.S. Dist. LEXIS 29007 (E. D. La. 2009); *Trejos v. Edita's Bar & Rest., Inc.*, # 2009 U.S. Dist. LEXIS 21239 (E.D.N.Y. 2009); *Cortez v. Medina's Landscaping*, 148 Lab. Cas. (CCH) P34,743 (N. D. Ill. 2002); *Galaviz-Zmora v. Brady Farms, Inc.* 230 F. R. D. 499 (S.D. Mich. 2005).

⁴³*Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N. J. 2005).

⁴⁴*Zirintusa v. Whitaker*, 2007 U.S. LEXIS, (D.D.C.2007).

⁴⁵*Renteria v. Italia Foods, Inc.*, 149 Lab. Cas. (CCH) P34,771 (N. D. Ill. Aug. 21,2003); *Galdames v. N & D Inv. Corp.*, # 2008 U.S. Dist. LEXIS 73433 (S.D. Fla. Sept. 24, 2008).

⁴⁶*Chellen v. John Pickle Co., Inc.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006).

⁴⁷*Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 324 (D.N. J. 2005).

⁴⁸Department of Labor, Employment Standards Administration Wage and Hours Administration, 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 (rev. July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs48.htm>.

⁴⁹154 P.3d 1080 (Kan. 2007).

that the state prevailing wage law⁵⁰ applies to undocumented workers who may sue for the prevailing wage for work already performed.⁵¹

WORKERS' COMPENSATION DEFINING "EMPLOYEE"

After the *Hoffman* decision, employers began to challenge state workers' compensation statutes' inclusion of undocumented aliens as covered employees. With the exception of Wyoming, most state courts have interpreted the definition of "employees" to include illegal aliens entitled to protection under workers' compensation laws.⁵²

Several states have even expressly included undocumented or "unlawful" employees under the statutory definition of employee in their workers' compensation statutes. Both North Carolina and South Carolina have used virtually identical language in their definitions of employee – "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, *including aliens*, and also minors, *whether lawfully or unlawfully employed...*"⁵³ (emphasis added.)

Further, state workers' compensation statutes that do not include such express reference to "unlawfully employed" persons have been interpreted broadly to include undocumented employees as having coverage. For example, *Correa v. Waymouth Farms*⁵⁴ has been frequently cited by other states' courts when confronted with the same issue.⁵⁵ In *Correa*, the Minnesota Supreme Court examined the language of its workers' compensation statute which defined employee as "any person who performs services for another for hire including...an alien."⁵⁶ It found

⁵⁰Cal. Lab Code §§ 1720 *et seq.* year The prevailing wage law establishes a minimum wage for employment on construction financed by public funds.

⁵¹*Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604 (Cal. App. 2d Dist. 2007).

⁵²*Felix v. Wyoming*, 986 P. 2d 161 (Wyo. 1999). At the time of this decision, the Wyoming workers' compensation statute, Wyo. Stat. Ann. § 27-14-102(a)(vii) year, definition of "employee" included "legally employed minors and aliens authorized to work by the United States department of justice, immigration and naturalization service," and did not specifically list unauthorized aliens among the exclusions. Since *Felix*, the statute has been amended to include "aliens whom the employer reasonably believes, at the date of hire and the date of injury based upon documentation in the employer's possession, to be authorized to work..." need full citation 2005 amendment ch.185 § 2, effective July 1, 2005.

⁵³N.C. Gen. Stat. § 97-2 (2009), S. C. Code Ann. § 42-1-130 (2008). In a similar vein, the Virginia statute 65.2-101 need year and annotation defines employee as "every person, including aliens and minors, in the service of another under any contract...whether lawfully or unlawfully employed."

⁵⁴664 N.W. 2d 324 (Minn. 2003).

⁵⁵*See, e.g.*, *Continental PET Technologies v. Palacias*, 604 S.E.2d 627, 630 (Ga. App. 2004), *Earth First Grading v. Gutierrez*, 606 S.E.2d 332, 335 (Ga. App. 2004), *Safeharbor Employer Services v. Velazquez*, 860 So.2d 984, 985 (Fla. App. 2003).

⁵⁶*Id.*

that “the clear language of the Act does not distinguish between authorized and unauthorized aliens...Had the legislature intended to exclude unauthorized aliens from coverage under the Act, it could easily have done so...but it did not.”⁵⁷

STATES INTERPRET THE EFFECT OF IMMIGRATION STATUS ON CLAIMS OF INJURED WORKERS

States that have addressed the workers’ compensation and personal injury rights of undocumented workers generally interpret these rights using one of four models: 1) benefits that are available, regardless of whether fraudulent documents are presented, 2) benefits that are available if the employees do not present fraudulent documentation, 3) limited benefits that are available, or 4) no benefits are available

BENEFITS ARE AVAILABLE REGARDLESS OF FRAUDULENT DOCUMENTS

A majority of state courts that have addressed the issue have allowed undocumented workers who are injured in the course of employment to collect benefits, regardless of their immigration status.⁵⁸ In these cases, the courts have focused on the cause of the worker’s injury, whether the worker’s immigration status was the cause of the injury and whether state law conferring workers’ compensation coverage to undocumented workers is preempted by IRCA.

Several courts discuss the public policy issues involved in the decision to allow undocumented workers to claim benefits. As one court explained, “were it otherwise, unscrupulous employers would be encouraged to hire aliens unauthorized to work in the United States, by taking the chance that the federal authorities would accept their claims of good faith reliance upon immigration and work authorization documents that appear to be genuine.”⁵⁹ At this point, it is unclear whether the implementation of E-Verify, an electronic means of comparing applicants’ I-9

⁵⁷664 N.W.2d 324, 329 (Minn. 2003).

⁵⁸*See, e.g.,* Design Kitchen and Baths v. Lagos, 882 A.2d 817 (Md. 2005), *Correa v. Waymouth Farms, Inc.*, 664 N.W. 2d 324 (Minn. 2003), *Earth First Grading v. Gutierrez*, 606 S.E. 2d 332 (Ga. Ct. App. 2004), *Safeharbor Employer Svcs. v. Velazquez*, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003), *Curiel v. Environmental Management Svcs.*, 655 S.E. 2d 482 (S. C. 2007), *Reinforced Earth Co. v. Workers’ Compensation Appeal Board*, 810 A. 2d 99 (Pa. 2002).

⁵⁹*Farmer Brothers Coffee v. Ruiz*, 133 Cal. Ct. App. 4th 533, 540 (Cal. Ct. App. 2005). *See also, Curiel v. Environmental Management Services*, 655 S.E. 2d 481, 484 (S.C. 2007), “Disallowing benefits would mean unscrupulous employers could hire undocumented workers without the burden of insuring them, a consequence that would encourage rather than discourage the hiring of illegal workers.” (emphasis supplied), and *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 331, FN4 (2003), “We...note that to the extent that denying unauthorized aliens benefits predicated on a diligent job search gives employers incentive to hire unauthorized aliens in expectation of lowering their workers’ compensation costs, the purposes underlying the IRCA are not served.”

documents to information in the U.S. Homeland Security and Social Security Administration databases, will affect the interpretation of “good faith reliance.”

In response to the *Hoffman* decision, in 2002 the state of California amended its Labor Code in order to clarify the rights of injured undocumented workers. Section 1171.5(a) provided that “all protections, rights, and remedies available under state law, except any reinstatement remedy provided by federal law, are available to all individuals regardless of immigration status who have...been employed in this state.”⁶⁰ This section and § 3351, which includes “unlawfully employed” aliens within the definition of employee, were challenged by an employer in *Farmer Brothers Coffee v. Workers’ Compensation Appeal Board*.⁶¹ The employer unsuccessfully argued that the California Labor Code was preempted by IRCA. The court reasoned that since IRCA does not contain express preemption language, there is no direct conflict between the Labor Code and IRCA. “The purpose of the...Act is to furnish, expeditiously and inexpensively, treatment and compensation for persons suffering workplace injury, irrespective of the fault of any party, and to secure workplace safety. It is remedial and humanitarian. Its benefits are not a penalty imposed upon the employer.”⁶² By excluding reinstatement as a remedy, the labor code avoided conflict with federal law. The court concluded that it was the employee’s injury rather than his immigration status that entitled him to workers’ compensation benefits, and that his undocumented status would not prevent him from receiving those benefits.

The Court of Appeals of Georgia reached a similar conclusion in *Continental PET Technologies v. Palacias*.⁶³ An injured employee had originally presented fraudulent documents to the employer had worked for the same employer for five years before her accident. The employer cited *Hoffman* to argue that awarding workers’ compensation benefits to undocumented workers would “contravene the purposes of the IRCA.”⁶⁴ However, the Georgia Court of Appeals disagreed with this argument, and instead reasoned that the goal of IRCA would be “subverted by allowing employers to avoid workers’ compensation liability for work-related injuries to those employees since such would provide employers with a financial incentive to hire illegal aliens.”⁶⁵ In response to the employers’ assertion that the employee’s fraud disqualified her from receiving benefits, the court again looked to the cause of the injury and whether the misrepresentation had led to the injury. Because the court found no causal connection between the fraud and the injury, it awarded benefits to Palacias by the workers’ compensation board.

⁶⁰Cal. Lab. Code § 1171.5 (2009).

⁶¹133 Cal. App. 4th 533 (Cal. Dist. Ct. App. 2005).

⁶²*Id.* at 539.

⁶³604 S.E.2d 627 (Ga. Ct. App. 2004).

⁶⁴*Id.* at 631.

⁶⁵*Id.* at 630-631.

The Superior Court of Massachusetts also used a causation analysis to address common law tort liability issues in *Pontes v. New England Power Co.*,⁶⁶ a negligence action by the employee of a subcontractor against general contractors. The defendants, relying on *Hoffman*, argued that plaintiff's immigration status should be considered in determining diminished earning capacity because he was not authorized to work in the United States. However, the court determined that "[t]his lessened ability to earn is not necessarily based on what job the injured plaintiff had previously done or the job that the individual intended to do in the future, but is instead based on the amount by which earning capacity is diminished due to the defendant's tortious conduct."⁶⁷ The court distinguished the public policy issues presented in this case from those in *Hoffman*. While *Hoffman* was directed toward decreasing incentives for undocumented workers to seek employment, *Pontes* addressed issues of workplace safety. "[T]he public policy in the present case relates to decreasing the incentive for employers themselves to violate IRCA. If employers [are] potentially less financially responsible for a workplace injury [if] the injured party is an illegal immigrant they will be more inclined to hire illegal immigrants for dangerous positions."⁶⁸

In a negligence action by an employee of a subcontractor, a Texas appeals court also distinguished the facts in *Hoffman* from those in personal injury cases. "[*Hoffman*] only applies to an undocumented alien worker's remedy for an employer's violation of the NLRA and does not apply to common-law personal injury damages...Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity."⁶⁹

BENEFITS ARE AVAILABLE IF NO FRAUDULENT DOCUMENTS WERE PRESENTED

A second line of cases has held that an unauthorized worker is entitled to benefits as long as the injured worker had not produced fraudulent documents in order to gain employment. The courts in these cases distinguish them from *Hoffman*, where "the employment relationship originated in the worker's own criminal violation of IRCA."⁷⁰

*Balbuena v. IDR Realty*⁷¹ is a case in which *dicta* indicate that either the production of false documents by the injured worker or the failure of the employer to verify the employee's I-9 documents would have an impact on the award of

⁶⁶18 Mass. L. Rep. 183 (Mass. Supp. 2004).

⁶⁷*Id.* at memorandum page (need full citation for memorandum) 5.

⁶⁸*Id.* at memorandum page 8.

⁶⁹*Tyson Foods v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003).

⁷⁰*Affordable Housing v. Silva*, 469 F.3d 219, 236 (2006).

⁷¹845 N.E.2d 1246 (N.Y. 2006).

damages. Citing state precedent, the court stated that “civil recovery is foreclosed ‘if the plaintiff’s conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation.’”⁷² However, the court noted that this rule had been applied in cases where the work itself was unlawful, not as in the present case in which the work was lawful. After noting that there was “no evidence in the records before [the court] that the plaintiffs (like the alien worker in *Hoffman*) tendered false documentation in violation of IRCA or that their employers satisfied their duty to verify plaintiffs’ eligibility to work,”⁷³ it affirmed the lower court’s award of lost wages to the injured employee. The issue of mitigation of damages, which may have implicated *Hoffman*’s backpay principle, was not implicated in this case, because the worker’s injuries were so severe as to limit future employment.

An undocumented alien who had been recruited by his employer who had knowledge of his immigration status, the plaintiff in *Affordable Housing v. Silva*, brought a common law negligence case as the employee of a subcontractor against a general contractor. In its decision in favor of the plaintiff, the court emphasized that “both the illegal employment relationship and the personal injury were the product of wrongdoing by others.”⁷⁴ (emphasis supplied). The New York law, where the accident occurred, did not require that compensatory damages be reduced due to the plaintiff’s violation of IRCA, and therefore, the state court found that the case did not “present the same concern for subversion of federal immigration law that was identified in *Hoffman Plastic*.”⁷⁵

LIMITED BENEFITS ARE AVAILABLE

Some courts have discussed limiting compensation for lost wages for undocumented workers, based on the assumption that continued employment would have required an illegal act under IRCA. These courts have nevertheless declined to limit the recovery of medical expenses, reasoning that “no new illegal act is required in order to incur such expenses.”⁷⁶

In *Reinforced Earth Co. v. Workers’ Compensation Appeal Board*,⁷⁷ the employer of an injured unauthorized worker sought to have the worker’s benefits suspended due to his immigration status, and argued that the employer should not be required to demonstrate that the employee was available for work. The Pennsylvania Supreme Court agreed that in a situation in which “an employer seeks to suspend the workers’ compensation benefits that have been granted to an employee who is an

⁷²*Id.* at 1258-59.

⁷³*Id.* at 1260.

⁷⁴*Affordable Housing v. Silva*, 469 F.3d 219, 237 (2006).

⁷⁵*Id.*

⁷⁶*Hernandez v. GPSDC*, 2006 U.S. Dist. LEXIS 9172, at 67 (2006).

⁷⁷810 A. 2d 99 (2002).

unauthorized alien, a showing of job availability by the employer is not required.”⁷⁸ However, the court clarified on remand that “while Reinforced Earth may seek in the circumstances presented a suspension of the total disability compensation Claimant was granted...it may not seek a suspension of the medical benefits Claimant was awarded,”⁷⁹ noting that the statute which addresses medical expenses applies “whether or not loss of earning power occurs.”⁸⁰

NO DISABILITY BENEFITS AVAILABLE

A few courts have denied benefits to injured workers because of their undocumented status. Two of the following cases are post-*Hoffman*. A third case, *Rivera v. United Masonry*,⁸¹ preceded *Hoffman* by eleven years, but the outcome would likely have been the same had it occurred post-*Hoffman*.

FALSE NAME USED

In Louisiana, a trial court dismissed a claim filed by an injured undocumented worker who had used fraudulent documents to obtain employment. The Louisiana Court of Appeals affirmed this dismissal, citing two federal decisions which dismissed claims filed by plaintiffs using false names.⁸² Instead of addressing the employer’s alleged negligence which caused the worker’s severe injuries, the court determined that the filing of this claim under a false name “qualifie[d] as flagrant contempt for the judicial process...that transcend[ed] the interests of the parties in the underlying litigation.”⁸³ The dissent expressed concern that denying the injured plaintiff an opportunity to bring a claim would not only give Louisiana employers an incentive to hire undocumented workers but would also allow them to subject the workers to substandard working conditions. This 2008 ruling is in sharp contrast to the majority of jurisdictions, which allow at least medical benefits to be awarded to injured undocumented workers.⁸⁴

⁷⁸*Id.* at 108.

⁷⁹*Id.* at 109 FN12.

⁸⁰*Id.* (citing 77 P.S. § 531(l)ii.)

⁸¹948 F. 2d 774 (D.C. Cir. 1991).

⁸²*Zocaras v. Castro*, 465 F.3d 479 (11th Cir. 2006), *Dotson v. Bravo*, 321 F.3d 663 (7th Cir. 2003).

⁸³ *Rodriguez v. Bollinger Gulf Repair*, 985 So.2d 305, 308 (La. Ct. App. 4th Cir. 2008).

⁸⁴*E.g.*, *Hernandez v. GPSDC*, # 2006 U.S. Dist. LEXIS 9172 at 67 (2006), *Reinforced Earth Co. v. Workers’ Compensation Appeal Board*, 810 A.2d 9 9 (2002).

NO WAGES EARNED UNDER STATUTORY DEFINITION

While some cases from Florida have resulted in an award of workers' compensation benefits to undocumented workers,⁸⁵ *Fast Track Framing v. Caraballo*⁸⁶ reversed an award of temporary total disability payments to an undocumented worker. The worker had been employed by a subcontractor, had never filled out an I-9 form, and was paid in cash. Because of this arrangement, the Florida District Court of Appeals held that the injured claimant had not received "wages" under the statutory definition of the term. Fla. Stat. § 440.02(28) defines wages as "only the wages earned and reported for deferral income tax purposes on the job where the employee is injured..." Because disability payments were calculated using the claimant's average weekly wage, the court determined that he had not earned wages. However, the court affirmed the award of medical expenses, presumably because those were not calculated using the injured party's wages.

The dissenting opinion argued that the reporting of wages was the responsibility of the employer and that the employer "obviously knew how much he was paying the claimant in cash, under the unlawful payment arrangement he himself had devised."⁸⁷ The dissent also expressed concern that "the effect of the decision is to immunize employers who elect to hire undocumented aliens. They will never have to pay for work place injuries, because their employees are not receiving 'wages'."⁸⁸

NO EARNING CAPACITY DUE TO IMMIGRATION STATUS

In *Rivera v. United Masonry*,⁸⁹ which preceded *Hoffman* by eleven years, an injured undocumented worker argued that if a market study showed that employers would not hire him due to his immigration status he should be considered unemployable and therefore entitled to continue receiving disability benefits. The circuit court recognized that this logic could lead to cases of undocumented workers receiving more benefits than legal ones, and affirmed the Benefits Review Board's decision to not consider undocumented status when determining whether a worker is disabled. The court noted that "[i]n the eyes of the law the injury cannot have caused any 'incapacity...to earn...wages,' as the employee had *no* such capacity before or after the injury. At most the injury has highlighted a pre-existing incapacity."⁹⁰ This decision left open the question of whether an undocumented worker with a debilitating injury would be given total and permanent disability benefits. Although this decision predates *Hoffman*, subsequent cases have not overruled it.

⁸⁵See *Safeharbor Employer Svcs. v. Velazquez*, 860 So.2d 984 (Fla. Dist. Ct. App. 2003).

⁸⁶606 S.E.2d 332 (Fla. Ct. App. 2008).

⁸⁷*Id.* at 359.

⁸⁸*Id.* at 360.

⁸⁹948 F.2d 774 (D.C. Cir. 1991).

⁹⁰*Id.* at 775.

TITLE VII

The *Hoffman* case opened a Pandora's Box of confusion regarding discrimination against illegal aliens under federal law. *Hoffman* regularly arises as an employer's defense in a wide variety of cases when undocumented status may be a question.⁹¹ While *Hoffman* arguably used sound legal reasoning to deny back pay to illegal aliens, subsequent cases have not applied the same rationale to Title VII workplace discrimination claims. Although courts have discussed the impact of *Hoffman*, they have consistently determined that the results in *Hoffman* should be limited to those facts, and have declined to apply its reasoning to other workplace issues.⁹²

The prevailing view in both federal and state courts has been that the passage of IRCA, "...did nothing to disturb the prevailing judicial consensus that undocumented workers were generally entitled to the same employment rights and remedies that were available to all documented workers... This was expressly reflected in post-IRCA decisions under...Title VII...as well as state and other federal workplace statutes."⁹³ Although Federal and state courts have recognized that *Hoffman* supports and endorses IRCA, they have consistently rendered decisions not allowing *Hoffman* to interfere with Title VII rights.

⁹¹ Avila-Blum v. Casa De Cambio Delgado, Inc., 236 F.R.D. 190 (S.D.N.Y. 2006) (Granting the plaintiff's request for a protective order during discovery.) ; Garcia v. Monument Management Group, L.L.C. d/b/d Holiday Inn Express Hotel & Suites, # 2006 U.S. Dist. LEXIS 48532 (Denying the application of *Hoffman* to a Title VII case.) Escobar v. Spartan Security Service, 281 F. Supp.2d 895 (S.D. Texas, 2003) (applying *Hoffman* to back pay but refusing application of *Hoffman* to front pay and reinstatement under Title VII). See also Kiren Dosanjh Zucker, *From Hoffman Plastic to the After-Acquired Evidence Doctrine: Protecting Undocumented Workers' Rights Under Federal Anti-Discrimination Statutes*, 26 WHITTIER L. REV. 601, 604-05 (2004).

⁹² Jin-Ming Lin and Chi-Wai Chao v. Chinatown Restaurant Corp., 771 F. Supp. 2d 185, 186 (Dist. Court, D. Mass. 2011). Citing, *Madiera v. Affordable Hous. Found, Inc.*, 469 F.3d 219, 247 (2d Cir. 2006) *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066 (9th Cir. 2004), *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604 (S.D.Fla. 2002).

⁹³ Single space Christopher Ho and Jennifer C. Chang, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, at 503 (2005), citing *EEOC v. Switching Sys. Div. of Rockwell Intl. Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Plaintiff plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally."); *Tortilleria "La Mejor"*, 758 F. Supp. at 590-91 (relying inter alia on IRCA legislative history, Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705, 716 (9th Cir. 1986), and *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988). But see *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 186-87 (4th Cir. 1998) (summarily rejecting relevance of *Sure-Tan* due to passage of IRCA, court reasoned that plaintiff was ineligible for reinstatement due to his expired work authorization and, thus, "has no cause of action.").

*Escobar v. Spartan Security Service*⁹⁴ was the first federal decision to address the application of *Hoffman* to a Title VII claim. Escobar was an undocumented worker who was terminated when he responded negatively to alleged sexual advances made by Spartan's president.⁹⁵ He filed a complaint against Spartan with the EEOC claiming sexual harassment, sex discrimination, and retaliation. After receiving a right to sue letter, Escobar filed suit in federal court against his former employer. The district court applied *Hoffman* to grant summary judgment denying backpay to Escobar, but it denied summary judgment on the remaining Title VII claims, noting that neither sexual harassment nor retaliation claims are dependent on a showing that the plaintiff was qualified for employment at the time of the alleged violations.⁹⁶

The 2004 Ninth Circuit case of *Rivera v. NIBCO, Inc.*,⁹⁷ a Title VII national origin discrimination case brought by twenty-three undocumented workers, upheld the district court's decision that defendants could not use the discovery process to inquire into the plaintiffs' immigration status. Although the court expressed doubt about *Hoffman's* applicability to backpay under Title VII, it concluded that "*Hoffman* does not make immigration status relevant to the determination whether a defendant has committed national origin discrimination under Title VII."⁹⁸ The court did not prohibit, however, an independent investigation into the work eligibility of the plaintiffs, and the principles in *McKennon v. Nashville Banner Publishing Co.*,⁹⁹ would require "calculation of backpay from the date of the unlawful discharge to the date the new information was discovered."¹⁰⁰ Therefore, if NIBCO were able to independently determine that the plaintiffs were unauthorized employees, and that it would have discharged them had it had this information, then backpay would be calculated from the time of their discharge until the time the information was acquired. This is clearly a different result from that reached in *Hoffman*, in which all backpay was prohibited.¹⁰¹

While the Rivera court did not distinguish between earned and unearned backpay, other cases brought under Title VII have made this distinction. The district court in *Chellen v. John Pickle Co.* cited numerous cases, concluding that, "Hoffman does not purport to preclude a backpay award for work that was actually performed by undocumented workers. The backpay at issue in *Hoffman* involved an amount calculated for a period of time after the date of the undocumented worker's

⁹⁴ *Escobar v. Spartan Security Service*, 281 F. Supp. 2d 895 (Dist. Ct. S.D. Texas, 2003).

⁹⁵ *Id.* at 896.

⁹⁶ *Id.* at 897.

⁹⁷ *Rivera v. NIBCO*, 364 F.3d 1057, 1061 (9 thCir. 2004).

⁹⁸ *Id.* at 1075.

⁹⁹ 513 U.S. 352 (1995).

¹⁰⁰ *Id.* at 362.

¹⁰¹ *Hoffman* at 151.

termination of employment.”¹⁰² Courts consistently award back pay to someone who performed some work, but vary with regard to those people with work not performed.

Employers should note that protections are available to employees for national origin discrimination under Title VII but that generally, national origin does not encompass citizenship or immigration status.¹⁰³ This fact was driven home in the recent case of *Cortezano v. Salin Bank*.¹⁰⁴ Karen Lopez, a U.S. citizen, married Miguel, a Mexican citizen. The couple lived in Indiana, Karen working for a bank and Miguel operating a small business which ultimately failed. Miguel travelled back to Mexico to apply for a U.S. visa and citizenship. When Karen asked her boss for vacation time, she explained the situation and requested time to help her husband, but she was met with hostility. Later and after a bank investigation, she was ultimately fired. When she brought suit alleging national origin discrimination, the court examined the bank’s report and noted that it only made reference to Miguel’s undocumented alien status and not his national origin. Citing *Espanoza*, the court ruled in favor of the bank.

Currently, a significant case is being considered in the California Supreme Court.¹⁰⁵ While Title VII issues have not yet arisen, the likely implications are noteworthy. Sergio C. Garcia was born in Mexico and was brought to the US when he was a toddler. The family returned to Mexico when Sergio was about nine years old, and he reentered the United States illegally eight years later, when Sergio was seventeen years old.¹⁰⁶ Sergio’s father, now a naturalized citizen, applied for a green card for his son eighteen years ago but that application is still pending.¹⁰⁷ Sergio Garcia, now thirty-five years old, attended college and law school and has passed the California Bar exam.¹⁰⁸

Recognizing IRCA disqualification of undocumented aliens from employment eligibility and further citing *Hoffman's* absolute support for the

¹⁰² 446 F. Supp. 2d 1247 at 1278 (N.D.Okla. 2006), citing *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-02 (W.D.Mich. 2005), *Martinez v. Mecca Farms, Inc.*, 213F.R.D. 601, 604-05 (S.D. Fla. 2002), *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002), *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002), and *Flores v. Albertsons, Inc.*, 2002 U.D. Dist. LEXIS 6171, 2002 WL 1163623 at 5* (C.D. Cal Apr. 9, 2002).

¹⁰³ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973)

¹⁰⁴ U.S. Court of Appeals for the 7th Circuit, No. 11-1631 (2012).

¹⁰⁵ *In Re: Sergio C. Garcia on Admission*, Bar Misc. 4186, S202512.

¹⁰⁶ *See In Re Sergio C. Garcia on Admission*, OPENING BRIEF OF THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA RE: MOTION FOR ADMISSION OF SERGIO C. GARCIA TO THE STATE BAR OF CALIFORNIA.

¹⁰⁷ Martha Neil, “Illegal Immigrant Should Be Admitted to Practice, California State Bar Tells State Supreme Court,” *available at*

http://www.abajournal.com/news/article/undocumented_immigrant_should_be_admitted_to_practice_calif_state_bar_tell/

¹⁰⁸ *Id.* at 1.

provisions of IRCA, the California Board of Bar examiners has taken the position that a license to practice law does not contravene either *Hoffman's* intent or IRCA itself. They reason that while an undocumented alien cannot become legally employed in the United States, an undocumented alien could legally act as an independent contractor or perform *pro bono* services.¹⁰⁹ Furthermore, the Board of Bar Examiners discussed the fact that the typical relationship between an attorney and a client is similar to an independent contractor and not to an employee,¹¹⁰ and that since remuneration is not involved, *pro bono* efforts would likewise not constitute employment.¹¹¹

The Department of Justice has taken the position that Mr. Garcia should be denied bar admission.¹¹² Only two positions are addressed by the United States. First, that a bar certification is a benefit and benefits are prohibited to undocumented aliens.¹¹³ Second, that granting a bar certification would imply that Garcia would be able to accept employment in contravention of federal law. Which position? This position is based on the federal government's disagreement with Garcia, and with the Board of Bar Examiners' position that acting as an independent contractor or serving in a *pro bono* status is not employment.¹¹⁴

The case is in its initial stages, and the California Supreme Court has requested *amicus curiae* briefs.¹¹⁵ Whether or not Title VII implications will arise at trial is yet to be seen. While currently the issue is about citizenship and not about national origin, should Garcia obtain his earned law license, his undocumented status could certainly be at issue were he to seek remuneration for independent contractor work and need to enforce a fee agreement against a client.

CONCLUSION

Ten years after the U.S. Supreme Court's decision in *Hoffman Plastic v. NLRB*, there has been no definitive ruling by the highest court on how far to extend the limitation of remedies for workplace law violations regarding undocumented workers, particularly in the areas of workers' compensation and Title VII actions. While *Hoffman* prohibits backpay to unauthorized workers under the NLRA, most lower courts have concluded that this decision was a declaration of the NLRB's

¹⁰⁹ *Id.* at 27.

¹¹⁰ *Id.* at 28.

¹¹¹ *Id.* at 29.

¹¹² *Garcia*, APPLICATION AND PROPOSED BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA.

¹¹³ Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996). See also 8 U.S.C. § 1621.

¹¹⁴ *Id.*, at 14, citing: *Matter of Tong*, 16 I&N Dec. 593 (BIA 1978) (holding that self-employment qualifies as working without authorization); see also 8 U.S.C. § 1324a(a)(4); 8 C.F.R. § 274a.5 (explaining that a client may be subject to penalties if he knowingly hires an independent contractor who lacks work authorization).

¹¹⁵ At the time of this writing, the court was considering applicant's request for judicial notice, filed on Sept. 20, 2012. See The California Courts website, available at <http://www.courts.ca.gov/18822.htm>

limitations rather than an announced policy to limit damages available to an undocumented worker who is injured.

Lower courts have explained distinctions between NLRA and other workplace laws. Often these distinctions are based on public policy and on whether extending rights to undocumented workers encourages or discourages illegal immigration and employers willing to take advantage of vulnerable employees. In order to resolve any existing conflicts, state legislatures should revisit workers' compensation statutes and clarify whether protection is extended to all employees, regardless of whether they are authorized to work in the United States. The EEOC should also clarify the limited protections available to illegal aliens under the federal anti-discrimination laws. Certainly giving limited protection only to employees who are "legal" would not significantly deter illegal immigration, and it might even have the effect of increasing the number of undocumented workers by giving prospective employers a financial incentive to hire these workers.

Perhaps, given the impact of Latino voters on the 2012 elections,¹¹⁶ the time has finally come to address not only the workplace rights of undocumented workers, but to engage in meaningful discussions about immigration reform, and to endorse a more comprehensive "guest worker" program, rather than continuing to rely on IRCA to solve the workplace issues of illegal immigration.

¹¹⁶ CNN Politics webpage, Nov. 9, 2012, available at [http://www.cnn.com/2012/11/09/politics/latino-vote-key-election/index.html\(last visted?\)](http://www.cnn.com/2012/11/09/politics/latino-vote-key-election/index.html(last%20visted?))