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Workplace Rights and Remedies For Undocumented Workers:

A Legal Treatise

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Immigrant workers are concentrated in nearly every low-wage industry of our economy, including many growth industries such as home care, restaurants, retail, childcare, and construction. In too many of these jobs, immigrant workers work under deplorable working conditions, earn poverty wages with no benefits, risk fatal injuries, and are vulnerable to employer harassment and retaliation.

Retaliation is a common occurrence for all workers. However, undocumented workers are particularly vulnerable to retaliation, for fear of detention and deportation. Despite the post-2012 presidential election excitement for immigration reform, the continued anti-immigrant fervor across the country with the U.S. Supreme Court's upholding of Arizona's racial profiling laws (SB 1070) and the administration's aggressive immigration enforcement in workplaces lend legitimacy to employers' use of immigration enforcement to undercut and chill workers' exercise of their labor and employment rights.

In this legal treatise, we discuss the rights and remedies available to undocumented immigrant workers under federal and state labor and employment laws, the workers' compensations statutes, and state common law. As discussed below, the enactment of Immigration and Reform Control Act of 1986 ("IRCA") and the U.S. Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) have been two watershed moments, impacting undocumented workers' ability to come forward to assert their workplace rights and limiting remedies that are available to them when they do. While it is well-settled that the rights of undocumented workers are relatively unchanged post-*Hoffman*, the full breath of remedies that are available to them still needs to be fully tested. At the same time, employers routinely invoke *Hoffman* to gain tactical advantages in litigation and to intimidate and harass workers to drop the lawsuit altogether.

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[1] This section was authored by Eunice Cho.

BACKGROUND

This section provides useful demographic and other background information about undocumented workers. We also discuss the enactment of IRCA and the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB* as two watershed moments that have significantly weakened undocumented workers' ability to come forward to assert their workplace rights and that have limited the remedies that are available to them when they do.

I. Demographics

According to the Pew Hispanic Center, there were 11.2 million undocumented immigrants living in the United States as of March 2010, constituting 5.2 percent (8 million) of the U.S. labor force.[2] The percentage of unauthorized immigrants in the labor force may decrease as beneficiaries of the Deferred Action for Childhood Arrivals (DACA) initiative (also known as "DREAMers") become eligible for deferred action and obtain work authorization. The Migration Policy Institute estimates that among the 1.26 million prospective beneficiaries of the DACA program, 58 percent (close to 740,000) are in the labor force.[3]

Undocumented workers earn considerably less than documented and U.S.-born workers.[4] The Urban Institute estimated in 2004 that about two-thirds of undocumented workers earn less than twice the minimum wage, compare with only one-third of all workers. The Pew Hispanic Center found that the median household income of undocumented immigrants in 2007 was $36,000, well below the $50,000 median household income for U.S.-born residents.[5] Some of the low-wage sectors and industries with high shares of undocumented workers as of 2008 include agriculture (25 percent), construction (17 percent), building, groundskeeping, and maintenance (19 percent), and food preparation and serving (12 percent).[6]

II. Workplace Conditions

A landmark national survey of 4,387 low-wage workers in three largest cities, New York, Chicago, and Los Angeles, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities,* found that undocumented workers are far more likely to experience wage and hour violations than U.S.-born

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[2] Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010* (Pew Research Center, February 1, 2011), available at http://pewhispanic.org/files/reports/133.pdf. The Department of Homeland Security's Office of Immigration Statistics' new estimates, released in March 2012, indicated that as of January 2011, 11.5 million undocumented immigrants resided in the U.S., virtually unchanged from the Pew Hispanic Center's estimates as of March 2010. *See* Jeanne Batalova & Alicia Lee, *Frequently Requested Statistics on Immigrants and Immigration in the United States,* (Migration Policy Institute, March 2012), available at http://www.migrationinformation.org/USfocus/display.cfm?ID=886#5

[3] Jeanne Batalova & Michelle Mittelstadt, *Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy*, (Migration Policy Institute, August 2012), available at http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf

[4] Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United State,* (Pew Research Center, April 14, 2009), available at http://www.pewhispanic.org/files/reports/107.pdf

[5] Jeffrey S. Passel, Randy Capps, & Michael Fix, *Undocumented Immigrants: Facts and Figures,* (Urban Institute Immigration Studies Program, January 12, 2004), available at http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf

[6] Passel *et al*, *A Portrait of Unauthorized Immigrants in the United States,* (Pew Research Center, April 14, 2009).

workers and documented workers.[7] Thirty seven percent of undocumented workers were not paid the minimum wage in the workweek preceding the survey, compared to 21 percent of documented workers and 16 percent of U.S.-born workers.[8] The survey also found that in the immigrant workforce, women experienced a higher rate of wage and hour violations then men did – 47 percent of undocumented women experienced the minimum wage violations while the violation rate among men were 30 percent.[9] *Broken Laws* also reported that of those who complained about a workplace issue or attempted to form a union in the past 12 months, 47 percent of workers experienced employer threats to fire workers or call immigration authorities.[10]

Underreporting of workplace injuries and illnesses is also a serious problem among immigrant workers across low-wage industries.[11] Many workers, due to language barriers or their employers' lack of robust safety programs, are unaware of the risks they face on the job. Others may feel that there is little choice but to accept those risks. A study of largely unionized immigrant hotel workers found that only 20 percent of those who had experienced work-related pain had filed workers' compensation claims, for fear of getting "in trouble" or being fired.[12] In a study on immigrant workers' perceptions of workplace health and safety, researchers from UCLA observed that "[w]orkers worried because they know the work they did was dangerous, and also because they knew that if they got injured they would have limited medical care options. Some respondents said that they could not really 'afford to worry' because they needed the job and had little control over the working conditions."[13] Similarly, researchers in North Carolina observed that "[m]any immigrant workers believe that in a dangerous work situation, they have no choice but to perform the task, despite the risk."[14]

III. Watershed Moments: Immigration Reform and Control Act of 1986 and Hoffman Plastic Compounds v. NLRB

- **Immigration Reform and Control Act of 1986**

The Immigration and Reform Control Act of 1986 ("IRCA"), for the first time in U.S. immigration history imposed civil and criminal penalties on employers for knowingly hiring and employing undocumented workers – these penalties are known as "employer sanctions." *See* 8 U.S.C. §§ 1324a(a)(1)(A), (a)(2), (e)(4), (f). IRCA also required employers to verify any employee's identity and eligibility to work legally upon hire by reference to specifically designated documents, and to fill out and retain an I-9 form on each new employee. *See* 8 U.S.C. §§ 1324a(b). IRCA, and in particular the employer sanctions, came with the dual promise that it would reduce illegal immigration and improve the wages and working conditions of U.S. workers. However, over twenty-five

[7] National Employment Law Project, *Workplace Violations, Immigration Status, and Gender: Summary of Findings from the 2008 Unregulated Work Survey*, August 2011, available at http://www.nelp.org/page//Justice/2011/Fact_Sheet_Workplace_Violations_Immigration_Gender.pdf?nocdn=1

[8] *Id.*

[9] *Id.*

[10] Annette Bernhardt *et al.,* Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (Sept. 2, 2009), available at http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1

[11] *Hidden Tragedy: Underreporting of Workplace Injuries and Illnesses*, Hearing before the Committee on Education and Labor, U.S. Congress, 2008, available at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg42881/pdf/CHRG-110hhrg42881.pdf

[12] Teresa Scherzer, Reiner Rugulies & Niklas Krause, *Work-Related Pain and Injury and Barriers to Worker's Compensation among Las Vegas Hotel Room Cleaners*, Am J Public Health, 483–488, (2005).

[13] Marianne P. Brown, Alejandra Domenzain & Nelliana Villoria-Siegert, *Voices from the Margins: Immigrant Workers' Perceptions of Health and Safety in the Workplace*, (The UCLA Labor Occupational Safety and Health Program, December 2002), available at http://www.losh.ucla.edu/losh/resources-publications/pdf/voicesreport.pdf

[14] North Carolina Occupational Safety and Health Project, *Immigrant Workers at Risk: A Qualitative Study of Hazards Faced by Latino Immigrant Construction Workers in the Triangle Area of North Carolina*, June 2000, available at http://coshnetwork6.mayfirst.org/sites/default/files/cpwrstudy.pdf

years of experience with employer sanctions has shown that this promise has not been met.[15] The number of undocumented immigrants living the U.S. has grown steadily since 1986, and the wages and working conditions in the low-wage sectors of the labor market have shown no sign of improvements. The *Broken Laws* report found that workplace violations are widespread and severe in low-wage labor markets. Twenty-six percent of surveyed low-wage workers were not paid the legally required minimum wage and 76 percent were not paid overtime in the previous week.[16] Moreover, employer sanctions has consigned millions of undocumented workers to the underground economy and workplace exploitation as employers use the law as an effective tool to intimidate and retaliate against workers who assert their workplace rights and to underpay (or fail to pay at all) their earned wages.

- ***Hoffman Plastic Compounds v. NLRB***

In 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 148-52 (2002) that undocumented workers who are fired for activities protected by the National Labor Relations Act ("NLRA") are covered by the Act but cannot recover backpay (the wages they would have earned had they not been illegally fired). The *Hoffman* case involved an undocumented worker who was fired for his organizing activities. The National Labor Relations Board ("Board") ordered reinstatement with backpay for the time the worker was not working because of the illegal termination. At the compliance hearing, the worker admitted that he used false documents to establish his work authorization. The Supreme Court concluded that the employer sanctions provision in the IRCA prevails over a conflicting labor protection statute like the NLRA. *See id*. at 148-51. Although the Supreme Court's decision was limited to the backpay remedy under the NLRA, the decision has emboldened employers to claim that undocumented workers have no rights whatsoever to unpaid wages, unlawful discrimination, health and safety standards, or joining a union or engaging in concerted activity. Moreover, while the Supreme Court noted that denying backpay does not mean that the employer who engages in unfair labor practice "gets off scot-free" because the Board "imposed other significant sanctions," *id.* at 152, employers, have a new perverse incentive to hire undocumented workers, to whom they owe no backpay in the event of an NLRA violation.[17]

[15] *See* Muzaffar A. Chishiti, *Enforcing Immigration Rules: Making the Right Choices*, 10 N.Y.U. J. Legis. & Pub. Pol'y 451 (2006-2007).

[16] Bernhardt *et al.,* Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (Sept. 2, 2009), available at http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1

[17] Chishiti, *supra* note 14, at 454.

PROTECTION UNDER THE FAIR LABOR STANDARDS ACT AND RELATED STATE WAGE AND HOUR LAWS

Immigration status has no impact on a worker's right to be paid for work already performed. It is well-settled that undocumented workers are covered under the Fair Labor Standards Act ("FLSA") and state minimum wage and overtime laws.

I. Coverage Under the Fair Labor Standards Act

Prior to *Hoffman*, the Fifth Circuit held that the FLSA is applicable to undocumented workers under the statute's broad definition of an employee.[18] *In re Reyes,* 814 F.2d 168, 170 (5th Cir. 1987)*, cert. denied*, 487 U.S. 1235, 108 (1988).[19] Similarly, the Eleventh Circuit held that an undocumented worker is covered under the minimum wage and overtime protections under the FLSA. *Patel v. Quality Inn South,* 846 F.2d 700 (11th Cir. 1988), *cert. denied,* 489 U.S. 1011 (1989). The Court stated that "[n]othing in the FLSA or its legislative history suggests that Congress intended to exclude undocumented workers from the [A]ct's provisions." *Id.* at 703. The Court also stated that, "nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." *Id.* at 704. The Court concluded that the plaintiff was eligible for backpay[20] for work already performed, distinguishing the backpay issue in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-903 (1984), which ruled that in calculating backpay for workers who lost their jobs for engaging in union activity in violation of the NLRA, the workers must be deemed "unavailable for work (and the accrual of backpay therefore tolled)" during any period when they were not legally present and employed in the U.S.

Courts have uniformly held that the Supreme Court's subsequent decision in *Hoffman* did not disturb the holding in *Patel* and that undocumented plaintiffs are entitled to recover unpaid wages for work already performed.[21] *See Galdames v. N & D Investment Corp.,* Nos. 10-1198, 10-14523, 2011 WL 2496280 (11th Cir. June 23, 2011); *Lucas v. Jerusalem Café, L.L.C.*, No. 4:10-CV-00582, 2012 WL 1758153 (W.D. Mo. May 10, 2012); *Jin-Ming Lin v. Chinatown Rest. Corp.*, 771 F. Supp. 2d 185 (D. Mass. 2011); *Solis v. Cindy's Total Care, Inc.* No. 10 Civ. 7242, 2011 WL 5170009 (S.D.N.Y. Oct. 31, 2011); *Castillo v. Hernandez*, No. EP-10-CV-247-KC, 2011 WL 1528762 (W.D. Tex. Apr. 20, 2011); *Melendez v. Primavera Meats, Inc.*, 270 F.R.D. 143 (E.D.N.Y. 2010); *Uto v. Job Site Servs.*, 269 F.R.D. 209 (E.D.N.Y. 2010); *Villareal v. El Chile, Inc.*, 266 F.R.D. 207 (N.D. Ill. 2010); *Garcia v. Palomino*, No. 09-02115, 2010 WL 5149280 (D. Kan. Dec. 13, 2010); *Rodriguez v. Niagara*, No. 09-22645, 2010 WL 2573974 (S.D. Fla. June 24, 2010); *Garcia v. Benjamin Group Enterprises, Inc.*, No. CV-09-2671, 2010 WL 2076093 (E.D.N.Y. May, 21, 2010); *Widjaja v. Kang Yue USA Corp.*, No. 09 CV 2089, 2010 WL 2132068, (E.D.N.Y. May 20, 2010); *David v. Signal Int'l, L.L.C.,* 257 F.R.D. 114 (E.D. La. 2009); *Trejos v. Edita's Bar and Restaurant, Inc.*, No. CV-08-1477, 2009 WL 749891 (E.D.N.Y. Mar 17, 2009); *Galdames v. N & D Investment Corp.*, No. 08-20472, 2008 WL 4372889 (S.D. Fla. Sep 24, 2008); *Jimenez v. Southern Parking, Inc.*, No. 07-

[18] The FLSA defines an employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1).

[19] See also *Castellanos-Contreras v. Decatur Hotels, L.L.C.*, 576 F.3d 274, 279 (5th Cir. 2009) (holding that H-2B guestworkers are entitled to FLSA protections); *Arriaga v. Fla. Pac. Farms, L.L.C.,* 305 F.3d 1228 (11th Cir. 2002) (H-2A workers are entitled to FLSA protections).

[20] The term "backpay" is used to describe both unpaid wages for hours already worked (under the FLSA and state minimum wage and overtime laws), and the pay a worker would have earned if not for unlawful termination or other employment discrimination (under Title VII and the National Labor Relations Act).

[21] But, in *Rodriguez v. ACL Farms, Inc.,* No. CV-10-3010, 2010 WL 4683743 *1 (E.D. Wash. Nov. 12, 2010), a case brought under the AWPA and Washington's Farm Labor Contractors Act (FLCA) for denial of agricultural employments to plaintiffs, the district court held that actual damages for work which was not performed must be treated differently than liability and statutory damages. at *2. The court concluded that immigration status is relevant to determination of actual damages. *Id.* at *4

23156, 2008 WL 4279618 (S.D. Fla. Sep 16, 2008); *Rengifo v. Erevos Enterprises, Inc.*, No. 06 Civ. 4266, 2007 WL 894376 (S.D.N.Y. 2007); *Zirintusa v. Whitaker,* No. 05-1738, 2007 WL 30603 (D.D.C. Jan 3, 2007); *Hernandez v. City Wide Insulation of Madison, Inc.*, No. 05C0303, 2006 WL 3474182 (E.D. Wis. Nov 30, 2006); *Chellen v. John Pickle Co., Inc.*, 434 F. Supp. 2d 1069, (N.D. Okla. May 24, 2006); *Flores v. Limehouse*, No. 2:04-1295, 2006 WL 1328762 (D.S.C. May 11, 2006); *Galaviz-Zamora v. Brady Farms,* 230 F.R.D. 499 (W.D. Mich. 2005); *Zavala v. Wal-Mart Stores, Inc.* 393 F. Supp. 2d 295, 325 (D.N.J. 2005); *Renteria v. Italia Foods,* No. 02 C 495, 2003 WL 21995190 (N.D. Ill. Aug. 21, 2003); *Flores v. Amigon,* 233 F. Supp. 2d 462 (E.D.N.Y. 2002); *Liu, et al. v. Donna Karan International, Inc.,* 207 F. Supp. 2d 191 (S.D.N.Y. 2002); *Martinez v. Mecca Farms, Inc.* 213 F.R.D. 601, 604-605 (S.D. Fla. 2002); *Flores v Albertson's, Inc.,* No. CV0100515, 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

Note, however, that in *Jin-Ming Lin v. Chinatown Rest. Corp.,* 771 F. Supp. 2d 185 (D. Mass. 2011) the district court, while ultimately concluding that undocumented workers were entitled to their unpaid wages under the FLSA, rejected as "insufficient" the well-settled principle that distinguishes backpay under the NLRA (for work not performed) from unpaid wages for all hours worked. The court stated that "[a]wards for work already performed under the FLSA would implicate federal immigration policy" in much the same way the *Hoffman* court found impermissible. 771 F. Supp. 2d at 187. However, the court reasoned that because an award for unpaid wages under the FLSA is not discretionary, but rather a matter of statutory entitlement once the necessary factual predicate has been established, courts were not free to "take into account" other "federal policies" like the IRCA. *Id.* at 189-190. While the court reached the correct decision, its reasoning is seriously flawed in advancing the argument that remedies that are available under the FLSA are in conflict with federal immigration laws.

Even prior to the *Hoffman* decision, defendants argued that immigration status is relevant to adequacy of class representation in wage and hour class actions, and courts consistently rejected the argument to be without merit. *See Ansoumana v. Gristede's Operating Corp*., 201 F.R.D 81, 87 (S.D.N.Y. 2001). The *Hoffman* decision afforded employers another opening to make the same old argument. However, courts have rejected defendants' reliance on *Hoffman* to continue to rule that immigration status is not relevant to adequacy of class representation in wage and hour class actions. *Galaviz-Zamora v. Brady Farms, Inc.* 230 F.R.D. 499, 502 (W.D. Mich. 2005) (in a class action brought by migrant agricultural workers under the FLSA and AWPA, the court rejected the defendants' argument that plaintiffs' immigration status has any relevance on "his or her ability to adequately represent other class members"); *David v. Signal International L.L.C.,* 257 F.R.D. 114, 124 (E.D. La 2009) (same); *see also Martinez v. Mecca Farms, Inc.* 213 F.R.D. 601, 606 (S.D. Fla. 2002) (rejecting defendant's argument that named plaintiffs could not adequately represent the class because they could be subject to deportation or could be distracted by the possibility of deportation).

Despite the weight of authority that clearly holds that undocumented workers have the right to seek unpaid wages for all hours worked, employers continue to argue that *Hoffman* limits the remedies available to undocumented plaintiffs. For example, in *Ulin v. Lovell's Antique Gallery*, C-09-03160, 2010 WL 3768012 (N.D. Cal. Sept. 22, 2010), defendants argued that *Hoffman* precludes an award of liquidated damages under the FLSA because liquidated damages are "akin to the backpay for work not performed" in that they go beyond compensating for work already performed." 2010 WL 3768012, at *7. The defendants further argued that the award of liquidated damages would mean rewarding violations of immigration law "while punishing the employer." *Id.* The court correctly rejected the defendants' arguments by stating that "the plain language of the liquidated damages provision focuses exclusively on the employer's conduct, not the employee's conduct. There is nothing in the language in the FLSA that allows the court to take plaintiff's misconduct into account in determining whether to award liquidated damages." *Id.* at *8. The court further noted that "liquidated damages are a form of compensation for time worked that cannot otherwise be calculated." *Id.* at *9.

Following the *Hoffman* decision, the U.S. Department of Labor ("DOL") issued a fact sheet distinguishing (1) the remedy of backpay for time a worker would have worked had he not been illegally discharged under the NLRA from (2) backpay for all hours an employee has actually worked, available under the FLSA or AWPA, and affirmed its continued enforcement of these laws regardless of a worker's immigration status.[22] DOL has reiterated this position through its community education campaign, "We Can Help"[23] and consistently in its *amicus* briefs.[24]

> ➢ **Practice Tip:** Workers sometimes use aliases or false names during employment. In filing the complaint, always use a worker's real name, whether the alias or a false name was used by the worker or supplied to the worker by the employer, to minimize the allegations of fraud and attacks on the worker's credibility. There are many reasons why a worker may have used another name, and this should not open the door to interrogations into a worker's immigration status.

II. Protection from Retaliation Under the FLSA

While harassment and retaliation against workers who attempt to assert their labor and employment rights are all too common in low-wage workplaces, undocumented workers are particularly vulnerable to employer harassment and retaliation because of their fear of immigration consequences. Employers' retaliatory tactics vary from cutting work hours, threats to call immigration authorities, and outright terminations and blacklisting workers.

- **Employer's Retaliatory Activity**

As discussed above, it is undisputed that undocumented workers are covered under the FLSA, and thus are protected under its anti-retaliation provision, 29 U.S.C. § 215(a)(3). There are only a few reported decisions involving undocumented workers and an employer's retaliatory motive to use immigration enforcement to chill the exercise of workers' rights. Reporting undocumented plaintiffs to government agencies subsequent to workers engaging in a protected activity can constitute retaliation under the FLSA. In *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.,* 103 F. Supp. 2d 1180 (N.D. Cal. 2000), the employer called then-INS and the Social Security Administration to report the plaintiff's undocumented status and that she was using a false Social Security number, just a few days after a pre-hearing conference but before the full administrative hearing on the worker's unpaid wage claim filed with the state department of labor. As a result of the defendant's action, the plaintiff was arrested and detained by the INS. *Id*. at 1182. On the plaintiff's motion for summary judgment, the court ruled that the defendant retaliated against the plaintiff in violation of § 215(a)(3) of the FLSA and that but for the plaintiff's prosecution of her FLSA-related claims, her employer

[22] 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 (Revised 2008), at http://www.dol.gov/whd/regs/compliance/whdfs48.htm.

[23] *See* U.S. Dep't of Labor News Release, "US Department of Labor statement on 'We Can Help' campaign" (June 24, 2010, available at http://www.dol.gov/opa/media/press/whd/WHD20100890.htm#.UIBV3Wc8r2Q . The "We Can Help" statement explains that [t]hrough Democratic and Republican administrations, the Department of Labor consistently has held that the country's minimum wage and overtime law protects workers regardless of their immigration status." *Id.*

[24] *See, e.g., Josendis v. Wall to Wall Residence Repairs, Inc,.* 662 F.3d 1292 (11th Cir. 2011), an amicus letter submitted in response to the 11th Circuit's request for the government's view on the undocumented workers' protection under the FLSA, at http://www.dol.gov/sol/media/briefs/josendis(A)-8-26-2010.htm#.UKkzTuOe8dI

would not have reported her to the INS and the Social Security Administration. [25] *Id*. at 1186; *see also Singh v. Jutla & C.D. & R's Oil, Inc.,* 214 F.Supp.2d 1056 (N.D. Cal. 2002) (ruling on a motion to dismiss, the court found that plaintiff sufficiently stated a retaliation claim under the FLSA by alleging that the employer threatened to call the immigration authorities unless the plaintiff dropped his unpaid wage claim and that his subsequent arrest and detention by the immigration authorities constituted retaliation.); *Centeno-Bernuy v. Perry*, No. 03-CV-457, 2009 WL 2424380, at *9 (W.D.N.Y. Aug. 5, 2009) (holding that the employer retaliated against H-2A workers who had filed an FLSA claim when employer reported the workers to the INS and other government agencies and falsely accused the workers of being terrorists).

One court has found that an employer's counsel urging a judge to report undocumented employees to the U.S. Attorney General's Office constituted adverse action under the FLSA, although the employer's counsel did not actually report the employee himself. *Suchite v. Kleppin*, 819 F. Supp. 2d 1284 (S.D. Fla. 2011), *reconsideration denied*, 2012 WL 193344 (S.D. Fla. Mar. 23, 2012).[26]

In addition to reporting undocumented workers to enforcement agencies, inquiring into the plaintiff's immigration status can be retaliatory. In *EEOC v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006), a case brought under Title VII for harassment, hostile work environment, and retaliatory discharge, the employer, in the midst of the pending litigation, required intervener-plaintiffs and other employees to complete employment applications, including an I-9 Form, for the first time. On a motion for a protective order, the court rejected the defendant's alleged motive for a "sudden desire to be in compliance with its obligations under the immigration law." *Id.* at 492. The court found that "[i]t is not plausible that this employer, in business since 1989, would now discover for the first time that its employee files were deficient in regards to immigration law requirements." *Id*. The court concluded that "the main purpose behind this alleged new found desire to abide by the law is to effect a not so subtle intimidation of the intervener plaintiffs and all the potential class members." *Id.* Accordingly, the court barred the employer from seeking any information from the employees regarding their immigration status until the termination of the case. *Id*. at 493.

The court's finding – that the true motive in the defendant's attempt to verify the worker's authorization in the middle of litigation is to intimate the intervener plaintiffs and other potential class members – is good authority to argue that the employer's attempt to inquire into the worker's immigration status, through I-9 verification or other means, can constitute retaliation.

The FLSA's anti-retaliation protection also applies to the actions of third parties, like local police officers. *See, e.g., Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894 (M.D. Tenn. 2009). In *Montano-Perez*, a group of workers were fired and ordered off the employer's property when they demanded their overdue wages. *Id.* at 898. When the workers refused to leave until they received their wages, the employer summoned the police, and the workers were arrested and turned over to the U.S. Immigration and Customs Enforcement ("ICE"). *Id*. The workers sued the employer, individual police officers, and the County Sheriff Department for retaliating against them in violation of the FLSA for complaining about their pay. In denying the County Department's motion to dismiss, the court concluded that plaintiffs sufficiently alleged that the County Department worked in concert with the employer to arrest the plaintiffs and then reported the plaintiffs to ICE because of the plaintiffs' complaint about their overdue pay. *Id.* at 901.

[25] The plaintiff's unpaid wage claim under the state labor code constitutes filing a complaint "related to the FLSA". *Contreras*, 103 F. Supp. 2d at 1184-85; 29 U.S.C. § 215(a)(3).

[26] However, the court granted summary judgment to the defendant finding that plaintiffs had failed to demonstrate defendant's retaliatory motive. *Suchite*, 819 F.Supp.2d at 1295-1297.

- **Practice Tip:** One strategy to protect undocumented workers who assert their wage and hour rights from the employer's retaliatory use of immigration enforcement is to file a complaint with the USDOL. In 2011, the USDOL entered into a Revised Memorandum of Understanding ("MOU") with the Department of Homeland Security to ensure that immigration enforcement does not interfere with the enforcement of certain employment and labor rights.[27] The MOU is designed to protect complaining workers from immigration enforcement during the pendency of the complaint.[28]

- **Remedies Under the FLSA for Retaliation**

The FLSA provides legal and equitable relief to effectuate the purpose of the FLSA's anti-retaliation provision and the remedies that are available include employment, reinstatement, promotion, lost wages, liquidated damages, compensatory damages,[29] and punitive damages[30]. *See* 29 U.S.C. § 216(b).

In a jurisdiction that awards compensatory and punitive damages under the FLSA, courts have held that compensatory damages and punitive damages are available to undocumented workers. *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.* No. C-98-2701, 2000 WL 1521369 (N.D. Cal. Oct. 5, 2000) (awarding damages for emotional distress and punitive damages); *Singh v. Jutla,* 214 F. Supp. 2d 1056, 1061-62 (N.D. Cal. 2002) (denying the employer's motion to dismiss the FLSA claim seeking compensatory damages); *see also Renteria*, 2003 WL 21995190, at *6 (holding that undocumented plaintiff is entitled to compensatory damages because this remedy does not assume continued employment by the defendant). At least one court has held that undocumented workers are not entitled to backpay and front pay for retaliatory discharge. *Renteria v. Italia Foods,* No. 02 C 495, 2003 WL 21995190, at *6 (N.D. Ill. August 21, 2003). Relying on *Hoffman*, the *Renteria* court concluded that awarding an undocumented plaintiff backpay and front pay "would trench on the polices expressed in the IRCA." *Id.*

[27] Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), available at http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf

[28] *See* a fact sheet on the MOU, "Immigration and Labor Enforcement in the Workplace: The Revised DOL-DHS Memorandum of Understanding (2011)", National Employment Law Project and National Immigration Law Center, available at http://www.nelp.org/page/-/Justice/2011/ImmigrationLaborEnforcementWorkplace.pdf?nocdn=1

[29] Compensatory damages, including damages for emotional distress are available in all the circuit courts that have reached this issue: Sixth, Seventh, Eighth, and Ninth Circuits. *Moore v. Freeman,* 355 F.3d 558 (6th Cir. 2004); *Travis v. Gary Community Healthy Mental Health Ctr., Inc.* 921 F.2d 108 (7th Cir. 1990); *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990 (8th Cir. 2001); *Lambert v. Ackerley,* 180 F.3d 997 (9th Cir. 1999).

[30] There is a circuit split as to the availability of punitive damages under 29 U.S.C. § 216(b). Punitive damages are available in the Seventh Circuit but are not available in the Eleventh Circuit. *Travis v. Gary Community Mental Health Ctr., Inc.,* 921 F.2d 108 (7th Cir. 1990); *Snapp v. Unlimited Concepts, Inc.,* 208 F.3d 928 (11th Cir. 2000). The Ninth Circuit has not explicitly held that punitive damages are available, but has stated in dicta that the reasoning in *Travis* was "persuasive" and quoted with approval a jury instruction stating that punitive damages can be awarded if the jury finds that "defendants' conduct was malicious, or in reckless disregard of plaintiffs' rights." *Lambert v. Ackerley*, 180 F.3d 997, 1009 (9th Cir. 1999).

- **Practice Tip:** In cases where an employer attempts to terminate an employee in violation of the FLSA's retaliation provision, it is important to act quickly and seek a temporary restraining order to enjoin the employer from engaging in a retaliatory discharge to avoid seeking a remedy of reinstatement that may implicate an inquiry into the worker's immigration status.

III. Coverage Under State Minimum Wage and Overtime Laws

There is no dispute that undocumented workers are protected under the state minimum wage and overtime laws. Courts have held, just as they have in FLSA cases, that wages for work already performed are distinguishable from the post-termination backpay disallowed in *Hoffman*. *See, e.g., Coma Corp. v. Kan. Dep't of Labor,* 154 P.3d 1080 (Kan. 2007) (Kansas Supreme Court holding that state law regulating wage claims applies to undocumented workers after *Hoffman*); *Gomez v. F & T Int'l (Flushing, NY) LLC,* 2007 NY Slip Op 27269 (N.Y. Sup. Ct. 2007); *Zirintusa v. Whitaker*, No. 05-1738, 2007 WL 30603 (D.D.C. Jan. 3, 2007). In addition to the state minimum wage and overtime laws, courts have ruled that undocumented workers are entitled to the prevailing wage protections under state law. *See, e.g., Serrano v. Underground Utilities Corp.,* 407 N.J. Super. 253, 970 A.2d 1054 (N.J. Super. App. Div. 2009); *Jara v. Strong Steel Door, Inc.*, 58 A.D.3d 600, 871 N.Y.S.2d 363 (N.Y. App. Div. 2d Dep't 2009); *Pineda v. Kel-Tech Const., Inc.*, 2007 WL 120217 (N.Y.Sup. Jan 10, 2007); *Reyes v. Van Elk, Ltd.,* 148 Cal.App.4th 604, 56 Cal.Rptr.3d 68 (Cal. App. 2d Dist. 2007) (prevailing wage cases should be analyzed like minimum wage cases for purposes of determining the applicability of *Hoffman*).

Shortly after the *Hoffman* decision, state agencies in New York, California, and Washington all issued public statements announcing that they would continue to enforce the laws to protect the rights of undocumented workers. The California Department of Industrial Relations posted on its website that undocumented workers are protected under the California labor and workplace safety and health laws and that it would not inquire into workers' immigration status in the enforcement of its laws.[31] California also passed a law that provides that immigration status is not relevant to state labor and employment laws, and that regardless of immigration status, workers are entitled to all rights and remedies available under state law except any reinstatement remedy prohibited by federal law. [32] *See* Cal. Lab. Code §1171.5. The law explicitly prohibits discovery of immigration status during litigation. *Id.* In 2003, the New York State Attorney General's office issued a formal opinion that the *Hoffman* decision does not preclude the New York State Labor Department from enforcing state wage and hour laws on behalf of undocumented workers.[33] The Washington State Department of Labor and Industries and Human Rights Commission issued statements explaining that undocumented immigrants continue to have access to full remedies, including backpay, under Washington State laws.[34]

[31] California Dept. of Industrial Relations, *All California workers are entitled to workplace protection available at* http://www.dir.ca.gov/QAUndoc.html

[32] In addition to the enforcement of state labor and employment laws, California has extended protection to undocumented plaintiffs in the enforcement of civil rights and employee housing laws. *See* CAL. CIV. CODE § 3339 (2002); CAL. GOV'T CODE § 7285, *et seq*. (2002); CAL. HEALTH & SAFETY CODE § 24000, *et seq*. (2002).

[33] N.Y. OP. Att'y Gen., Formal Opinion No. 2003-F3, (October 21, 2003) *available at* *http://www.ag.ny.gov/sites/default/files/opinion/2003-F3%20pw.pdf*

[34] Letter dated October 7, 2002 from Susan Jordan, Executive Director, Washington State Human Rights Commission, to Antonio Ginatta, Director, Washington State Commission on Hispanic Affairs (on file with NELP).

PROTECTION UNDER THE NATIONAL LABOR RELATIONS ACT

In *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the Supreme Court held that the National Labor Relations Board ("Board") lacked the remedial authority to award backpay to an undocumented worker who, in violation of IRCA, had presented false work authorization documents to obtain employment. The decision, and subsequent NLRA cases and Board guidance interpreting the decision have placed substantial limits on the possible remedies available to undocumented workers under the NLRA.

I. Coverage Under the National Labor Relations Act

It is well-settled that undocumented workers are "employees" within the meaning of the NLRA, *see Sure-Tan v. NLRB,* 467 U.S. 883 (1984), and are thus covered under the Act. This remains true after the Supreme Court's decision in *Hoffman*. *See, e.g., Agri-Processor Co. Inc. v. NLRB*, 514 F.3d 1, 5 (D.C. Cir. 2008), *cert. den.* 129 S.Ct. 594 (2008) ("[T]here is absolutely no evidence that in passing IRCA Congress intended to repeal the NLRA to the extent its definition of "employee" includes undocumented aliens. Thus, the NLRA's plain language, as applied by the Supreme Court in Sure-Tan, continues to control after IRCA, as the Seventh, Ninth, and Eleventh Circuits have all held."). Thus, the Board has consistently held that a worker's immigration status is irrelevant to a determination of the employer's liability under the NLRA. *See, e.g., In re Tuv Taam Corp.*, 340 NLRB No. 86 (Sep. 30, 2003).

Therefore, a worker's immigration status is never relevant during the merits stage of a Board proceeding. However, as will be explained below, an employer may in some instances legitimately raise the issue of immigration status at the compliance stage to argue that it cannot lawfully reinstate undocumented workers, and that it is not liable for backpay for work not performed.

II. Using Immigration Status to Retaliate Against Workers

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

This remains true after *Hoffman. See, e.g., AM Property Holding Corp., Maiden 80/90 NY LLC and Media Technology*, 350 NLRB No. 80, 86 (2007) (unfair labor practice to threaten employees with an investigation regarding their immigration status in retaliation for giving testimony at a Board proceeding).[35]

[35] In at least one recent case of such retaliation, however, the Board has declined to issue an unfair labor practice complaint. In May 2012, at Palermo Pizza Factory in Milwaukee, Wisconsin, nearly 100 immigrant workers were asked to re-verify their immigration status after requesting that the employer recognize their union as their exclusive representative for collective bargaining and submitting a representation petition and authorization cards to the NLRB. The basis for this re-verification demand was ostensibly an earlier letter from ICE notifying the employer that it had completed an audit and would soon be issuing the company a Notice of Suspect Documents. Following the issuance of this re-verification letter, the workers engaged in protests. The employer then shortened its re-verification period from 28 to 10 days. In early June of 2012, NLRB personnel contacted ICE to request that ICE stay its worksite enforcement proceedings during the Board's investigation and proceedings, and on June 7, 2012, ICE informed the employer that it was in fact staying immigration enforcement proceedings. Nonetheless, a few days later, the employer discharged approximately 75 striking workers, ostensibly because their work authorization had been called into question. The union argued that these firings were clearly an unfair labor practice and the employer's reason was pretextual, given that ICE had already stayed immigration enforcement before Palermo fired the employees. However, the Region declined to issue a complaint on this charge, a decision that as of January 2013 is being appealed to the General Counsel of the Board.

ICE has also clarified that its Internal Operating Instruction 287.3a is still binding on the agency. This 1990s policy says that when the agency receives information concerning the employment of undocumented workers, officials must "consider" whether the information is being provided to interfere with employees' exercise of workplace rights, or whether the information is being provided to retaliate against those employees.[36]

Additionally, on June 17, 2011, ICE issued memorandums outlining guidelines for exercising prosecutorial discretion in cases where individuals involved are in efforts to protect their civil and labor rights. These memorandums state that it is generally against ICE policy to remove individuals in the midst of a "legitimate effort to protect their civil rights or civil liberties" and that it will consider as a factor an individual's cooperation with federal, state or local law enforcement authorities, including investigations by the Department of Labor or the NLRB.[37] For more information on prosecutorial discretion, please see the last section of this treatise, "Immigration Remedies and Relief for Undocumented Workers Involved in Workplace Disputes".

III. Remedies Under the National Labor Relations Act

- **Backpay**

In *Hoffman*, the Court held that the IRCA precluded the Board from awarding backpay to an undocumented worker who, in violation of the IRCA, had presented false work authorization to obtain employment. The Court concluded that an award of backpay would "unduly trench upon explicit statutory prohibitions critical to federal immigration policy" by condoning past violations and encouraging future violations of the IRCA. *Hoffman*, 535 U.S. 137, 151.

In his dissent, Justice Breyer argued that denying backpay would only "increase the employer's incentive to find and hire illegal-alien employees," especially in cases where the employer knew of the worker's undocumented status. Justice Breyer explicitly noted that this situation of a "knowing employer" was not before the Court. *Id.* at 155.

Subsequently, in *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47 (2011), the Board was presented with the question of whether *Hoffman* also foreclosed a backpay award to undocumented workers where the employer – not the employees – violated the IRCA. An administrative law judge had awarded backpay to the discriminatees in *Mezonos,* notwithstanding their (assumed) undocumented immigration status. The administrative law judge distinguished *Hoffman* by noting that in *Hoffman*, the employee violated the IRCA by presenting false work authorization documents. By contrast, the discriminatees in *Mezonos* did not tender false documents, and the employer violated the IRCA by hiring them without requiring them to show work authorization.

The Board reversed the ALJ's decision, finding that *Hoffman* "broadly precludes backpay awards to undocumented workers regardless of whether it is they or their employer who has violated IRCA". 357 NLRB No. 47, at *2. The concurrence noted, however, that the result in this case frustrates the policies of the NRLA and the IRCA, and noted that the Board was not "definitively shut[ting] the door on other monetary remedies,

[36] Formerly INS Operating Instruction 287.3(a), now designated as Special Agent Field Manual 33.14(h).

[37] Memorandum from John Morton, Director, ICE, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," (June 17, 2011), available at: http://www.ice.gov/doclib/securecommunities/pdf/prosecutorial-discretion-memo.pdf.

which have not been tested here." 357 NLRB No. 47, at *10. As of January 2012, this decision is currently on appeal to the Second Circuit.

- **Reinstatement**

Hoffman did not disturb the "conditional reinstatement" portion of the holding in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 417 (1995), *enf.* 134 F.3d 50 (2d Cir. 1997) in which an employer that hired employees knowing that they were undocumented was required to offer immediate and full reinstatement to the workers "provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents in order to allow the employer to meet its obligations under IRCA." 134 F.3d at 57.

After the *Hoffman* decision, the General Counsel of the Board issued a memorandum entitled "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc., GC 02-06 (July 19, 2002) ("GC 02-06 memo").[38] This memo explains that conditional reinstatement remains appropriate for undocumented workers whom an employer knowingly hires, and that the *Hoffman* decision does not preclude the Board from imposing a conditional reinstatement order against employers "who flout both the [NLRA] and IRCA by hiring and firing known undocumented workers." However, reinstatement, or conditional reinstatement, is not appropriate where an employer establishes that it would not have hired or retained the worker had it known of his or her undocumented status. A worker who benefits from such a conditional reinstatement order will be given a "reasonable period of time" to establish work eligibility and to comply with 1-9 requirements.

- **Other Board Remedies**

In *Hoffman*, the Court noted that the Board retained the authority to impose other "significant sanctions" on employers who violate the Act, including cease-and-desist orders, and a requirement that the employer conspicuously post a notice to employees setting forth their rights under the Act and detailing its prior unfair practices. 535 U.S. at 152. It also noted that employers who fail to comply with these orders are subject to contempt proceedings. *Id*. Because contempt sanctions are available only for violations of court-enforced Board orders obtained through litigation or formal settlements, Board guidance instructs the NLRB Regions to seek a formal settlement in cases involving employers that knowingly hire undocumented workers and use their work authorization status to threaten and discharge them in retaliation for their organizing activity. GC-02-06 memo.[39]

Board guidance also instructs the Regions to require a notice to be read to employees and to compel an employer to continue to assist an undocumented worker in her efforts to adjust her immigration status where the discrimination itself is the employer's discontinuance of its previous support. *See also French American School of the Pacific Northwest*, Case 36-CA-10711, 2010 WL 5313289 (N.L.R.B. Div. of Judges, Dec. 27, 2010) (finding an unfair labor practice where employer cancelled worker's work visa because of worker's support of the union). Advocates should urge the Regions to submit cases to the Division of Advice that they believe require extraordinary remedies, such as union access to employees or to employee rosters. The General Counsel has also said that *Hoffman* does not preclude backpay "for work previously performed under unlawfully imposed terms and conditions (e.g. a unilateral change of pay or benefits)."[40]

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[38] "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc., GC 02-06 (July 19, 2002) , available at http://www.nlrb.gov/publications/general-counsel-memos

[39] *Id*.

[40] NLRB Case Handling Manual, Part Three, Compliance Proceedings, 2011.10560.7, available at http://www.nlrb.gov/sites/default/files/documents/44/compliancemanual.pdf

In *Mezonos Maven Bakery, Inc.*, while closing the door on backpay remedies even in cases where employers violated the IRCA, the Board concurrence stated that it was not "definitively shut[ting] the door on other monetary remedies, which have not been tested here." 357 NLRB No. 47, at *10. Specifically, it stated that "it is arguable, for example, that a remedy that requires payment by the employer of backpay equivalent to what it would have owed to an undocumented discriminate would not only be consistent with *Hoffman*, but would advance Federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole discriminatees whose backpay the Board had been unable to collect. Because of the procedural posture of this case, we do not examine such a remedy here. However, we would be willing to consider in a future case any remedy within our statutory powers that would prevent an employer that discriminates against undocumented workers because of their protected activity from being unjustly enriched by its unlawful conduct." *Id*.

- **Immigration Remedies**

In July 2011, the Board issued a memo announcing guidelines for seeking the assistance of immigration agencies to advance enforcement of the NLRA. "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," OM 11-62 (June 7, 2011) ("OM 11-62 memo").[41] This can include deferring immigration action during a Board proceeding, releasing individuals from custody or providing access to witnesses in custody, and providing visa remedies, including U and T visas in appropriate cases. For a detailed explanation on how to apply for U or T visas, which are granted by other labor agencies as well, please see the last section of this treatise, "Immigration Remedies and Relief for Undocumented Workers Involved in Workplace Disputes". Additionally, ICE guidelines provide that enforcement staff may exercise "favorable discretion", such as release from detention and deferral or a stay of removal generally, in situations in which individuals are engaging in protected activity, for example union organizing efforts, complaints to authorities about employment discrimination, or participation in a private lawsuit regarding civil rights or liberties violations.[42]

The General Counsel of the NLRB has advised its Regions to discuss the following situations with its Division of Operations-Management, the division that is responsible for the Board's activity in this area. Examples of these situations include (1) where a worker in a case loses his or her immigration status, particularly as a result of protected activities; (2) where the worker's presence in the country is important to enforcement of the Act; (3) where NLRB or immigration processes are being abused by the employer; and/or (4) where the employer knew or was willfully ignorant of the employee's lack of status. OM 11-62 memo.[43]

IV. Procedural Issues in Board Proceedings and Investigations after *Hoffman*

- **Raising Immigration Status During a Board Investigation and/or at the Compliance Stage of a Board Proceeding**

The Board and several Courts of Appeal have held that lack of authorization to work during the backpay period is an affirmative defense to backpay. *See Tortilleria La Poblanita*, 357 NLRB No. 22, slip op. 4 fn. 7 (2011);

[41] "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," OM 11-62 (June 7, 2011), available at http://www.nlrb.gov/publications/operations-management-memos

[42] Formerly INS Operating Instruction 287.3(a), now designated as Special Agent Field Manual 33.14(h).

[43] "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," OM 11-62 (June 7, 2011), available at http://www.nlrb.gov/publications/operations-management-memos

Domsey Trading Corp., 636 F.3d 33, 37 (2d Cir. 2011); *NLRB v. C&C Roofing Supply, Inc.*, 569 F.3d 1096, 1099 (9th Cir. 2009).

This raises procedural questions of when, and how, defendants can raise immigration status during compliance hearings and/or backpay investigations to argue that discriminatees are not entitled to backpay.

The NLRB General Counsel's policy, as most recently stated in its June 2011 memorandum, is that employees are generally presumed to be lawfully authorized to work; the Board's Regions should refrain from conducting a *sua sponte* immigration investigation; and Regions should object to questions concerning immigration status at the merits stage of a proceeding. OM 11-62 memo.[44] Additionally, the General Counsel instructs its Regions to investigate a worker's immigration status only after an employer establishes the existence of a "genuine issue" during the compliance stage, and that they should conduct this investigation by asking the worker or worker's representative to respond to the employer's evidence. *Id*. The Board's 2011 memorandum also directs Regions to continue to consult GC 02-06, the General Counsel's memorandum issued after the *Hoffman* decision, for additional direction. GC 02-06 likewise states that Regions have no obligation to investigate an employee's immigration status unless it is relevant to the remedy is being sought – e.g. reinstatement or backpay[45] – and an employer affirmatively establishes the existence of a "substantial immigration issue", and that a "substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminate is undocumented . . . [a]gain, a mere assertion is not a sufficient basis to trigger such an investigation." GC 02-06 memo.[46]

What constitutes a substantial immigration issue? In 2003, the NLRB stated that the fact that an employer had received a Social Security no-match letter is not evidence that a particular worker is in the country unlawfully. *In re Tuv Tamm Corp.,* 340 NLRB No. 86 (2003). More recently, the Ninth Circuit suggested, in the context of an arbitration award of reinstatement for workers fired for failing to respond to a Social Security no-match letter within a three-day period set by the employer, that for an employer to have "constructive knowledge" that workers are undocumented, it must have actual information coming directly from immigration authorities. *Aramark Facility Services v. Service Employees Intern. Union, Local 1877*, 530 F.3d 817 (9th Cir. 2008). *See also Merchants Bldg. Maint*, 28-CA-22660, 2010 WL 5101104 (NLRB Div. of Judges) (Jan. 1, 2010) (ALJ holding that employer failed to show that the discriminatees were undocumented despite Social Security number no-matches, and that at most, the employer's evidence showed that the employees provided inaccurate Social Security numbers for some reason).

In *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011), the Second Circuit held that the Board had abused its discretion by prohibiting an employer from eliciting relevant testimony on discriminatees' immigration status as it sought to prove its affirmative defense that discriminatees were not entitled to backpay under *Hoffman*. The Court held that it was clear that immigration status is relevant to the question of backpay eligibility post-*Hoffman*, and that the "only limits the Board may place on cross-examination are the usual limits the presider may place on cross-examination." 636 F.3d at 38. However, the Court underscored the Board's "legitimate interest in fashioning rules that preserve the integrity of its proceedings", and said that it would "leave it to the Board to fashion evidentiary rules consistent with *Hoffman*". *Id*. *at* 39.

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[44] *Id*.

[45] The GC memo notes that "proof of a discriminatee's undocumented status, as with any other defense to reinstatement or backpay, must be established through evidence proffered by the party making the allegation, and not through a sua sponte regional investigation."

[46] "Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc., GC 02-06 (July 19, 2002), available at http://www.nlrb.gov/publications/general-counsel-memos

Subsequently, in *Flaum Appetizing Corp.*, 357 NLRB 162 (2011), the Board granted a motion to strike the employer's affirmative defense that *Hoffman* precluded a backpay award. The Board held that the applicable rules of pleading required that a *Hoffman* affirmative defense be specifically alleged, and that in this case – where the employer simply asserted that the workers were undocumented – such specificity had not been met. The Board found that the *Hoffman* decision "did not address, much less resolve" the procedural questions raised by its holding, including which party has the burden of pleading lack of work authorization, under what circumstances can a party inquire into immigration status, and which party has the burden of proof on this issue. The Board distinguished the Second Circuit decision's in *Domsey*, noting that that case analyzed a judge's exclusion of immigration status evidence under the abuse of discretion standard, where the affirmative defense was properly pled. *Id.* at 6. The Board held that because the employer articulated no factual support (or reason to believe it could obtain such factual support) that the workers were not entitled to backpay, ordinary rules of pleading supported striking the *Hoffman* affirmative defense. Importantly, the Board explained that if it were to permit the pleading of an affirmative defense based on immigration status in the complete absence of any articulable reason, it would contravene the policies underlying both the IRCA and the NLRA because (1) employers would plead this affirmative defense, serve subpoenas, and elicit testimony "whenever a discriminatee has a Hispanic surname", or alternatively (2) employers would plead it in every compliance case in the hopes of discovering information supporting such a defense, resulting in a fishing expedition that would chill immigrant workers from coming forward to assert their NLRA rights. *Id*. at 9-10.

After the *Flaum* decision, the Board's Division of Operations Management issued a new memo entitled "Case Handling Instructions for Compliance Cases after *Flaum Appetizing Corp.*, OM 12-55 (May 4, 2012) ("OM 12-55 memo").[47] This memo instructs Regions to demand a full accounting of evidence an employer intends to rely on for its *Hoffman* affirmative defense, and in cases where an employer's answer is insufficient, to file a pre-trial motion for a bill of particulars. If an employer's pleadings continue to be deficient, Regions are instructed to file a motion to strike the affirmative defense. Additionally, if subpoenas *duces tecum* have been served on discriminatees in a compliance proceeding where the employer is pleading this affirmative defense, Regions are instructed to move to revoke these subpoenas conditionally subject to a ruling on the motion for a bill of particulars.

The OM 12-55 memo also modifies the Board's Case Handling manual to make clear that an employer's reinstatement offer is not valid if conditioned on re-verification of employment status.

Finally, the OM 12-55 memo allows Regions to consider whether an employer commits an independent unfair labor practice where, without evidence of an employee's immigration status, it issues subpoenas for the employee's work authorization documents for purposes of harassing the employee.

[47] "Case Handling Instructions for Compliance Cases after Flaum Appetizing Corp., OM 12-55 (May 4, 2012), available at http://www.nlrb.gov/publications/operations-management-memos

PROTECTION UNDER THE FEDERAL AND STATE EMPLOYMENT DISCRIMINATION LAWS

I. Coverage Under Title VII of the Federal Civil Rights Act

Undocumented workers are entitled to protection under the Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000e *et seq.,* and other federal and state employment discrimination laws.[48] After enactment of IRCA in 1986 and prior to *Hoffman*, the established Equal Employment Opportunity Commission ("EEOC") case law largely held that undocumented workers are protected under federal employment discrimination laws. *See Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A*., 860 F.2d 1168, 1173 (2d Cir. 1988); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989); *EEOC v. Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991).[49] The *Hoffman* decision did not disturb the settled principle that Title VII and other federal employment discrimination statutes cover undocumented workers. *See, e.g., Rivera et. al v. NIBCO, Inc.,* 364 F. 3d 1057 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005); *EEOC v. The Restaurant Co.,* 490 F. Supp.2d 1039 (D. Minn. 2007).

II. Remedies Under Title VII of the Federal Civil Rights Act

Under Title VII, a worker is entitled to reinstatement, instatement, backpay, front pay, compensatory damages, punitive damages, and other injunctive relief. *See* 42 U.S.C. § 2000e-5. In 1999, following the Supreme Court's decision in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), the EEOC issued Enforcement Guidance stating that an undocumented worker was presumptively entitled to post-discharge backpay on the same basis as other workers as long as the worker remained present in the U.S. and available for work.[50] After the *Hoffman* decision, the EEOC rescinded this Enforcement Guidance, stating that it had relied on NLRA cases to conclude that undocumented workers were entitled to all forms of monetary relief, including post-discharge backpay.[51] However, the EEOC continues to maintain that *Hoffman* does not disturb the settled principle that federal employment discrimination statutes cover undocumented workers.[52]

After *Hoffman*, the remedies available to undocumented workers are not totally conclusive and the actual impact of *Hoffman* remains to be fully tested. However, a key Ninth Circuit decision, *Rivera et. al. v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005) lends force to the argument that *Hoffman* does not apply to Title VII cases.[53] In *Rivera,* a Title VII national origin discrimination case where the defendant

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[48] The other anti-discrimination laws are the Age Discrimination in Employment Act (ADEA), section 501 of the Rehabilitation Act, the American Disabilities Act (ADA), and the Equal Pay Act (EPA).

[49] Prior to *Hoffman,* however, the Fourth Circuit held that pursuant to IRCA, at least in the hiring context, undocumented workers who cannot make a successful showing of authorization to work in the U.S. are not entitled to the equitable remedies available under Title VII. *Egbuna v. Time Life Libraries, Inc.,* 153 F.3d 184 (4th Cir. 1998), *cert. denied,* 119 S.Ct. 1034 (1999). The same court had 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 not qualified for the job. *Reyes-Gaona v. North Carolina Growers' Ass'n.,* 250 F.3d 861 (4th Cir. 2001).

[50] Equal Employment Opportunity Comm'n, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, EEOC Notice No. 915.002, Oct. 26, 1999, available at http://www.eeoc.gov/policy/docs/undoc.html

[51] Equal Employment Opportunity Comm'n, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, EEOC Directives Transmittal No. 915.002, Jun. 27, 2002, available at http://www.eeoc.gov/policy/docs/undoc-rescind.html. In the EEOC Rescission, the EEOC stated that it was "reexamining" its policy in light of *Hoffman.* The EEOC has yet to issue another Enforcement Guidance since then.

[52] *Id.*

[53] See Christopher Ho & Jennifer C. Chang, *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 (2005) for a discussion of an argument that

sought information on the plaintiffs' immigration status and places of birth, the Ninth Circuit, upholding the protective order, stated in favorable dicta that it "seriously doubt[ed]" that *Hoffman* applies to Title VII cases because of three significant differences between Title VII and the NLRA: (1) Title VII depends on private causes of action, rather than the actions of the NLRB; (2) Title VII includes remedies designed to punish employers; and (3) federal judges, not the Board, decide appropriate remedies in Title VII cases. 364 F.3d at 1067-70. In an earlier Title VII case where plaintiffs sought post-discharge backpay, a district court, denying the defendant's motion to compel production of documents related to plaintiffs' immigration status, stated that "[c]oupled with the authority of a federal court as opposed to the NLRB, the Court cannot conclude at this time that *Hoffman* is dispositive of the issues raised in the motion to compel and plaintiffs' responses." *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237, 239 (C.D. Ill. 2002). The court's conclusion on the inapplicability of *Hoffman* to the Title VII context, however, was only dicta, as the court ultimately found that the information sought by defendants – plaintiffs' immigration status *during* their employment by defendants – was clearly not relevant to determining post-termination backpay. *Id*.

Following *Rivera*, a number of courts have held that immigration status is not relevant to Title VII cases, at least at the liability phase of trial. The EEOC has been aggressive in its largely successful pursuit of protective orders to prohibit discovery of immigration status related information.[54] *See, e.g., EEOC v. Fair Oaks Dairy Farm, L.L.C.,* No. 2:11 cv 265, 2012 WL 3138108 (N.D. Ind. Aug. 1, 2012); *EEOC v. Kovacevich 5 Farms,* No. 1:06-cv-01652007, WL 1599772 (E.D. Cal. June 4, 2007); *EEOC v. The Restaurant Co.,* 448 F.Supp.2d 1085, 1086-88 (D. Minn. 2006); *EEOC v. City of Joliet,* 239 F.R.D. 490 (N.D. Ill, 2006); *EEOC v. First Wireless Group, Inc.,* 225 F.R.D. 404 (E.D.N.Y. 2004); *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190 (S.D.N.Y. 2006). [55]

However, some courts have held that immigration status may be relevant to a determination of damages, including compensatory damages for emotional distress. In *EEOC v. Evans Fruit Co.*, No. CV-10-3033, 2011 WL 1884477, at *2 (E.D. Wash. April 11, 2011), a case brought under Title VII for sexual harassment and state statutory and common laws, the court allowed discovery into the worker's immigration status because it concluded that "it is relevant to the issue of the amount of certain actual pecuniary damages to which she may be entitled." [56] On the EEOC's motion for reconsideration, the EEOC clarified that it is only seeking non-economic damages for emotional distress claims. *EEOC v. Evans Fruit Co.,* No. CV-10-3033, 2011 WL 2471749, at *1 (E.D. Wash. June 21, 2011). Nevertheless, the district court concluded that immigration status has potential relevance to emotional distress claims, while leaving it open whether such evidence will be admitted at trial.[57] *Id. at* *2. Notably, in contrast to *Evans Fruit,* in *Cazorla v. Koch Foods of Mississippi, LLC*, ___ F.Supp.2d ___, 2012 WL 6161959, at *2 (S.D. Miss. Nov. 30, 2012), where the plaintiffs sought damages for emotional distress in a Title VII case, the court rejected the defendants' argument that the plaintiffs' immigration status may provide an alternative reason for their emotional distress. The court thus barred discovery into information related to the plaintiffs' immigration status, noting the *in terrorem* effect the disclosure of such information would have in discouraging plaintiffs from asserting their rights in the litigation. *Id.*

Hoffman does not bar backpay awards to undocumented workers in Title VII actions. Also, Christopher Ho and Araceli Martínez-Olguín at the The Legal Aid Society-Employment Law Center are good resources for Title VII cases.

[54] The powerpoint presentation of William R. Tamayo, EEOC Regional Attorney at the 2012 Farmworker Law Conference notes additional unreported decisions where the EEOC successfully sought protective orders. (powerpoint on file with NELP).

[55] Following Hoffman, some plaintiffs in federal discrimination cases have simply foregone claims for backpay, or even conceded that they were not entitled to backpay. See, e.g., Escobar v. Spartan Security Services, 281 F.Supp.2d 895, 896 (S.D. Tex. 2003), in a Title VII sexual harassment, sex discrimination and retaliation case, the plaintiff conceded that he is not entitled to backpay under Title VII given the Supreme Court's decision in Hoffman.

[56] Plaintiff-intervenor sought backpay under the state discrimination law and not under Title VII.

[57] See also *Iweala v. Operational Technologies Services, Inc.,* 634 F.Supp.2d 73, 80 (D.D.C. 2009) where the court held in a Title VII case that plaintiff could proceed with her Title VII claims, regardless of immigration status, but that her visa status and lack of employment eligibility "may limit her remedies."

- **Practice Tip:** Without conceding that immigration status is relevant to a determination of damages, bifurcating a trial into liability and damages phases can be useful to avoid prejudice under Fed. R. Civ. P. 42(b). *See, e.g*., *Rivera v. NIBCO, Inc.,* No. CIV-F-99-6443, 2006 WL 845925 (E.D. Cal. March 31, 2006) (the court granting plaintiffs' request to bifurcate the Title VIII proceeding); *see also EEOC v. Evans Fruit Co., Inc.* No. CV-10-3033, 2011 WL 1884477 (E.D. Wash. April 11, 2011) (the court proposed a bifurcation of the trial into liability and damages phases); *Rodriguez v. ACL Farms, Inc*. No. CV-10-3010, 2010 WL 4683743 (E.D. Wash. Nov. 12, 2010) (in a case brought under the AWPA and Washington's Farm Labor Contractors Act (FLCA), the court bifurcated the case).

III. State Employment Discrimination Laws

The availability of backpay and other economic and non-economic remedies under state employment discrimination laws has not been fully addressed by the courts since *Hoffman*. For the same reasons that the Ninth Circuit in *Rivera* indicated that *Hoffman* did not apply to Title VII cases, and because there are additional arguments supporting a state's ability to make its own policy choices in this area, remedies at the state level may remain unaffected.[58] However, there is at least some negative, but distinguishable, case law in this area.

In *Crespo v. Evergo Corp.* 366 N.J. Super. 399 (N.J. Super. Ct. App. Div. 2004), an undocumented plaintiff alleged discriminatory termination for defendant's failure to allow her to return to employment after her maternity leave and brought a claim under the New Jersey Law Against Discrimination (NJLAD), N.J. Stat. Ann. § 10:5-1-42. The New Jersey Superior Court dismissed the complaint holding that plaintiff's disqualification from legal employment precluded her post-termination damages – both economic and non-economic damages. *Id*. at 400. In reaching this conclusion, the court noted that IRCA as applied by the U.S. Supreme Court in *Hoffman* bars plaintiff from pursuing both economic and non-economic damages. *Id.* at 394. *Crespo's* holding should be read narrowly, at least with the noneconomic damages, because the court seems to suggest that it would have reached a different conclusion had the plaintiff alleged aggravated sexual harassment or other egregious circumstances during her employment. In discussing another case with authority, the court observed that "[w]e can conceive of other circumstances such as the aggregated sexual harassment … where the need to vindicate the policies of LAD … and to compensate an aggrieved party for tangible physical or emotional harm could lead to the conclusion that even a person who was absolutely disqualified from holding public employment should be allowed to seek compensation for harm suffered during that employment." *Id.* at 400.

[58] Note, the disclosure of immigration status was required in *EEOC v.Evans,* No. CV-10-3033, 2011 WL 2471749, at *1 (E.D. Wash. June 21, 2011), a case that included claims brought under the Washington state discrimination law.

UNDOCUMENTED WORKERS AND FUTURE LOST WAGES IN TORT ACTIONS

I. Determining the Lost Earnings Capacity of Undocumented Workers in Tort Actions

Defendants routinely invoke *Hoffman* to argue that undocumented workers are precluded from asserting claims for future lost earnings in tort actions. As detailed below, the majority of courts to consider the issue have concluded that undocumented workers may be entitled to recover some future lost earnings, but have considered issues including a) whether the worker violated the IRCA by submitting false work authorization; b) calculating future lost earnings based on what the worker would have earned in their country of origin; and c) the likelihood that the worker will return to their home country, among other issues.

A minority of courts, including Texas, have held that future lost earnings are recoverable in their entirety, holding that *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." *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003), *citing Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768,779 (Tex. App. 1993); *see also Contreras v. KV Trucking, Inc*., No. 4:04-CV-398, 2007 WL 2777518 (E.D. Tex. Sept. 21, 2007) (denying motion to exclude damages for lost earnings capacity because of plaintiffs' undocumented status). In *Vargas v. Kiewit Louisiana Co.*, Civ. No. H-09-2521, 2012 WL 2952171 (S.D. Tex. July 18, 2012), a federal district court in Texas held that an award of future lost earnings in a wrongful death action (the decedent, an undocumented worker, died while working on a construction project) would not contravene the IRCA. The court dismissed the defendant's argument that an award of lost earnings would condone violations of the IRCA because the decedent used false documents to obtain employment, finding that "immigrants will not be motivated to violate IRCA in order to obtain additional U.S. wages after suffering fatal injuries." *Id.* at * 5.

Likewise, in a preliminary decision on a motion for a protective order, a Massachusetts court held that an injured worker's immigration status was irrelevant to his earning capacity, and observed that "[i]f employers know that they will be potentially less financially responsible for a workplace injury as long as the injured party is an illegal immigrant they will be more inclined to hire illegal immigrants for dangerous positions." *Pontes v. New England Power Company,* No. 0300160A, 2004 WL 2075458, *at* *3 (Mass.Super. Aug 17, 2004).

At least two courts have barred claims for future lost earnings, reasoning that an award of lost wages would violate the IRCA and *Hoffman*. On a summary judgment motion in a products liability case, a district court in Florida barred the lost future U.S. wages claim of a plaintiff who was not eligible for employment in the U.S. and who had used false documents to obtain employment. *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F.Supp. 2d 1317 (M.D. Fla. 2003). The court reasoned that "permitting an award predicated on wages that could not lawfully have been earned, and on a job obtained by utilizing fraudulent documents runs 'contrary to both the letter and spirit of the IRCA, whose salutory purpose it would simultaneously undermine.'" 313 F.Supp. 2d at 1337, *citing Majlinger v. Cassino Contracting Corp.*, 766 N.Y.S.2d 332, 334 (N.Y.Sup.Ct. 2003). It also reasoned that the backpay in *Hoffman* was akin to the lost future wages sought by the plaintiff because both constituted an award for work never to be performed. *Id*. at 1337. In a personal injury action arising out of a car accident, a district court in Kansas held that any negligence of the driver should be imputed to the plaintiffs because they were engaged in unlawful conduct – entering the U.S. illegally – and that plaintiffs' undocumented status precluded recovery for lost income based on projected earnings in the U.S. *Hernandez-Cortez v. Hernandez,* No. Civ. A. 01-1241, 2003 WL 22519678 (D. Kan. Nov. 4 2003).

However, these courts only barred recovery for lost income based on projected U.S. earnings, and did not consider the question of whether plaintiffs could recover future lost wages that they would have earned in their home countries.

Most courts have followed the following approach: permitting undocumented immigrants to proceed with claims of future lost earnings capacity in tort actions, but considering whether such damages are limited by what plaintiffs would earn in their home countries, on the theory that these plaintiffs are barred by *Hoffman* and IRCA from seeking future lost earnings that they could not lawfully earn in the United States. This means that immigration status, although irrelevant on the issue of liability, is relevant on the issue of calculating future lost earnings.

II. Common Issues Arising in Tort Cases Involving Undocumented Workers

- **Whether an employer knew that the worker was undocumented, for purposes of determining whether a worker can recover future lost earnings based on U.S. wages.**

In *Rosa v. Partners in Progress Inc.*, 868 A.2d 994 (N.H. 2005), the Supreme Court of New Hampshire agreed that in "most circumstances" an undocumented worker could only recover damages for what he could have earned in his home country. However, the court held that a person responsible for an undocumented worker's employment may be held liable for future lost earnings based on U.S. wages if that person knew or should have known of the worker's status, but hired or continued to employ him nonetheless – unless the worker submitted false documents and the employer reasonably relied upon those documents in hiring.

- **Whether an undocumented worker used false documents to "induce" an employer to hire him.**

In *Balbuena v. IDR Realty*, 845 N.E.2d 1246, 6 N.Y. 338 (N.Y. 2006), New York's highest court held that an injured workers' undocumented status did not preclude their recovery of future lost earnings in a common law and negligence and state labor law action. The court emphasized that unlike in *Hoffman*, the plaintiffs did not violate the IRCA by using false documents to obtain employment, re-iterating that the IRCA does not make it a crime to simply work without authorization. As the post-*Balbuena* case law has developed in New York, some courts have focused on plaintiff's use of false documents to obtain employment. *See, e.g., Ambroso v. 1085 Park Avenue LLC*, No. 06-CV-8163, 2008 WL 4386751, at *13 (S.D.N.Y. Sept. 25, 2008) ("*Balbuena* . . . suggest[s] that workers who do use false documentation to obtain employment may not recover lost wages under New York Labor Law . . [i]n light of these precedents, this Court feels compelled to conclude that undocumented workers who violate IRCA may not recover lost wages in a personal injury action based on a violation of New York Labor Law."). However, even where undocumented workers have used false documents, courts have not barred recovery where employers did not rely on these documents in hiring. For example, in *Macedo v. J.D. Poscillo, Inc.*, 68 A.D.3d 508, 891 N.Y.S.2d 46 (1st Dep't. 2009), the First Appellate Department overturned a trial court decision that had barred a lost wages claim because the plaintiff had used a false Social Security number. The appellate court held that the plaintiff did not forfeit his right to recover lost wages because the evidence did not show that the false documents actually induced the defendant to hire him – where defendant had "failed to comply with its employment verification obligations in good faith" by failing to require plaintiff to fill out and sign an I-9 form until months after the workplace accident at issue took place. 68 A.D. 3d at 511, 891 N.Y.S.2d at 49. *See also Coque v. Wildflower Estates Developers, Inc.*, 867 N.Y.S.2d 158 (N.Y. App. Div. 2d Dep't. 2008) ("We hold that a worker's submission of false documentation is sufficient to bar recovery of damages for lost wages only where that conduct actually induces the employer to hire the worker, and that this circumstance is not present where the employer knew or should have known of the worker's

undocumented status or failed to verify the worker's eligibility for employment as required by federal legislation.").

- **Whether evidence of immigration status is relevant; and if relevant, whether it is more prejudicial than probative.**

In *Salas v. Hi-Tech Erectors*, 230 P.3d 583 (Wash. 2010), an undocumented worker brought a personal injury action against scaffolding subcontractor. The Washington Supreme Court held that the trial court abused its discretion by admitting evidence of the plaintiff's immigration status when he sought damages for lost future income, holding that any probative value of plaintiff's status was outweighed by the danger of unfair prejudice. The court agreed that plaintiff's immigration status was relevant, noting that the relevance requirement "is not a high hurdle." However, it found that that the probative value of this evidence was low, given that "immigration status alone is not a reliable indicator of whether someone will be deported", and that based solely on his status, the risk that plaintiff could be deported was "exceptionally low." Conversely, it found the potential prejudicial effect to be high, reasoning that "issues involving immigration can inspire passionate responses that carry a significant danger to interfering with the fact finder's duty to engage in reasoned deliberation." 230 P.3d at 586.

However, in *Zuniga v. Morris Materials Handling, Inc.*, No. 10–C–696, 2011 WL 663135 (N.D.Ill. Feb. 14, 2011), a federal district court in Illinois granted defendants' motion to allow discovery into plaintiff's immigration status, holding that his "ability to be employed legally in this country is arguably relevant to [his claim for future earnings]". The court also rejected the argument that discovery into immigration status would have an *in terrorem* effect on potential plaintiffs, stating that the concern was not as significant in the context of common law litigation.

In *Davila v. Grimes*, No. 2:09-CV-407, 2010 WL 1737121 (S.D. Ohio, Apr. 29, 2010), a federal district court in Ohio granted a motion to compel responses regarding immigration status in a personal injury lawsuit. The Court noted the split among jurisdictions as to whether *Hoffman* precludes such an award and stated that it found no relevant authority in either the Sixth Circuit or the State of Ohio. It held, however, that it need not reach final resolution of the issue "at this juncture", because "at a minimum, it is clear that Plaintiffs immigration status is relevant to his claim for lost future wages." 2010 WL 1737121, at *3.

In a subsequent Ohio federal district court case, the court denied a motion *in limine* to preclude evidence of immigration status in a wrongful death action, holding that where the decedent was not only undocumented but had deportation proceedings pending against him at the time of his death, such evidence was relevant to the assessment of damages for lost future earnings. *Novovic v. Greyhound Lines, Inc.*, No. 2:09-CV-00753, 2012 WL 252124 (S.D. Ohio Jan. 26, 2012). The court acknowledged that "federal case law is not entirely settled on this issue," and that immigration status could have a prejudicial effect on the jury. However, it noted that even in *Salas v. Hi-Tech Erectors*, where the Washington Supreme Court found that the prejudicial effect outweighed any probative value, the Court acknowledged that immigration status is relevant and that "if deportation proceedings [against Mr. Salas] had actually been initiated . . . their holding may have been different." 2012 WL 252124, at *3, *citing Salas v. Hi-Tech Erectors*, 230 P.3d at 585-86. The court also held that evidence of immigration status could be introduced for purposes of mitigating the damages claimed for loss of consortium, after defendant argued that decedent's immigration status made it less likely that his family would ever be able to reunite with him in the United States. *Id*.

Similarly, in *Vargas v. Kiewit Louisiana Co.*, Civ. No. H-09-2521, 2012 WL 2952171 (S.D. Tex. July 18, 2012), a federal district court in Texas held that the decedent's estate would not be guaranteed lost earnings based on U.S. wages because the defendants would be entitled to establish that the use of past (U.S.) wages to calculate

future wages was factually improper, by for example, presenting proof that the decedent was about to be deported or surely would be deported, or proof that his false documents may have been discovered, eliminating his chances of continuing or finding additional work. 2012 WL 2952171, at *5.

In Colorado, a court of appeals held that the plaintiff would be entitled to lost future wages in a negligence action arising out of a car accident unless the defendant could prove the plaintiff was both in violation of IRCA and unlikely to remain in the country. The court remanded so that the defendant could attempt to show the relevance of plaintiff's immigration status, suggesting that the fact plaintiff had been driving without a state driver's license made it "reasonable to inquire" whether plaintiff was in the country illegally. *Silva v. Wilcox,* 223 P.3d 127 (Colo. App. 2009).

- **Whether to send the issue of immigration status to the jury, with an instruction that immigration status is one of the factors it can consider in assessing damages.**

In *Balbuena*, the New York Court of Appeals noted that any conflict with IRCA's purposes could be "alleviated by permitting a jury to consider immigration status as one factor in its determination of the damages, if any, warranted under the Labor Law . . . in other words, a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all the relevant facts and circumstances presented in the case. 845 N.E.2d at 1259, at 362. In *Madeira v. Affordable Housing Foundation*, 469 F.3d 219 (2d Cir. 2006), the Second Circuit upheld a jury award where the trial court instructed that the jury could conclude that the plaintiff's immigration status and potential removability was relevant to his future lost wages claim. The court noted that the jury's future earnings award represented far more than the plaintiff would have earned in his home country, but considerably less than he could have earned in the U.S. over the same amount of time, concluding that "one can reasonably infer that the jury concluded that, but for his injury, [the plaintiff] would have remained at worked in the United States, but only for a limited period." 469 F.3d at 225-26. A New York trial court held that an undocumented political asylum seeker was not barred from recovering future lost wages in a workplace injury action, but that the jury was to consider the economic effect should the plaintiff lose his asylum case. *Maliqi v. 17 E. 89th St. Tenants*, 25 Misc.3d 182, 189-190, 880 N.Y.S.2d 9172009, NY Slip Op 29255 (N.Y. Sup. Ct. 2009).

- **Whether an expert's testimony calculating future lost earnings capacity is relevant and reliable under *Daubert*.**

In *Cruz v. Bridgestone/Firestone North America,* No. CIV 06-538, 2008 WL 5598439 (D.N.M. Aug. 29, 2008) a federal district court in New Mexico held that two expert testimonies, one providing the value of an "average statistical life" in the U.S. and the other calculating future lost earning capacity and future medical expenses, were barred by *Daubert* because they were computed based solely on U.S. figures and wage scales, without making "any attempt to acknowledge the Mexican citizenship of the plaintiffs or the legal barriers to their earning the average American wages which are the foundation of both experts' studies." 2008 WL 5598439, at *6. Observing that several of the plaintiffs had spent the majority of their working careers in Mexico and were only sporadically in the U.S., while two of the plaintiffs were teenagers at the time of the accident at issue and had never been employed in the U.S., the court cited the "pitfalls of a simplistic approach of merely assuming any undocumented worker will earn the average wage over a statistic lifetime in the United States". *Id.* ("[i]n cases involving illegal aliens, the court should also take into account other factors, such as whether the alien committed a fraudulent act in obtaining employment, the possibility of deportation, the likelihood of the alien voluntarily returning to his home country, and the individual alien's migration patterns." (internal citation omitted)).

In *Avalos v. Atlas World Group, Inc.*, No. 2:03cv174, 2005 WL 6736327 (S.D. Miss. Apr. 4, 2005), a wrongful death and personal injury action, defendants moved to preclude the economic analysis of plaintiffs' economic expert, which estimated future earnings of the decedent based on U.S. wages. Defendants argued that this economic analysis was neither relevant nor reliable under *Daubert* because it failed to take into account that the decedent was undocumented. The federal district court in Mississippi agreed, but noted that the decedent allegedly stated, a month before his accident, that he intended to return to Mexico in two years. Therefore it only held the plaintiff's economic analysis irrelevant to the extent that it was offered to establish future U.S. wages for any period *beyond* the two years from the date of the decedent's statement. 2005 WL 6736327 at *4-5.

- **Whether the policy goals underlying workers' compensation and common law tort claims are analogous or distinguishable.**

In a products liability suit brought by the plaintiff against the manufacturer of a table saw that caused plaintiff's injuries, a federal district court in Illinois considered whether an undocumented immigrant could recover economic damages for lost future earnings and diminished earning capacity in an Illinois common law tort action. *Wieglus v. Ryobi Technologies, Inc.*, ___ F. Supp. 2d ___, 2012 WL 2367883 (N.D.Ill. June 21, 2012). At the time of his injury, the plaintiff had overstayed a 6-month visitor visa. Following his accident, he left the U.S., and as the court noted, as a result of violating the terms of his visitor's visa, was subject to a 10-year entry bar. The court distinguished an Illinois Appellate Court case holding that undocumented workers were entitled to receive workers' compensation benefits by stating that the policy implication of awarding workers' compensation benefits, which "act as a form of insurance" for employers are "significantly different" from those implicated by awarding damages in state tort actions. After reviewing caselaw from other jurisdictions, the court held that *Hoffman* and IRCA precludes recovery of damages based on loss of future U.S. earnings, but does not preclude recovery of damages for lost future earnings or earning capacity based on what the plaintiff could earn in his country of lawful residence. This, the court stated, "fairly balances the federal government's immigration policies . . . with the objectives of a common law tort action." 2012 WL 2367883, at *6.

In *Zuniga v. Morris Materials Handling, Inc.*, No. 10–C–696, 2011 WL 663135 (N.D.Ill. Feb. 14, 2011), a federal district court in Illinois distinguished between workers' compensation and "other remedies created by statutes to protect workers" and "common law tort actions against suppliers and maintainers of equipment with whom the plaintiff had no prior relationship." In the latter, the court stated, without explanation, that "[t]here is no reason to believe that suppliers and maintainers of equipment will be less interested in avoiding negligence liability because of the possibility that a particular plaintiff's damages might be limited by his immigration status." 2011 WL 663136, at *5.

In *Bordejo v. Lakhan*, ____ F. Supp.2d ____, 2011 WL 3667570 (M.D.Pa. Aug. 22, 2011), an undocumented worker brought a negligence action seeking to recover damages for a workplace injury, and the employer argued, on a summary judgment motion, that the plaintiff was barred by *Hoffman* and IRCA from seeking lost earnings because he could not have been legally hired to work and earn. The federal district court in Pennsylvania denied the employer's motion for summary judgment on the plaintiff's claims for lost earnings. In doing so, the court cited the Pennsylvania Supreme Court's decision in *Reinforced Earth Co. v. W.C.A.B. (Astudillo)*, 570 Pa.464, 810 A.2d 99, 105 (2002), which upheld an award of workers' compensation benefits to an undocumented worker as persuasive as to whether an undocumented worker could recover lost earnings in a tort action. The court noted that the dissent in *Reinforced Earth* would have found that IRCA precluded undocumented workers from receiving workers' compensation benefits, and "[t]o the extent that the majority disagreed with that position, and to the extent that one of the purposes of Pennsylvania's workers' compensation system is to replace the traditional tort system, we predict that the Pennyslvania Supreme Court would not preclude Berdejo's claims for lost earnings as a matter of law." at *7.

Similarly, in *Kalyta v. Versa Products, Inc.,* Civ. A. No. 07-1333, 2011 WL 996168 (D.N.J. Mar. 17, 2011), an undocumented plaintiff brought a products liability and negligence suit for injuries he suffered when using a ladder that collapsed. On a motion for summary judgment, the defendants argued that IRCA precluded the plaintiff from recovering future lost wages. The federal district court in New Jersey denied the defendants' motion. It cited a pre-*Hoffman* but post IRCA case, *Mendoza v. Monmouth Recycling Corp.*, 228 N.J. Super 240, 248, 672 A.2d 221 (N.J. App. Div. 1996), which held that undocumented workers were entitled to workers' compensation benefits, and which recognized a pre-IRCA case noting that "a well-established body of law holds that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries." *Mendoza* at 248, *citing Montoya v. Gateway Ins. Co.*, 168 N.J. Super. 100, 104, 401 A.2d 1002 (N.J. App. Div. 1979). The district court stated that the *Mendoza* court, in "determining that workers' compensation is a personal injury remedy," 2011 WL 996168, at *6, had implied that personal injury remedies were also available to undocumented workers, and cited the *Mendoza* court's observation that "[s]urely, the effect on the worker of his injury has nothing to do with his citizenship or immigrations status." *Mendoza* at 247, 672 A.2d 221. The court acknowledged the post-*Hoffman* New Jersey appellate decision *Crespo v. Evergo Corp.*, 366 N.J. Super 391, 399 (N.J. App. Div. 2004), which held that an undocumented worker was precluded from damages as a result of her allegedly unlawful termination due to pregnancy discrimination. However, the court found that the *Crespo* court only held that IRCA barred economic damages "[i]n the context of plaintiff's claims" and that in *Crespo*, (1) the plaintiff had presented false employment authorization documents (2) plaintiff's claims arose solely from her termination, not from any injury, and (3) defendants had not identified any New Jersey authority stating that legal employment is a prerequisite to recovering lost wages in a personal injury action 2011 WL 996168, at *6. The court also declined to rule on the admissibility of the plaintiff's economic loss expert report at that time, but noted that other district courts had found inadmissible expert reports that calculated lost earnings based on U.S. wages. *Id.*, at *7.

In *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003), where a federal district court in Florida barred the lost U.S. future wages claim of an undocumented worker who used false documents, the court conceded that it was well settled that workers' compensation benefits remained available to undocumented workers, but argued that unlike workers' compensation, lost wages "constitute neither a type of insurance, nor a substitute for the Florida tort system. Nor do they reflect serious policy considerations on the part of the Florida legislature." 313 F. Supp. 2d at 1337.

RIGHT TO WORKERS' COMPENSATION BENEFITS

I. Coverage Under State Workers' Compensation Laws

Despite near-unanimous legal authority that undocumented and migrant workers are entitled to workers' compensation benefits, the *Hoffman* decision caused an onslaught of litigation in which employers and insurance companies argued that these workers were either not covered by worker's compensation schemes or not entitled to specific benefits. For the most part, courts rejected these claims**.** Courts in Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania South Carolina, Tennessee, Texas, and Virginia have concluded that undocumented immigrant workers are covered under workers' compensation statutes. *See Abel Verdon Const. v. Rivera,* 348 S.W.3d 749, 755 (Ky. 2011); *Dowling*, 712 A.2d at 407-08; *Gonzalez v. Performance Painting, Inc.,* 258 P.3d 1098, 1105 (N.M. Ct. App. 2011); *Asylum Co. v. District of Columbia Dept. of Employment Services*, 10 A.3d 619, 634 (D.C.2010); *Visoso v. Cargill Meat Solutions*, 778 N.W.2d 504, 511 (Neb. 2009); *Econ. Packing Co. v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 915, 926 (Ill. App. Ct. 2008); *Amoah v. Mallah Mgmt., LLC*, 866 N.Y.S.2d 797, 801 (N.Y. App. Div. 2008); *Roset-Eredia v. F.W. Dellinger, Inc.*, 660 S.E.2d 592, 599 (N.C. Ct. App. 2008); *Curiel v. Envtl. Mgmt. Servs.,* 655 S.E.2d 482, 484 (S.C. 2007); *Gamez v. Indus. Comm'n,* 141 P.3d 794 (Ariz. Ct. App. 2006); *Design Kitchen & Baths v. Lagos,* 882 A.2d 817, 830 (Md. 2005); *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 4th 533 (Cal. Ct. App. 2005); *Earth First Grading v. Gutierrez*, 606 S.E.2d 332 (Ga. Ct. App. 2004); *Doe v. Kansas Dep't of Human Res.*, 90 P.3d 940 (Kan. 2004); *Rajeh v. Steel City Corp.,* 813 N.E.2d 697, 707 (Ohio Ct. App. 2004); *Safeharbor Employer Servs., Inc. v. Velazquez*, 860 So. 2d 984, 986 (Fla. App. Ct. 2003); *Cherokee Indus., Inc., v. Alvarez,* 84 P.3d 798 (Okla. 2003); *Correa v. Waymouth Farms, Inc.,* 664 N.W.2d 324, 329 (Minn. 2003); *Medellin,* No. 033243-00, 2003 WL 23100186 (Mass. Dep't of Indus. Accidents Dec. 23, 2003); *Silva v. Martin Lumber Co.,* No. M2003-00490-WC-R3-CV, 2003 WL 22496233 (Tenn. Workers' Comp. Panel 2003); *Appellant: *** v. Respondent: ****, 2002 WL 31304032 (Tex. Work. Comp. Comm'n 2002)*; Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 177 (Nev. 2001);;*Champion Auto Body v. Gallegos*, 950 P.2d 671, 673 (Colo. Ct. App. 1997); *Mendoza v. Monmouth Recycling Corp*, 672 A.2d 225 (N.J.Super. 1996); *Rodriguez v. Integrity Contracting,* 38 So.3d 511 (La. Ct. App. 2010); *but cf. Sanchez v. Eagle Alloy,* 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) (holding that wage loss compensation could be suspended for an undocumented worker from the date that the employer learned that the worker did not have authorization to be employed, under a specific state law that allows suspension of wage loss benefits if a worker commits a "crime" that prevents him or her from working or obtaining work); *Reinforced Earth Co.,* 810 A.2d at 1040-41 (holding that undocumented immigrants are entitled to medical benefits but that time loss benefits for undocumented workers may be suspended without a showing of job availability by the employer).

Only one state court, the Wyoming Supreme Court, has held that undocumented workers are excluded from workers' compensation by statute, because of that statute's explicit language excluding certain aliens. *Felix v. State ex rel., Wyo. Workers' Safety & Comp. Div.*, 986 P.2d 161, 164 (Wyo. 1999). The Virginia court held in *Granados v. Windson Devel. Corp.*, 509 S.E.2d 290, 293 (Va. 1999) that an undocumented worker was not covered under the general term "employee" in the Virginia Workers' Compensation Act, but that ruling was overruled by statute, Va. Code Ann. § 65.2-101 (as amended Apr. 19, 2000). *Marblex Design International, Inc. v. Striker*, 678 S.E.2d 276, 279 (Va. Ct. App. 2009).

State courts have routinely held that statutes that broadly cover workers or employees provide coverage for undocumented workers.[59] Likewise, where statutes more specifically include "aliens," but do not distinguish between documented and undocumented aliens, courts have found coverage.[60] More specific statutory language including "aliens, whether lawfully or unlawfully employed," have also been held to include undocumented immigrant workers.[61]

II. Employer Defenses

- **Illegality of Contract**

In one of the earliest cases in which a state court thoroughly analyzed an undocumented worker's entitlement to workers' compensation, the Connecticut Supreme Court addressed the issue of "illegality of contract" or a "legal disability" that would interfere with the grant of worker's compensation benefits. In *Dowling v. Slotnik,* 712 A.2d 396 (Conn. 1998), an undocumented worker who was injured while working for her employer as a live-in housekeeper and nanny sought workers' compensation benefits. The *Dowling* court rejected the employer's "disability" argument, stating that "[the IRCA] itself gives no indication that Congress intended the act to preempt state laws whenever state laws operate to benefit undocumented aliens." Indeed, 'it is clear from [the] legislative history [of the IRCA] that Congress anticipated some conflict between the new statute and ... various state ... statutes.... As explained in the House Report: 'It is 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....'" *Dowling*, 712 A.2d at 404 (internal citations omitted).

The court in *Dowling* found employment agreements between such workers and their employers constitute "contracts of service" as is required to establish an employer-employee relationship. "Although we agree with the respondents that 'under the [Workers' Compensation A]ct ... coverage must arise from a contract of employment, either express or implied'. . . we do not agree that an employment agreement between an employer and an illegal alien is so tainted by illegality that, as a matter of law, the agreement cannot constitute a 'contract of service.'" 712 A.2d at 409 (citations omitted).[62]

This reasoning has been applied in case after case involving injured undocumented workers. *See Champion Auto Body v. Gallegos*, 950 P.2d 671, 673 (Colo. Ct. App. 1997))(rejecting argument that the claimant was

[59] See *Design Kitchen,* 882 A.2d at 823-27 (interpreting statute defining "employee" as "an individual . . . while in the service of an employer under an express or implied contract") (collecting cases); *Continental PET Tech., Inc. v. Palacias,* 604 S.E.2d 627, 629 (Ga. Ct. App. 2004) (interpreting statute defining "employee" as "every person in the service of another under any contract of hire or apprenticeship"); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo),* 749 A.2d 1036, 1038 (Pa. Cmwlth. 2000), *aff'd* 810 A.2d 99(2002) (interpreting statute defining "employee" as "any natural person who performs services for another for a valuable consideration"); *Dowling v. Slotnik,* 712 A.2d 396, 407-08 (Conn. 1998) (interpreting statute defining "employee" as "any person who . . . works under any contract of service . . . with an employer"); *Artiga v. M.A. Patout & Son,* 671 So. 2d at 1139 (La. Ct. App. 1996) (interpreting statute defining "employee" as "every person performing services arising out of and incidental to his employment"); *Lang v. Landeros,* 918 P.2d 404, 405 (Okla. Ct. App. 1996) (interpreting statute defining "employee" as "any person engaged in the employment of any person, firm, limited liability company, or corporation covered by the terms of the Workers' Compensation Act").

[60] *See, e.g., Bollinger Shipyards, Inc. v. Director, Office of Worker's Compensation Programs,* 604 F.3d 864, 874 (5th Cir. 2010); *Econ. Packing Co.*, 901 N.E.2d at 920 ("the plain meaning of 'aliens,' therefore, includes not only foreign-born citizens that can legally work in the United States, but also those that cannot"); *Rajeh*, 813 N.E.2d at 701; *Correa,* 664 N.W.2d at 329-30; *Sanchez*, 658 N.W.2d at 515-16; *Gene's Harvesting v. Rodriguez,* 421 So. 2d 701 (Fla. Dist. Ct. App. 1982).

[61] *See, e.g., Silva,* 2003 WL 22496233 at *2; *Del Taco v. Worker's Comp. Appeals Bd.*, 79 Cal. App. 4th 1437, 1439 (Cal. Ct. App. 2000); *Visoso*, 778 N.W.2d at 511.

[62] In fact, were a state to outlaw contracts between employers and undocumented workers, such a provision would likely itself be pre-empted. An Alabama law purporting to do so was recently held preempted and its enforcement enjoined by the Eleventh Circuit Court of Appeals. *U.S. v. Alabama,* 691 F.3d 1269 (11th Cir. 2012).

under a "legal disability" which prevented him from working and which therefore precluded him from proving any wage loss to show entitlement to temporary partial disability benefits); *Sanchez v. Eagle Alloy,* 658 N.W.2d 510, 515-516 (Mich. Ct. App. 2003) ("Defendant argues that because plaintiffs fraudulently misrepresented their employment status when seeking employment from defendant, plaintiffs did not enter into a valid contract of hire with defendant that would permit payment of worker's compensation benefits. We disagree."); *Fernandez-Lopez,* 671 A.2d at 1053 ("Whatever superficial appeal this logic might have, the argument is clearly contrary to the existing authorities."); *Lang v. Landeros*, 918 P.2d 404, 405 (Okla. Ct. App. 1996)(fact that the worker entered the country illegally does not preclude him from entering into an employment relationship).

- **Preemption**

While the U.S. Supreme Court has never had occasion to directly rule on the issue of federal preemption of state workers' compensation laws, traditional preemption analysis, as well as the reasoning of a number of state courts, has firmly established that federal immigration law does not preempt either state workers' compensation coverage or the remedy of healing benefits.

Nothing in the IRCA itself expressly or impliedly prohibits states from providing workers' compensation benefits to undocumented workers. As noted in *Dowling* and many other decisions, IRCA imposes penalties on employers who knowingly hire undocumented workers; it does not address those workers entitlement to compensation for work performed or for work hours lost due to injury, and legislative history indicates it was not intended to do so. *See*, *e.g. Correa*, 664 N.W.2d at 329 ("As written, the IRCA does not prohibit unauthorized aliens from receiving state workers' compensation benefits.... Thus, we conclude that the IRCA was not intended to preclude the authority of states to award workers' compensation benefits to unauthorized aliens."); *Reinforced Earth*, 749 A.2d at 1038 ("the IRCA does not, in and of itself, preclude an illegal alien from being considered an 'employee' for purposes of the Act.")

Under longstanding preemption principles, if state legislation is a valid exercise of state police powers, there is a presumption of non-preemption. *Rice v. Santa Fe Elevator Corp*., 331 U.S. at 230. Workers' compensation is just such a matter. "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).

Nor does immigration law so thoroughly occupy the field of labor law or create any conflict with provision of workers' compensation benefits to undocumented workers injured at work. As noted in *Safeharbor*, 860 So. 2d at 986, ("IRCA does not contain express preemption language nor does it so thoroughly occupy the field as to require a reasonable inference that Congress left no room for states to act. Further, since *Hoffman* found benefits other than backpay to be applicable to illegal aliens, there is no conflict between state and federal law in this case.") *Dowling*, 712 A.2d at 404 ("There is no merit to the respondents' argument that providing workers' compensation benefits to undocumented aliens would stand as an obstacle to "removing the employment 'magnet' that draws undocumented aliens into the country. Potential eligibility for workers' compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for undocumented aliens to enter this country illegally"); *Amoah*, at 32 (we find that "limiting a [reduced earnings] claim by an injured undocumented alien would lessen an employer's incentive to ... supply all of its workers the safe workplace that the Legislature demands"); *Ruiz v. Belk Masonry Co., Inc.* 559 S.E.3d 249, 252 (2002) ("we hold that federal law prohibiting the hiring of illegal aliens does not prevent illegal aliens from being included in the North Carolina Workers' Compensation definition of 'employee,' nor does federal law prevent illegal aliens, based solely on immigration status, from receiving workers' compensation benefits."); *Abel*

Verdon, 348 S.W. 3d at 754 (Kentucky law "does not conflict with the objectives of the IRCA, which are to deter employers from hiring unauthorized aliens and to deter aliens from entering the United States illegally in order to obtain employment."); *Continental PET Technologies*, 269 Ga. App. at 563-564 ("Inasmuch as the goal of the IRCA is to reduce the incentives for employers to hire illegal aliens, that goal 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.").

Neither does the Supreme Court's *Hoffman* decision suggest any inconsistency between immigration law and the routine provision of lost wages to injured undocumented workers under state worker's compensation laws. At issue in *Hoffman* was a worker's entitlement to backpay – wages he would have earned had he not been fired in violation of the National Labor Relations Act. The court found that since the worker could not lawfully have earned the wages in the first place, and could not lawfully mitigate damages, he was not entitled to backpay.

In contrast, workers' compensation benefits are meant to compensate a worker for inability to earn a living because of a work-related injury or illness. They are designed to provide a means of support for workers who cannot work because of injury, and have no relationship to inability to work because of immigration status. *See, Asylum Co.*,10 A.3d at 632. *Econ. Packing* 901 N.E.2d at 922 ("Unlike the undocumented alien in *Hoffman* the claimant in this case has suffered a loss of earning unrelated to her violation of the IRCA.") *Accord, Farmer Bros. Coffee*, 133 Cal. App. 4th at 542; *Design Kitchen & Baths*, 882 A.2d at 822.

Further, as courts and commentators have noted, backpay at issue in *Hoffman* was a discretionary remedy, unlike workers' compensation benefits, which are a non-discretionary trade-off of a worker's right to sue her employer in tort. *See Bollinger*, 604 F. 3d at 877.

- **Use of False Work Authorization Documents.**

In some instances, employers have argued that if a worker provided an invalid Social Security number to the agency, she has committed "fraud" and is ineligible for benefits. The Kansas Supreme Court held that a worker who submitted a false name and Social Security number on her application for workers' compensation had committed a "fraudulent or abusive act" within the meaning of the Kansas worker's compensation law. *Doe v. Kansas Dept. of Human Resource*, 90 P.3d 940 (Kan. 2004). In that case, the court held that the worker could be fined for committing a "fraudulent act," but that she was still entitled to benefits, since undocumented workers are entitled to benefits under Kansas law. Courts in California, Tennessee, New York, and Florida have found that use of a false Social Security number does not constitute fraud. *Farmers Bros. Coffee*, 133 Cal.App.4th 533; *Matrix Employee Leasing v. Leopoldo Hernandez*, 2008 WL 623340 (Fla. Dist. Ct. App,2008); XYZ Cleaning Contractors, 2006 WL 1221568 (N.Y. Work. Comp.Bd. 2006); *Silva v. Martin Lumber Company,* 2003 WL 22496233 Tenn. Workers' Comp. Panel, 2003). The California court refused to call the use of a false Social Security number fraud, since the use of the false number had no direct connection to the injury, reasoning that "[i]t was employment, not the compensable injury, that Ruiz obtained as a direct result of the use of fraudulent documents."

III. Benefits for Undocumented Workers Under State Workers' Compensation Laws

- **Time Loss Benefits**

While it is clear that undocumented workers are entitled to basic coverage under workers' compensation laws, it is less clear that the undocumented are entitled to the same remedies as other workers in every state. Employers frequently argue that *Hoffman*'s emphasis on the undocumented worker's inability to mitigate damages without violating federal law means that undocumented workers are not entitled to time loss compensation. Since *Hoffman*, only two state courts, in Michigan and Pennsylvania, have placed limitations on the availability of time loss recovery for injured workers based on immigration status. *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Ct. Apps. Mich. 2003); *The Reinforced Earth Company v. Worker's Compensation Appeal Board* (Astudillo) 810 A.2d 99 (Pa. 2002). All others, including Georgia and Oklahoma, have held that basic entitlement to workers' compensation and basic elements of workers' compensation such as time loss benefits and medical benefits, remain available to unauthorized workers after *Hoffman*. *See*, *e.g., Continental PET Technologies, Inc. v. Palacias*, 269 Ga.App. 561, 604 S.E.2d 627 (2004); *Cherokee Industries*, 84 P.3d at 801; *Lang,* 918 P.2d 404; *Econ. Packing Co.,* 901 N.E.2d at 921; *Visoso*, 778 N.W.2d at 512; *Correa,* 664 N.W.2d at 328; *Del Taco,* 79 Cal. App. at 1441; *Curiel,* 655 S.E.2d at 485; *Earth First Grading*, 606 S.E.2d at 335; *Champion Auto Body,* 950 P.2d at 673.

- **Vocational Rehabilitation Benefits**

Courts are more divided on the availability of vocational rehabilitation benefits to workers whose immigration status has been disclosed to the employer. In a North Carolina case an employer argued that it could not perform required vocational rehabilitation for an undocumented worker without violating the employer sanctions provisions of the IRCA. *Gayton v. Gage Carolina Metals, Inc.,* 560 S.E.2d 870 (2002). The court held, however, that there were a number of vocational rehabilitation functions that could be performed without violating federal law, including performing labor market surveys to find suitable jobs in the area, counseling, job analysis, analysis of transferable skills, job seeking skills training, or vocational exploration, and ordered that these be provided as necessary.

Unfortunately, courts in Nevada, Nebraska, and California have held that undocumented immigrants are not entitled to vocational rehabilitation benefits. *Tarango v. State Indus. Ins. System,* 25 P.3d 175 (Nev. 2001); *Ortiz v. Cement Products, Inc*., 708 N.W.2d 610 (Neb. 2005); *Farmers Bros. Coffee v. Worker's Comp. Appeals Bd.,* 133 Cal. App. 4th 533 (Cal.App. 2 Dist. 2005).

- **Death Benefits**

State workers' compensation systems include provisions for death benefits to be paid to the dependents of a deceased worker. The question of whether "dependents" can include those that reside in another country has not been problematic for courts. Even in a case of a male immigrant who left his wife behind for thirty-seven years, a Minnesota court was able to find that the widow was not voluntarily living apart from her husband, and that the presumption of dependency applied. *Baburic v. Butler Bros.*, 46 N.W.2d 661 (Minn. 1951), cited in Larson's workmen's compensation, 96.06[2]. The concept of constructively ''living with'' the deceased employee is also applied to children. In a Wisconsin case, even when a child lived in a foreign country but received support from the father, he was considered to be "living with" the father for purposes of entitlement to death benefits. *Milwaukee W. Fuel Co. v. Indus. Comm'n*, 190 N.W. 439 (Wis. 1922), Larson, 96.06[4]).

Some state laws contain particular restrictive provisions regarding death benefits payable to nonresident dependents. Most of these, including Delaware, Iowa, Kentucky, Oregon, and South Carolina, provide reduced benefits to dependents residing in another country Del. Code Ann. tit.19, § 2333, Iowa Code § 85.31(5); Ky. Rev. Stat. Ann. § 342.130; Or. Rev. Stat. § 656.232; S.C. Code Ann. § 42-9-290. At least one state, Alabama, expressly excludes nonresident aliens from benefits, and a few, like Wisconsin, Arkansas and North Carolina, specify that only certain classes of beneficiaries may receive benefits as nonresident alien dependents Ala. Code § 25-5-82; Wis. Stat. § 102.51(2)(b); Ark. Code Ann. § 11-9-111(a); N.C. Gen. Stat. § 97-38.

- **Social Security Number Requirements as Barrier to Access of Benefits**

Even in states where state law clearly allows immigrants, regardless of immigration status, to receive compensation for job injuries, use (and misuse) of Social Security number requirements can bar access. Florida is one of many states with favorable court rulings that immigrants, no matter what their status, are entitled to workers' compensation. However, in 2004, the state began rejecting workers' compensation applications submitted without a Social Security number, pursuant to a state law. In only a few months, the state had rejected hundreds of applications.[63] In November 2005, the Florida Supreme Court held that this practice was unlawful under the Federal Privacy Act. *Florida Div. Of Workers' Compensation v. Cagnoli,* 914 So.2d 950 (Fla. 2005).

The Social Security number issue has become more complicated by new requirements with respect to Medicare Secondary Payer laws. Providers of workers' compensation have been required as of January 1, 2011 to provide information to the U.S. Department of Health & Human Services ("HHS") about whether workers' compensation applicants are receiving Medicare, in order to determine whether a claim should be paid by Medicare or by the workers' compensation system. After a number of extensions on the effective date of the reporting requirements, Centers for Medicare & Medicaid Services ("CMS"), the federal agency that administers Medicare, issued on April 10, 2010 an alert regarding collecting of health insurance claim numbers and Social Security numbers.[64]

CMS has provided some guidance indicating that reporting entities are not required to ask injured workers for a Social Security number. States may fulfill their obligations simply by mailing a letter to claimants asking whether they are receiving Medicare. Claimants who are not receiving Medicare can simply answer "no" and sign the form. If claimants do not return the letter, states face no penalties, but will be required to send it annually for as long as a claim is open. CMS has a draft form that may be used by states. However, CMS does not require states and insurance companies to take this approach. It is not yet clear how many states are currently using the suggested form instead of requesting a Social Security number.

[63] Chandler, L. 2006. Illegal Immigrants Frequently Denied Compensation. McClatchy Newspapers, http://www.ufcw.org/ufcw_members_only/safety_and_health_facts/undocumented_workers.cfm.

[64] Centers for Medicaid and Medicare Services, Office of Financial Services/Financial Management Group, *Collection of Medicare Health Insurance Claim Numbers (HICNs), Social Security Numbers (SSNs) and Employer Identification Numbers (EINs) (Tax Identification Numbers) – ALERT*, April 6, 2010, at http://www.cms.gov/Medicare/Coordination-of-Benefits/MandatoryInsRep/Downloads/RevisedCollectionSSNEINs.pdf

PROTECTING UNDOCUMENTED WORKERS FROM INTRUSIVE DISCOVERY

I. Summary

Relying on *Hoffman*, employers routinely engage in intrusive discovery to inquire into plaintiffs' immigration status or documents or information that could reveal their immigration status, like income tax returns, Social Security numbers, place of birth, passports, or place of education. While employers generally defend their intrusive discovery by claiming that such information is allegedly relevant to the damages claimed or defenses or to plaintiff's credibility, there is no question that employers invoke *Hoffman* to gain tactical advantages in litigation – to intimidate workers to drop the lawsuit altogether for fear of deportation or potential criminal prosecution. While discovery into plaintiffs' home address or employment history (past and current) may not readily implicate their immigration status, it nonetheless has a similar chilling effect for fear of immigration agents knocking on their doors or showing up at their jobs.

The Ninth Circuit decision in *Rivera v. NIBCO, Inc.,* 364 F.3d 1057 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005), which upheld a protective order post-*Hoffman*, indicates that some courts understand this dynamic. Considering the employers' argument that it "needed" disclosure of plaintiffs' immigration status to present its defense that they were not entitled to backpay under Title VII after *Hoffman*, the Court weighed the plaintiffs' interest in non-disclosure, and stated: "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 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." 364 F.3d at 1065.

Because employers use multiple ways – obvious and less obvious – to probe into a worker's immigration status, it is very important to be vigilant of any gateway questions like "where were you born", for example, that can open the door to more invasive immigration related questions and to move for a protective order to bar any inquiry during discovery. It is also a good practice to resolve any discovery dispute related to the plaintiff's immigration status before the plaintiff's deposition to avoid stopping the deposition in the middle and contacting for the court for a possible ruling.

Because courts have uniformly held that *Hoffman* does not apply to wage and hour claims under federal and state laws, there is overwhelming FLSA case law that grants protective orders barring discovery of plaintiff's immigration status on the grounds that immigration status is not relevant to any claim or defense.[65] In *Flores v. Albertsons Inc.,* No. CV01-00515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002), where defendants claimed that plaintiffs' immigration status was relevant because it may limit their liability for unpaid wages, the court rejected defendants' reliance on *Hoffman* and ruled that immigration status was not relevant to the action. The court further underscored that allowing such discovery would have an *in terrorem* effect, forcing workers "to withdraw from the suit rather than produce such documents and face termination and/or potential deportation." *Id.* at **6.* Similarly, in another FLSA case, a district court noted that immigration status is not relevant, and even if it were, "the risk of injury to the plaintiff if such information were disclosed outweighs the need for its disclosure." *Liu v. Donna Karan International, Inc.,* 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002).

[65] See below for the compilation of cases in FLSA and employment discrimination cases.

For other cases involving FLSA claims,[66] see *Almanza v. Baird Tree Service Co., Inc.*, No. 3:10–CV–311, 2012 WL 4026933 (E.D. Tenn. Sept. 12, 2012) (denying discovery of immigration status because it is irrelevant to unpaid wage and retaliation causes of action under the FLSA); *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 212 (N.D. Ill. 2010) (granting plaintiffs' motion for a protective order and holding that *Hoffman* did not apply to plaintiffs' claims under the FLSA for pay for work already performed); *David v. Signal Int'l, L.L.C*, 257 F.R.D. 114, 122-124 (E.D. La. 2009) (issuing a protective order and holding that plaintiffs' immigration status was irrelevant when plaintiffs sought unpaid wages for work actually performed); *Baca v. Brother's Fried Chicken*, No. 09-3134, 2009 WL 1349783, at *2 (E.D. La. May 13, 2009) (holding immigration status not relevant to protection under the FLSA and issuing a protective order); *Trejos v. Edita's Bar and Restaurant, Inc.*, No. CV–08–1477, 2009 WL 749891, at *1 (E.D.N.Y. Mar. 17, 2009) (holding workers' immigration status not relevant to whether plaintiffs were employees under the FLSA and limiting discovery regarding immigration status); *Hernandez v. City Wide Insulation of Madison, Inc.,* No. 05C0303, 2006 WL 3474182 (E.D. Wis. Nov 30, 2006) (denying defendant's motion for reconsideration because immigration status is irrelevant to FLSA claims); *Galaviz-Zamora v. Brady Farms,* 230 F.R.D. 499 (W.D. Mich. 2005); *Topo v. Dhir,* 210 F.R.D. 76 (S.D.N.Y. 2002); *Flores v. Amigon,* 233 F.Supp.2d 462 (E.D.N.Y. 2002).[67]

Despite the well-settled principle that immigration status is not relevant in FLSA cases, defendants have argued in some cases that immigration status is relevant to a determination of whether workers are independent contractors and thus not covered under the FLSA. *See Montoya v. SCCP Painting Contractors, Inc.,* 589 F. Supp. 2d 569 (D. Md. 2008); *Trejos v. Edita's Bar and Restaurant, Inc.,* No. CV–08–1477, 2009 WL 749891 (E.D.N.Y. Mar. 17, 2009). Defendants in *Montoya* and *Trejos* alleged that workers deliberately "sought" not to be employees to hide their immigration status. In *Montoya,* defendants claimed that, "the plaintiffs individually negotiated to be independent contractors, bargained not be employees of SCCP, and declined to fill out paperwork to become employees." 589 F. Supp.2d at 577. Similarly, defendants in *Trejos* argued that discovery of plaintiffs' immigration status will establish that they "sought to avoid employee status." 2009 WL 749891, at *2. The district courts in both cases correctly rejected the defendants' arguments, because "neither the subjective intent of the worker in forming the employment relationship nor the label affixed by the putative employer controls the question whether a worker is an employee under the FLSA." *Montoya,* 589 F.Supp.2d at 577; *Trejos v. Edita's Bar and Restaurant, Inc.,* 2009 WL 749891, at *2 (E.D.N.Y. 2009) (precluding defendants from inquiring about plaintiffs' immigration status, stating the subjective intent of the parties in forming the employment relationship has little or no significance in determining whether a plaintiff is an independent contractor or employee.)

The vague claim that a plaintiff's "credibility" should permit discovery into a worker's immigration status is common. Defendants often request certain documents, such as tax returns, or seek to question plaintiffs during depositions about whether they falsified their tax returns, used fraudulent Social Security numbers, or misrepresented their immigration status at the time of hire, all to "test" their credibility. While courts in FLSA and Title VII cases recognize that credibility is arguably always an issue, they have generally rejected the employers' attempt to use the workers' immigration status to test or attack their credibility because

[66] For cases decided prior to *Hoffman,* see *In re Reyes,* 814 F.2d 168 (5th Cir. 1987), and *Romero v. Boyd Brothers Transportation Co.,* 1994 LEXIS 8609 (D Ct. Va. 1994).

[67] But see *Romero-Hernandez v. Alexander*, 2009 WL 1809484, *6 (N.D. Miss. June 24, 2009), a case involving backpay for hours not worked under the breach of contract and ¾ guarantee claims under the H-2A program. The court allowed discovery into plaintiffs' immigration status on the grounds that under *Hoffman*, "immigration status may be relevant for their claims for any hours that they may not have actually worked." In *Perez-Farias v. Global Horizons, Inc.,* No. CV-05-3061, 2007 WL 1412796, at *2 (E.D. Wash. May 10, 2007), a class action brought for unpaid wages under the AWPA, among other claims, the court noted that defendants are allowed to use evidence in their possession regarding the immigration status of class members, while barring inquiry into their immigration status during the discovery process.

immigration status is not relevant to underlying claims and have held that such "unlimited inquiry into the subject of immigration status" would impose "an undue burden on private enforcement" of workplace rights.[68] *Avila-Blum v. Casa de Cambio Delgado, Inc.,* 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (denying defendants' request to inquire at a deposition whether plaintiff falsified immigration and employment application documents); *see also David v. Signal International, LLC*, 257 F.R.D. 114, 124 (E.D. La. 2009) (finding that defendants' opportunity to test the plaintiffs' credibility does not outweigh the public interest in allowing workers to enforce their rights); *Widjaja v. Kang Yue USA Corp.,* No. 09 CV 2089, 2010 WL 2132068, at *1 (E.D.N.Y. May 20, 2010) (same).

The majority of courts that have considered the credibility issue have also concluded that "the damage and prejudice which would result to Plaintiffs if discovery into their immigration status is permitted far outweighs whatever minimal legitimate value such material holds for Defendants." *Galaviz-Zamora v. Brady Farms, Inc.,* 230 F.R.D. 499, 502 (W.D. Mich. 2005) (emphasis in original); *Sanchez v. Creekstone Farms Premium Beef, LLC,* No. 11-4037, 2011 WL 5900959, at *3 (D. Kan. Nov. 23, 2011); *Garcia v. Palomino, Inc.,* No. 09-02115, 2010 WL 5149280, at *1 (D. Kan. Dec. 13, 2010); *see also Rengifo v. Erevos Enterprises, Inc.,* No. 06 Civ. 4266, 2007 WL 894376, at *3 (S.D.N.Y. March 20, 2007) (concluding that "the opportunity to test the credibility of a party based on representations made when seeking employment does not outweigh the chilling effect that disclosure of immigration status has on employees seeking to enforce their rights."). In *EEOC v. First Wireless Group, Inc.*, No. 03-CV-4990, 2007 WL 586720, at *2 (E.D.N.Y. Feb. 20, 2007), the court rightly pointed out that the employer's attempt to ask about the worker's use of any false Social Security number is a "back door" attempt to discover the worker's immigration status.

However, some courts in the Title VII context have allowed defendants to attack workers' credibility by permitting defendants to ask deposition questions – though limited – on the workers' use of aliases or false names or filing of tax returns. In *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. 2005), the court allowed defendants to establish the charging workers' "propensity for dishonesty" by asking them whether they used false names or falsified their identities. The court did limit the inquiry by precluding the defendants from asking the circumstances surrounding the alleged use of aliases or falsified identities. *Id.* Similarly, in *Sandoval v. American Building Maintenance Industries, Inc.,* 267 F.R.D. 257, 277 (D. Minn. 2007), a Title VII sexual harassment, discrimination and retaliation case, the court allowed defendants to ask plaintiffs about the use of alias or false names, while limiting the inquiry to the same scope as in *Bice of Chicago*. To establish that the charging workers were "dishonest," the court in *EEOC v. First Wireless Group* permitted the defendant to ask the workers whether they filed any tax returns and whether their tax returns contain any false information. 2007 WL 586720, at *4.

Notably, the courts in these cases have all denied the defendants' request to inquire into the workers' use of different Social Security numbers and other information related to immigration status, recognizing that these inquiries are oppressive and would have a chilling effect on workers' coming forward to assert their claims. *See Bice of Chicago,* 229 F.R.D. at 583; *First Wireless Group*, 2007 WL 586720, at *2; *Sandoval,* 267 F.R.D. at 277. In allowing limited questions concerning the workers' use of alleged false names or falsifying information on tax returns, courts have not readily connected such inquiry with discovery into immigration status. However, workers generally connect the use of aliases and filing (or lack of filing) of tax returns with their immigration status and have fears of criminal prosecution. Therefore, preparing workers on how to respond to this line of inquiry is critical to minimize not only the attack on their credibility but more importantly to protect them from any potential criminal prosecution.

[68] Because the employer is required to keep records of their employees' wages, work hours, and other terms and conditions of employment under the FLSA, it should also be argued that an employee's testimony is rarely needed and thus there are no real credibility questions at issue.

- **Practice Tips:** When a plaintiff has to answer any questions that may reveal their immigration status or expose the plaintiff to potential criminal prosecution (for failure to file income tax returns or used fraudulent documents to get a job, for example) during discovery in response to interrogatories, compelled production of documents or deposition questions, the plaintiff can assert the Fifth Amendment protection against self-incrimination. *See United States v. White,* 322 U.S. 694, 699 (1944); *Garner v. United States,* 424 U.S. 648, 656 (1976). The Fifth Amendment privilege extends not only to answers that would themselves support a criminal prosecution, but also those that might provide "a link in the chain" to possible criminal liability. *Hoffman v. U.S.,* 341 U.S. 479, 486 (1951).

In addition to credibility, defendants sometimes claim that documents or information that could reveal a worker's immigration status (e.g., income tax returns, Social Security numbers, or driver's license) are needed to determine the plaintiffs' complete work history or to determine the identity of the workers' employers (in instances where defendants deny that they ever employed plaintiffs, for example). In cases where a worker's work history may be relevant to the claims or the defenses in the proceeding, some courts have held that an affidavit from the plaintiffs regarding their work history is sufficient. *Cazorla v. Koch Foods of Mississippi, LLC.,* ___ F.Supp.2d ___, 2012 WL 6161959, at *3 (S.D. Miss. Nov. 30, 2012); *EEOC v. Kovacevich "5" Farms,* No. 1:06-cv-0165, 2007 WL 1599772, at *5 (E.D. Cal June 4, 2007); *Galaviz-Zamora,* 230 F.R.D. at 502-03.

In the FLSA context, courts have generally barred the production of income tax returns on the grounds that they are not relevant to unpaid wage claims and that defendants failed to demonstrate a compelling need for them.[69] *See Uto v. Job Site Services Inc.,* 269 F.R.D. 209, 212 (E.D.N.Y. 2010); *Melendez v. Primavera Meats, Inc.*, 270 F.R.D. 143, 144 (E.D.N.Y. 2010) (rejecting argument that tax returns were necessary to determine identify of plaintiff's employers and noting that because defendant failed to establish that the information sought could not be obtained from a less intrusive source, defendants had not met their burden of showing a compelling need). Similarly, in *Cazorla v. Koch Foods of Mississippi, LLC.,* ___ F.Supp.2d ___, 2012 WL 6161959, at *3 (S.D. Miss. Nov. 30, 2012), a Title VII case, the court denied discovery into the plaintiffs' tax documents (income tax returns and W-2 and 1099 forms) concluding that the defendants failed to show a compelling need for them. However, in *EEOC v. First Wireless Group, Inc.,* 225 F.R.D. 404 (E.D.N.Y. 2004), where the defendants sought the income tax returns solely for the purpose of credibility, the court allowed defendants to inquire at a deposition whether the workers filed tax returns, "as an alternative source" of satisfying defendants' inquiry while barring the production of income tax returns themselves. 225 F.R.D. at 406. As stated above, while a court may see that limited questions during a deposition to be appropriately narrowly tailored, this line of inquiry can still be damaging for workers who may fear potential criminal prosecution.

As discussed above, discovery into immigration status in employment discrimination cases has been less conclusive, but plaintiffs should continue to argue that immigration status is irrelevant.

[69] Courts typically bar discovery of income tax returns "because of both 'the private nature of the sensitive information contained therein' and 'the public interest in encouraging the filing by taxpayers of complete and accurate returns.'" *Uto v. Job Site Services Inc.,* 260 F.R.D. 209, 212 (E.D.N.Y. 2010) (quoting *Smith v. Bader,* 83 F.R.D. 437, 438 (S.D.N.Y. 1979)). Courts apply a two-prong test to determine whether to compel discovery of tax returns: "(1) the returns must be relevant to the subject matter of the action and (2) there must be a compelling need for the return because the information is not readily obtainable from a less intrusive source." *Melendez v. Primavera Meats, Inc.,* 270 F.R.D. 143, 144 (E.D.N.Y. 2010) (quoting *Sadofsky v. Fiesta Prods., LLC,* 252 F.R.D. 143, 149 (E.D.N.Y. 1998)).

II. Cases Barring Discovery of Information and Documents Related to Immigration Status

- **<u>Allowing discovery of immigration status information would deter workers from asserting their rights and consequently destroy the cause of action for that class of workers:</u>**
    - *In re Reyes,* 814 F.2d 168, 170 (5th Cir. 1987) (denying discovery of plaintiffs' immigration status in a case brought under the FLSA and AWPA, noting that such discovery could inhibit the pursuit of their legal rights).
    - *Cazorla v. Koch Foods of Mississippi, LLC.,* ___ F.Supp.2d ___, 2012 WL 6161959, at *2 (S.D. Miss. Nov. 30, 2012) (denying discovery into immigration status in a Title VII case because any relevance of immigration status is clearly outweighed by the *in terrorem* effect disclosure of this information would have in discouraging the plaintiffs from asserting their rights in the lawsuit).
    - *Reyes v. Snowcap Creamery, Inc.*, ___F. Supp. 2d ____, 2012 WL 4888476, at *3 (D. Colo. Oct. 15, 2012) (noting that defendant's discovery of immigration status is a calculated attempt to intimidate and harass the plaintiff by the former employer).
    - *Castillo v. Hernandez*, No. EP–10–CV–247, 2011 WL 1528762, at *4 (W.D. Tex. Apr. 20, 2011) (granting a protective order in an FLSA class action to bar inquiry of Social Security numbers from potential class members, stating that "disclosure of immigration information could prevent parties from asserting their rights for fear of suffering immigration-related consequences").
    - *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 213 (N.D.Ill. 2010) (allowing discovery into immigration status in FLSA actions would cause undocumented plaintiffs to withdraw their claims or refrain from bringing an action).
    - *Uto v. Job Site Servs.*, 269 F.R.D. 209, 212 (E.D.N.Y. 2010) (barred discovery of Social Security numbers in an FLSA collective action, noting that permitting inquiry into a party's immigration status, when not relevant, presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights").
    - *Rodriguez v. Niagara*, No. 09–22645–CIV, 2010 WL 2573974 at *3 (S.D. Fla. June 24, 2010) (holding that discovery into immigration status under the FLSA "will serve to dissuade certain Plaintiffs from pursuing this action").
    - *Garcia v. Benjamin Group Enters. Inc.*, 2010 WL 2076093 at *2 (E.D.N.Y. May 21, 2010) (denying a motion to compel the production of passports, visas, green cards, and driver's licenses in an FLSA case, noting that the "request constitutes an irrelevant inquiry into immigration status that might chill the plaintiffs' inclination to pursue their claims").
    - *Widjaja v. Kang Yue USA Corp*., No. 09 CV 2089, 2010 WL 2132068, at *1 (E.D.N.Y. May 20, 2010) (holding that discovery into immigration status would deter plaintiffs from pursuing FLSA claims, and further noting that *Hoffman* does not apply when rewarding backpay for unpaid wages).
    - *David v. Signal International, LLC*, 257 F.R.D. 114, 122, (E.D. La. 2009) (granting a protective order where discovery of immigration status would have chilling effect on Plaintiffs' claims and immigration status was irrelevant to wage claims for work actually performed).
    - *Sandoval v. Rizutti Farms, Ltd.,* No. CV–07–3076, 2009 WL 2058145, at *3 (E.D. Wash. Jul. 15, 2009) (On reconsideration, barred discovery into immigration status in order to prevent chilling of private right of action under Washington law).
    - *Baca v. Brother's Fried Chicken*, No. 09-3134, 2009 WL 1349783, *1 (E.D. La. May 13, 2009) (holding that allowing discovery into immigration status could inhibit plaintiffs from pursuing their rights under the FLSA).
    - *Sandoval v. Rizzuti Farms, Ltd.*, No. CV–07–3076, 2009 WL 959478, at *2 (E.D. Wash. Apr. 7, 2009) (in a case brought under AWPA and state labor law, held that the chilling effect of disclosing plaintiffs' immigration status would prevent workers from exercising their rights).

- *Trejos v. Edita's Bar and Restaurant, Inc.,* No. CV–08–1477, 2009 WL 749891, *2 (E.D.N.Y. Mar. 17, 2009) (immigration status has "little or no significance" to show that workers agreed to be treated as independent contractors in an FLSA case).
- *Rengifo v. Erevos Enterprises, Inc.,* No. 06 Civ. 4266, 2007 WL 894376, *2 (S.D.N.Y. Mar. 20, 2007) (granting a protective order where immigration status only went to collateral issue because of *in terrorem* effect in an FLSA case).
- *E.E.O.C. v. The Restaurant Co.,* 448 F. Supp. 2d 1085, 1086-88 (D. Minn. 2006) (holding immigration status not relevant where no claim was made for either backpay or front pay and not relevant prior to damages phase of proceeding in a Title VII case for sexual harassment and retaliatory discharge).
- *Avila-Blum v. Casa De Cambio Delgado, Inc., et al.,* No. 05 Civ. 6435, 2006 WL 1378470, at *2 (S.D.N.Y. May 16, 2006) (barring evidence of immigration status in the liability phase of a discrimination case because the inquiry would have a chilling effect on the rights of the plaintiff and because its probative value was questionable).
- *E.E.O.C. v. Bice of Chicago,* 229 F.R.D. 581 (N.D. Ill. 2005) (denying discovery of immigration status "because questions about immigration status are oppressive, they constitute a substantial burden on the parties and the public interest and they would have a chilling effect on victims of discrimination from coming forward to assert discrimination claims").
- *Galaviz-Zamora v. Brady Farms, Inc.,* 230 F.R.D. 499, 501 (W.D. Mich. 2005) (in an FLSA case, held that a plaintiff must "articulate specific facts showing clearly defined and serious injury resulting from the discovery sought" in order to obtain a protective order, and finding that possibility of discharge, prosecution, deportation, and withdrawal of claim meets this standard).
- *Cabrera v. Ekema,* 265 Mich. App. 402, 411-412, 695 N.W.2d 78, 83 (2005) (denying discovery of plaintiffs' Social Security numbers and immigration documents in a case under the FLSA and state common law, concluding that the request was made for the improper purpose of intimidating plaintiffs to withdraw their lawsuit and forgo their legal rights to recover unpaid wages).
- *E.E.O.C. v. First Wireless Group, Inc.,* 225 F.R.D. 404, 405 (E.D.N.Y. 2004) (holding that the probative value of the information does not outweigh the severe prejudicial effect such information would have on the abilities of immigrant workers to pursue their claims and thus that it would "constitute an unacceptable burden to the public interest" in a Title VII discrimination case).
- *Flores v. Albertsons, Inc.,* No. CV0100515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (denying defendant's motion to compel production of documents related to the immigration status of the plaintiffs in an FLSA action because of the *in terrorem* effect it would have).
- *Flores v. Amigon,* 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (stating that discovery of immigration status would effectively eliminate the FLSA as a means for protecting undocumented workers from exploitation and retaliation).
- *Liu v. Donna Karan International, Inc.,* 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (denying discovery of immigration status based on risk of intimidation and chilling effect in an FLSA action).
- *Topo v. Dhir,* 210 F.R.D. 76, 79 (S.D.N.Y. 2002) (denying discovery of immigration status in an FLSA case because of its *in terrorem* effect even though status could be "relevant to a collateral matter on cross examination").

- **<u>In balancing concerns of the parties, immigration status is not discoverable because the prejudicial effect on the plaintiff far outweighs the probative value to the defendant:</u>**
  - *Reyes v. Snowcap Creamery, Inc.*, ___F.Supp.2d ____, 2012 WL 4888476, at *3 (D. Colo. Oct. 15, 2012) (denying discovery of plaintiff's previous immigration status in an FLSA case because *in terrorem* effect of producing immigration related documents weighed in favor of granting a protective order).
  - *Sanchez v. Creekstone Farms Premium Beef, LLC.*, No. 11–4037, 2011 WL 5900959, at *3 (D. Kan.

Nov. 23, 2011) (holding in an FLSA case that the damage and prejudice which would result to plaintiffs if discovery into their immigration status was permitted far outweighed whatever minimal legitimate value such material held for defendants).

- *Garcia v. Palomino*, No. 09–02115, 2010 WL 514 9280, at *4 (D. Kan., Dec. 13, 2010) (denied motion to reopen discovery in an FLSA case, holding that any benefits discovery materials would provide in establishing credibility did not outweigh prejudice that would result to plaintiffs were discovery into immigration status permitted.)
- *Rodriguez v. Niagara*, No. 09–22645–CIV, 2010 WL 2573974, at *3 (S.D. Fla. June 24, 2010) (denying defendants' motion to compel in an FLSA case because the likely prejudice of allowing disclosure of the plaintiff's immigration status outweighs the benefits to the defendants, absent some particularized reason for the information).
- *David v. Signal International, LLC*, 257 F.R.D. 114, 122 (E.D. La. 2009) (granting a protective order where discovery of immigration status is irrelevant to wage claims for work actually performed, and discovery of such information would have intimidating effect).
- *Bailon v. Seok AM No. 1 Corp.,* No. C09–05483JRC, 2009 WL 4884340, at *2-3 (W.D. Wash. Dec. 9, 2009) (plaintiffs' immigration status is irrelevant to claims for wages for work performed under the Washington Minimum Wage Act and state policy is to enforce workers' compensation laws regardless of immigration status).
- *Baca v. Brother's Fried Chicken*, No. 09-3134, 2009 WL 1349783, at *2 (E.D. La. May 13, 2009) (granting a protective order where immigration status was not relevant to protection under the FLSA).
- *Lozano v. City of Hazleton,* 239 F.R.D. 397 (M.D. Pa. 2006) (determining harm to plaintiffs of disclosure of immigration status outweighs benefit to defendants of that information in a civil rights case).
- *Avila-Blum v. Casa De Cambio Delgado, Inc.*, 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (in a discrimination case, concluding that "[w]hile there can be little doubt about the highly prejudicial effect of such evidence at trial or its substantial social burden in other respects on the individual involved, the relevance and probative value of the discovery in addressing underlying claims that are the subject of this litigation are questionable at best, at least at the liability stage").
- *Garcia-Andrade v. Madra's Cafe Corp.*, No. 04-71024, 2005 WL 2430195 (E.D. Mich. Aug. 3, 2005) (denied discovery of immigration status, driver's license, identification documents, birth certificates, tax filings, passports, Social Security numbers, employment authorization card, and number and date of border crossings in an FLSA case, for the harm to plaintiff outweighs any relevance to the case).
- *Flores v. Amigon,* 233 F.Supp.2d 462, 464-65 (E.D.N.Y. 2002) (granting plaintiff's motion for a protective order because information was not relevant to defendant's defense, and even if it were, the potential for prejudice far outweighed whatever minimal probative value such information would have).

- **Allowing inquiry into plaintiff's immigration status would have the perverse effect of encouraging employers to hire undocumented workers so as to avoid accountability for unlawful workplace practices:**
  - *Patel v. Quality Inn South,* 846 F.2d 700, 704 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (noting that chilling undocumented worker's rights to assert claims under FLSA would be counterproductive to government efforts to discourage employer hiring of these workers).
  - *David v. Signal International, LLC*, 257 F.R.D. 114, 124-125 (E.D. La. 2009) (holding that allowing investigation into the immigration status of a class representative in an FLSA case would undermine the effectiveness of the FLSA and help create an unacceptable economic incentive for employers to hire undocumented workers).

- *E.E.O.C. v. City of Joliet,* 239 F.R.D. 490, 492 (N.D. Ill. 2006) (in a Title VII case, stating that safeguarding the rights of undocumented workers will strengthen immigration laws by eliminating unscrupulous motivations to hire undocumented workers).
- *Singh v. Jutla,* 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002) (stating in an FLSA retaliation case that "every remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers").
- *Design Kitchen & Baths v. Lagos,* 882 A.2d 817, 826 (Md. Ct. App. 2005) (in a workers' compensation case, the court found that if immigration were discoverable, workers would be at the mercy of "unscrupulous employers who could, and perhaps, would, take advantage of this class of persons and engage in unsafe [and exploitative] practices with no fear of retribution, secure in the knowledge that society would have to bear the cost[s of their unlawful conduct]").

- **Immigration status is not relevant to credibility:**
  - *Widjaja v. Kang Yue USA Corp.*, No. 09 CV 2089, 2010 WL 2132068, at *1 (E.D.N.Y. May 20, 2010) (rejecting defendant's argument that immigration status was relevant to credibility in an FLSA case).
  - *Corona v. Adriatic Italian Rest. & Pizzeria*, 2010 WL 675702, at *1 (S.D.N.Y. Feb. 23, 2010) (granting motion *in limine* in an FLSA case to preclude inquiry into immigration status, stating that the impact of cross-examination on immigration status, as it relates to credibility, was speculative).
  - *David v. Signal International, LLC,* 257 F.R.D. 114, 124 (E.D. La 2009) (in a putative class action under the FLSA, forced labor and other statutory claims, the court rejected defendants' argument that immigration status was relevant to test plaintiffs' credibility and thus their adequacy as putative class representatives).
  - *Avila-Blum v. Casa de Cambio Delgado, Inc.*, 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (in an employment discrimination case, the court precluded inquiry into immigration status during deposition, holding that a party's credibility does not by itself warrant unlimited inquiry into the subject of immigration status).
  - *First Am. Bank v. Western DuPage Landscaping, Inc.,* No. 00 C 4026, 2005 WL 991892, at *2-3 (N.D. Ill. Apr. 11, 2005) (in a wrongful death action, the court did not allow impeachment of witnesses on the basis of a witness' undocumented status, stating that "[w]ith regard to the citizenship status of witnesses, GM has not identified any authority under Rule 608(b) standing for the broad proposition that the status of being an illegal alien impugns one's character for truthfulness or untruthfulness").
  - *E.E.O.C. v. Bice of Chicago,* 229 F.R.D. 581 (N.D. Ill. 2005) (granting a protective order in a discrimination case where defendants sought immigration status information for credibility).
  - *Galiviz-Zamora v. Brady Farms, Inc.,* 230 F.R.D. 499 (W.D. Mich. 2005) (denying discovery of immigration status in an FLSA case even though it was arguably relevant to the issue of plaintiffs' credibility because the court concluded that the damage and prejudicial effect was too great).
  - *E.E.O.C. v. First Wireless Group, Inc.,* 225 F.R.D. 404 (E.D.N.Y. 2004) (denying discovery of tax returns and immigration status even though marginally relevant to credibility in a Title VII discrimination case).
  - *Mischalski v. Ford Motor,* 935 F. Supp. 203 (E.D.N.Y. 1996) (holding that status of being undocumented immigrant is not probative of a witness' character for truthfulness under the federal rules in a tort action).

- **Barring discovery into documents related to immigration status:**
  A number of courts have also denied discovery into information and documents that could reveal workers' immigration status, such as tax documents, driver's licenses, and Social Security numbers.
  - *Cazorla v. Koch Foods of Mississippi, LLC.*, ___ F.Supp.2d ___, 2012 WL 6161959, (S.D. Miss. Nov.

30, 2012) (denying discovery into immigration status, Social Security numbers, alias, and tax documents or other information related to income).

- *EEOC v. Fair Oaks Dairy Farms, L.L.C.,* No. 2:11 cv 265, 2012 WL 3138108 (N.D. Ind. Aug. 1, 2012) (denying request for visa, passport, birth certificate, and state and federal tax returns in a Title VII sexual harassment case).
- *Sanchez v. Creekstone Farms Premium Beef, LLC,* No. 11–4037, 2011 WL 5900959 (D. Kan Nov. 23, 2011) (barring discovery into immigration status and income tax returns in an action brought under the FLSA and state statutory and common law on the grounds that any benefit to defendant would be far outweighed by the damage and prejudice which would result to plaintiffs if discovery were permitted).
- *Castillo v. Hernandez,* No. EP–10–CV–247*,* 2011 WL 1528762, at *4 (W.D. Tex. Apr. 20, 2011) (granting a protective order in an FLSA class action to bar inquiry of Social Security numbers from potential class members, stating that "disclosure of immigration information could prevent parties from asserting their rights for fear of suffering immigration-related consequences").
- *Melendez v. Primavera Meats, Inc.*, 270 F.R.D. 143, 145 (E.D.N.Y. 2010) **(**rejecting defendants' argument that plaintiffs' tax returns were necessary to show that plaintiffs were not employed by defendants in an FLSA case, noting that there were less intrusive means for obtaining that information).
- *Uto v. Job Site Servs.,* 269 F.R.D. 209, 212 (E.D.N.Y. 2010) (granting a protective order to bar discovery of Social Security numbers in an FLSA case, noting that permitting inquiry into a party's immigration status, when not relevant, presents a "danger of intimidation [that] would inhibit plaintiffs in pursuing their rights").
- *David v. Signal International LLC*, 735 F.Supp.2d 440 (E.D. La 2010) (denying the defendants' request for plaintiffs' T-and U-visa applications but allowing plaintiffs' sworn statements attached to such applications); *id.*, No. 08-1220, 2010 WL 4667972 (E.D. La. Nov. 5, 2010) (denying defendants' motion for reconsideration and granting plaintiffs request to produce redacted affidavits attached to their T-and U-visa applications).
- *Garcia v. Benjamin Group Enters. Inc.,* No. CV–09–2671, 2010 WL 2076093, at *2 (E.D.N.Y. May 21, 2010) (denying a motion to compel the production of passports, visas, green cards, and driver's licenses in an FLSA case, noting that the "request constitutes an irrelevant inquiry into immigration status that might chill the plaintiffs' inclination to pursue their claims").
- *Bailon v. Seok AM#1 Corp.,* No. C09–05483, 2009 WL 4884340 (W.D. Wash. Dec. 9, 2009) (barring discovery relating to plaintiffs' immigration status, including immigration documents, passports, visas, social security numbers, tax identification numbers, and information about national origin and entry into the U.S. in a case brought under the state minimum wage law).
- *Baca v. Brother's Fried Chicken,* No. 09-3134, 2009 WL 1349783, at *1 (E.D. La. May 13, 2009) (recognizing the in terrorem effect of inquiring into a party's immigration status when irrelevant to any material claim, denied discovery of plaintiff's immigration status, Social Security numbers, and address in an FLSA case).
- *David v. Signal International, LLC*, 257 F.R.D. 114 (E.D. La 2009) (rejected discovery of plaintiffs' current immigration status, current addresses, and employment history post-termination from defendants).
- *EEOC v. Kovacevich "5" Farms*, No. 1:06-cv-0165-OWW, 2007 WL 1599772 (E.D. Cal June 4, 2007) (denied discovery of driver's licenses and social security numbers in an employment discrimination case).
- *Garcia-Andrade v. Madra's Cafe Corp.*, No. 04-71024, 2005 WL 2430195 (E.D. Mich. Aug. 3, 2005) (denied discovery of immigration status, driver's license, identification documents, birth certificates, tax filings, passports, Social Security numbers, employment authorization cards, and number and date of border crossings in an FLSA case, because the harm to plaintiff outweighed

any relevance to the case).

- *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005) (recognizing that documents sought by defendants are designed to uncover plaintiffs' immigration status and not their employment history, as alleged by defendants, denied discovery of plaintiffs' tax returns, driver's licenses, identification cards, passports, social security cards, green cards, work authorization cards, voter's registration card, and birth certificates in an FLSA case. The court allowed affidavits detailing plaintiffs' employment history).
- *E.E.O.C. v. First Wireless Group, Inc.*, 225 F.R.D. 404 (E.D.N.Y. 2004) (denying discovery of tax returns and immigration status in a Title VII discrimination and retaliation case).
- *Flores v. Albertsons, Inc.*, No. CV0100515, 2002 WL 1163623 (C.D. Cal April 9, 2002) (denying discovery of plaintiffs' income tax returns because there was little relevant information in the tax returns, there was an *in terrorem* effect in ordering their production, and there was no compelling need for the returns because the information sought could be obtained from other sources)
- *Sandoval v. American Building Maintenance Industries, Inc.*, No. 06 CV 1772, 2006 WL 6607858 (D. Minn. Sept. 21, 2006) (denied discovery into immigration-related information because it has no bearing on plaintiffs' Title VII and state discrimination claims, except allowed discovery of Social Security numbers for the limited purpose of obtaining plaintiffs' medical records).

PROTECTING UNDOCUMENTED WORKERS AT TRIAL: MOTION *IN LIMINE*

I. Summary

Consistent with the principle that immigration status is not relevant to any claim or defense in unpaid wage claims, courts in FLSA cases have unequivocally barred the introduction or solicitation at trial of any evidence regarding a worker's immigration status, including national origin, employment authorization, and Social Security numbers. *See, e.g., Francois v. Mazer,* No. 09-Civ. 3275, 2012 WL 1506054, at *1 (S.D.N.Y. Apr. 24, 2012) (holding that evidence of immigration status has no bearing on matters of consequences to be determined under the FLSA and is thus an inappropriate topic for trial); *Solis v. Cindy's Total Care, Inc.,* No. 10 Civ. 7242, 2011 WL 5170009, at *1 (S.D.N.Y. Oct. 31, 2011) (an employee's immigration status or national origin is clearly irrelevant to unpaid overtime claim under the FLSA). Courts have also held that even if evidence of immigration status were relevant to some elements of a claim or a defense, or may be relevant to attack a plaintiff's credibility, such evidence would be precluded under FRE 403 because it could unduly prejudice plaintiff's case. *See Francois v. Mazer,* No. 09-Civ. 3275, 2012 WL 1506054, at *1 (S.D.N.Y. Apr. 24, 2012); *see also Ponce v. Tim's Time*, No. 03 C6123, 2006 WL 941963, at *1 (N.D. Ill March 16, 2006) (excluded immigration status evidence, noting that because immigration issue in the employment context has become a "hot button issue of late," the danger of unfair prejudice is high); *Salas v. Hi-Tech Erectors*, 230 P.3d 583, 586 ("issues involving immigration can inspire passionate responses that carry a significant danger to interfering with the fact finder's duty to engage in reasoned deliberation").

However, one district court in the Second Circuit denied a plaintiff's motion *in limine* in an FLSA case, concluding that the plaintiff's immigration status was relevant to the jury's assessment of the credibility of the parties' claims concerning the plaintiff's compensation, the plaintiff's allegation of defendant's willful violation of the FLSA, and the nature of the plaintiff's duties as a live-in domestic worker. *Campos v. LeMay*, No. 05 Civ. 2089, 2007 WL 1344344, at *8 (S.D.N.Y. May 7, 2007). In reaching this conclusion, the court credited the defendant's allegation that the plaintiff's immigration status was the reason for paying her in cash and for her working as a live-in domestic worker. *Id.* at 7.

II. Cases Granting Motions *in Limine* to Exclude Evidence of Plaintiff's Immigration Status

- *Berdejo v. Ideal Systems, Inc.,* No. 3:09-cv-0509, 2012 WL 3260422, at *1 (M.D. Pa. Aug. 8, 2012) (exclude plaintiff's immigration status in a negligence case).
- *Galindo v. Vanity Fair Cleaners*, Nos. 09–Civ–6990, 10–Civ–5109, 2012 WL 2510278, at *3-4 (S.D.N.Y. Jun. 29, 2012) (granting a motion *in limine* to exclude evidence related to plaintiffs' immigration status and payment or non-payment of taxes in an FLSA case).
- *Lucas v. Jerusalem Café, LLC*, No. 4:10–CV–00582, 2012 WL 1758153, at *2-3 (W.D. Mo. May 10, 2012) (denying defendants' request for a new trial in an FLSA case, where defendants argued that the court erred in granting a motion *in limine* that precluded defendants from mentioning plaintiffs' immigration status).
- *Francois v. Mazer,* No. 09 Civ. 3275, 2012 WL 1506054, at *1 (S.D.N.Y. April 24, 2012) (holding that immigration status is irrelevant to FLSA and NY state labor law claims, that evidence related to immigration status could unduly prejudice plaintiff's case, and that the value such evidence may hold for impeachment purposes is outweighed by the chilling and prejudicial effect of disclosure).

- *Garcia v. Bae Cleaners, Inc.*, No. 10 Civ. 7804, 2011 WL 6188736, at *1 (S.D.N.Y. Dec. 12, 2011) (holding that immigration status is irrelevant to FLSA claims and would unduly prejudice plaintiff's case).
- *Solis v. Cindy's Total Care, Inc.*, No. 10 Civ. 7242, 2011 WL 6013844 (S.D.N.Y. Dec. 2, 2011) (supplementing the previous order to amplify the court's reasoning to exclude evidence as to plaintiffs' immigration status in an FLSA case).
- *Solis v. Cindy's Total Care, Inc.,* No. 10 Civ. 7242, 2011 WL 517009 (S.D.N.Y. Oct. 31, 2011) (holding that immigration status is not relevant to FLSA claims and for impeachment purposes).
- *Palma v. Safe Hurricane Shutters, Inc.*, No. 07–22913, 2011 WL 6030073, at *2 (S.D. Fla. Oct. 24, 2011) (prohibited defendants from mentioning or soliciting testimony at trial regarding plaintiffs' immigration status in an FLSA case).
- *Campos v. Zopoundidis,* No. 3:09–cv–1138, 2011 WL 4852491, at *1-2 (D. Conn. Oct. 13, 2011) (rejecting defendants' claim that plaintiffs' immigration status was relevant to defendant's good faith defense in an FLSA case).
- *Corona v. Adriatic Italian Rest. & Pizzeria*, 2010 WL 675702, at *1 (S.D.N.Y. Feb. 23, 2010) (granting motion *in limine* in an FLSA case to preclude inquiry into immigration status, stating that the impact of cross-examination on immigration status, as it relates to credibility, was speculative).
- *Ponce v. Tim's Time, Inc.*, No. 03 C 6123, 2006 WL 941963, at *1 (N.D. Ill March 16, 2006) (barred eliciting evidence or testimony concerning plaintiffs' immigration status, aliases and Social Security numbers in an FLSA case).
- *Rodriquez v. The Texan*, *Inc.,* No. 01 C 1478, 2002 WL 31061237 (N.D. Ill. 2002) (granted a motion *in limine* to exclude a mitigation of damages defense and plaintiffs' immigration status issues where the defendant failed to raise and thus waived the mitigation of damages as an affirmative defense in an FLSA case).

IMMIGRATION REMEDIES AND RELIEF FOR UNDOCUMENTED WORKERS INVOLVED IN WORKPLACE DISPUTES

Undocumented workers may be eligible for protection from removal or for immigration relief as a result of their attempts to exercise their workplace rights, or as a result of mistreatment in the workplace. In situations where an undocumented worker faces detention or deportation, it is always wise to consult with an experienced immigration attorney to determine all available options for immigration relief.

I. Prosecutorial Discretion

Undocumented workers who are involved in an effort to protect their civil and labor rights and liberties may be able to request prosecutorial discretion from ICE in order to avoid removal from the country. ICE may exercise its prosecutorial discretion in a number of ways, including deciding not to issue or to rescind a Notice to Appear (NTA); release an individual from detention; grant deferred action, parole, or stay a final order of removal; close a removal proceeding to prevent deportation; administrative closure (temporary removal of case from immigration court calendar) or grant of immigration relief, including parole.[70]

ICE has identified a number of factors to consider when deciding to grant prosecutorial discretion. Most importantly for undocumented workers, ICE considers as a factor an individual's cooperation with federal, state, or local law enforcement authorities, including investigations by the USDOL or the NLRB.[71] ICE has also stated that it is generally against ICE policy to remove individuals in the midst of a "legitimate effort to protect their civil rights or civil liberties."[72] Specifically, ICE has noted that in prosecutorial discretion requests, "particular attention should be paid to . . . individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor."[73]

Similarly, ICE has specified that it is against department policy to initiate removal proceedings against victims or witnesses to a crime.[74] ICE will consider additional factors, including the individual's length of presence in the United States, pursuit of education in the United States, service in the military, lack of criminal history, immigration history, ties and contribution to the community, and U.S. citizen family members. However, ICE will consider negative factors, including risk to national security, a lengthy criminal record, gang membership, or an egregious record of immigration violations, including illegal re-entry and immigration fraud.[75]

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[70] Memorandum from John Morton, Director, ICE, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," (June 17, 2011) (available at: http://www.ice.gov/doclib/securecommunities/pdf/prosecutorial-discretion-memo.pdf), hereinafter "Exercising Prosecutorial Discretion," at 2-3.

[71] *Id.* at 4.

[72] Memorandum from John Morton, Director, ICE, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," (June 17, 2011) (available at: http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf), hereinafter "Certain Victims, Witnesses, and Plaintiffs," at 4.

[73] *Id.* at 2.

[74] Id. at 4.

[75] Exercising Prosecutorial Discretion, at 4-5.

II. U Visas

A "U visa" is a temporary non-immigrant status available to non-citizen victims of certain "qualifying criminal activities," including crimes committed in the workplace. U visa recipients may receive lawful status for up to four years; can adjust their status to that of lawful permanent resident after three years; and receive work authorization in the United States. In addition, U visa recipients may sponsor qualifying family members to receive derivative visas. 8 U.S.C. § 1184(p). The grant of work authorization with a U visa may also provide eligibility for remedies including reinstatement and backpay otherwise barred to undocumented workers.

In order to qualify for a U visa, an undocumented worker must: 1) have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity; 2) possess information concerning the qualifying criminal activity; 3) have been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity; and 4) show that the criminal activity violated a local, state, or federal law or occurred in the United States. 8 C.F.R. § 214.14(b)(4).[76]

The U visa statute identifies twenty-six qualifying criminal activities that can trigger U visa eligibility. 8 U.S.C. § 1101(a)(15)(U)(iii). Immigrant workers may be victims of several different workplace-related qualifying crimes. Below is a list of potential qualifying criminal activities and fact patterns:

- Abusive sexual contact/rape/sexual assault/sexual exploitation: unwelcome sexual contact, assault, rape, or exploitation by co-workers, employers, or clients.

- Blackmail or extortion: Threats to blacklist workers for organizing; coercion, including threats or actual force or violence, to obtain property, including wages or money, by an employer; threats to fire, report to law enforcement, or immigration authorities in order to obtain money or other items of value.

- Felonious assault: abusive touching, battery, beating, or use of a weapon resulting in substantial mental or physical harm.

- Involuntary servitude/peonage/trafficking: Can include (1) employer's threats of physical, psychological, financial, or reputational harm that compel an individual to continue work; (2) threats to contact local law enforcement or immigration authorities by an employer in order to compel continued work; (3) confiscation or withholding of identity documents, passports, or other travel documents by an employer. Supporting facts could include wage theft; inadequate food, housing, medical care or clothing; lengthy hours; verbal or physical abuse; restricted contact with others; use of locks and fences to restrict workers' mobility (which may also constitute U visa-eligible criminal activities of false imprisonment or unlawful criminal restraint).

- Obstruction of justice/perjury/witness tampering: (1) evidence of visa fraud, false statements in seeking certification for labor, misuse of visas by an employer, fraudulent wage and hour records; (2) employer instructions to lie to law enforcement investigators; (3) intimidation of workers who seek to comply with law enforcement investigations or affirmative complaints against an employer, including threats to contact local law enforcement or immigration authorities. A petitioner must show that he or she has "been directly and proximately harmed by the perpetrator of witness tampering, obstruction

[76] 8 C.F.R. § 214.14(a)(5) defines "investigation or prosecution" of a qualifying crime or criminal activity as referring to "the *detection* or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity." *See also* 8 C.F.R. § 214.14(c)(2)(i).

of justice, or perjury" and that there are reasonable grounds to conclude that the offense was committed to "avoid or frustrate" efforts to bring the perpetrator to justice, or to "further the perpetrator's abuse or exploitation . . . through manipulation of the legal system." Many petitions identifying these crimes have included other qualifying crimes, and advocates should carefully document injury to the worker to demonstrate the required substantial physical or mental harm caused by the qualifying crime.

In order to proceed with a U visa application, the worker must first obtain certification from a law enforcement agency or judge confirming that he or she is a victim of a qualifying criminal activity and has been helpful in detecting, investigating, or prosecuting that crime.

Agencies that investigate labor or civil rights violations, such as the U.S. Department of Labor, EEOC, the National Labor Relations Board, and their state equivalents, are often the first to identify victims of workplace crime and exploitation. The U.S. DOL, EEOC, NLRB, as well as the California Department of Fair Employment and Housing ("CA DFEH") and the New York State Department of Labor ("NYSDOL") have released protocols for certifying U visa petitions. In addition, local, state, and federal law enforcement agencies, prosecutors, and judges have certified U visa petitions for workplace-related crimes. Copies of agency protocols are available at NELP's National Wage and Hour Clearinghouse, www.justpay.org.

- **US DOL:** The US DOL has limited U visa certification authority to the Wage and Hour Division ("WHD"). The WHD will certify U visa petitions in cases that involve any of five qualifying criminal activities: **involuntary servitude, peonage, trafficking, obstruction of justice, and witness tampering**. The qualifying criminal activity must arise "in the context of a work environment or an employment relationship," and the petitioner must show a "related, credible allegation of a violation of a law that WHD enforces." The worker must also demonstrate helpfulness or willingness to be helpful to a WHD investigation. Immigrant workers may request U visa certification when filing a complaint of a labor violation over which the WHD has jurisdiction or during or after the WHD completes an investigation. The WHD has designated a coordinator in each of the division's five regional offices to manage requests for U visa certification, coordinate efforts with department investigators and other law enforcement agencies, and work with the department's solicitor's office in reviewing requests. Applicants for certification or their advocates should direct their requests to the relevant regional U visa coordinator, who must ensure that the petitioner is interviewed in person, make a preliminary determination of eligibility for certification, and prepare a narrative statement of the case.[77]

- **EEOC:** In order for the EEOC to certify a U visa petition, the qualifying criminal activity must be related to unlawful employment discrimination alleged in an EEOC complaint or under investigation by the EEOC on some other basis. The protocol does not otherwise restrict the qualifying crimes that the certification may include. The EEOC must interview the U visa applicant in person. The EEOC protocol requires requests for U visa certification to be submitted to an EEOC Regional Attorney, who investigates whether the petitioner is a victim of a qualifying criminal activity and has been helpful to law enforcement. The attorney must determine whether the case meets both factual and legal U visa certification requirements and prepare a narrative of the case for submission to the EEOC Office of General Counsel. The narrative must describe EEOC's involvement, draw a conclusion regarding the petitioner's credibility, document injury and helpfulness, describe the qualifying criminal activity and cite relevant statutes, and include a draft Form I-918. If the General Counsel recommends certification,

[77]Memorandum from Nancy J. Leppink, Acting Administrator, U.S. Department of Labor Wage and Hour Division, to Regional Administrators, Certification of Supplement B Forms of U Nonimmigrant Visa Applications (Apr. 28, 2011), http://1.usa.gov/K9rwVH.

the request is forwarded to the EEOC Office of the Chair for final review.[78]

- **NLRB:** To petition for a U visa advocates should send a request to the National Labor Relations Board Regional Office, Deputy Associate General Counsel's Office in the Division of Operations Management, which must first determine whether the petitioner is a victim of a qualifying criminal activity related to a meritorious unfair labor practice that the board is investigating. The Regional Office must then submit a written recommendation for U visa certification to the Division of Operations-Management. Advocates have been advised to wait until the Board makes an unfair labor practice determination before requesting certification. The NLRB has outlined potential scenarios for unfair labor practices that may constitute qualifying criminal activity for U visa purposes — for example, an employer's confiscation of an employee's passport or imposition of illegal working conditions could constitute involuntary servitude, while interference with protected activity through illegal threats of retaliation, including threats to call immigration authorities or blacklist employees, could constitute blackmail.[79]

- **CA DFEH:** The California Department of Fair Employment and Housing will certify U visa petitions where it is actively investigating a California Fair Employment and Housing Act or Ralph Act claim of an individual who has requested certification. Cases in private litigation for which the department has issued a right-to-sue letter without an ongoing investigation are currently ineligible for U visa certification. The Department of Fair Employment and Housing will certify U visas for thirteen qualifying crimes: sexual assault, sexual exploitation, abusive sexual contact, rape, trafficking, domestic violence, murder, manslaughter, abduction, extortion, torture, incest, and prostitution. Advocates who request certification should submit to the department's consultant a draft Form I-918B, detailed facts and statutory analysis about the qualifying criminal activity, and an explanation of the relationship between the crime and the discriminatory activity under investigation. Department consultants are authorized to complete and sign Form I-918B, although certification requests must be reviewed by the Chief of Enforcement.[80]

- **NYSDOL:** The New York State Department of Labor has issued a U visa certification memorandum that is considerably broader than that issued by the U.S. Department of Labor.[81] To certify a U visa petition, the state agency must have jurisdiction to investigate the case and the allegations must make the petitioner a victim of one of the twenty-six qualifying criminal activities identified in the federal U visa statute. The request for certification must be submitted during, or within a reasonable time after, the conclusion of the state agency's investigation or detection of the qualifying crime, and the individual must be, have been, or be likely to be helpful in the investigation. When requesting U visa certification from the New York State Department of Labor, advocates should include the claim number and name of any agency staff involved in the claim and submit a completed draft I-918B form. Advocates should include thorough information about the details of the crime, injury to the victim, victim's statement of helpfulness in the investigation, and victim's written authorization for the agency to communicate directly with the advocate. After a certifying official completes Form I-918B, applicants must submit the complete U visa application within six months.

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[78] Memorandum from Naomi C. Earp, Chair, EEOC, to District Directors and Regional Attorneys, EEOC, EEOC Procedures for U Nonimmigrant Classification Certification (Jul. 3, 2008), http://bit.ly/KjyiGx.

[79] Memorandum from Richard A. Siegel, Associate General Counsel, National Labor Relations Board, to All Regional Directors, Updated Procedures in Addressing Immigration Status Issues That Arise During NLRB Proceedings (June 7, 2011), http://bit.ly/J2eZBl.

[80] Memorandum from Phyllis W. Cheng, Director, California Department of Fair Employment and Housing, Employment Division Directive: Obtaining U Visas in Investigated Cases (May 6, 2010), http://bit.ly/IY5NdF.

[81] Memorandum from N.Y. State Department of Labor, Memorandum & Order Regarding Certification of U Visa Petitions (2011).

A law enforcement agency's certification does not guarantee that the U visa will be granted. U.S. Citizenship and Immigration Services has jurisdiction to approve or deny the visa and is responsible for determining whether a victim has suffered "substantial mental or physical abuse" as a result of the qualifying crime, based on a number of enumerated factors. 8 C.F.R. §§ 214.14(c)(1) & (b)(1). The agency may grant up to 10,000 U visas per year, not including qualifying dependents. After the cap is met, the Department of Homeland Security will grant deferred action, a temporary status with employment authorization, to U visa applicants. 8 C.F.R. § 214.14(d)(2). The U.S. DOL and EEOC have certified hundreds of U visa petitions combined in recent years. The 10,000 cap for U visas was reached for the first time in 2010.[82]

III. T Visas

A "T visa" is a temporary non-immigrant status that provides immigration relief to victims of "severe forms of trafficking." A "severe form of trafficking" includes "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purposes of subjection of involuntary servitude, peonage, debt bondage, or slavery." 8 C.F.R. § 214.11(a). It is important to note that not all forms of labor exploitation rise to the level of a "severe form of trafficking," which requires the showing of force, fraud, or coercion that would prevent an individual from leaving the exploitative work situation.

A T visa recipient is granted lawful status for up to three years; can adjust their status to that of a lawful permanent resident as soon as a related criminal case is closed or after three years; eligibility for federal public benefits; and work authorization. 8 C.F.R. § 214.11(l); 22 U.S.C. § 7105(b)(1)(A). In addition, T visa recipients may sponsor qualifying family members to receive derivative visas. 8 C.F.R. § 214.11(o).

In order to qualify for a T visa, an applicant must show that he or she is a (1) victim of a severe form of trafficking in persons; (2) is physically present in the United Sates due to trafficking; (3) has complied with any reasonable request for assistance in the investigation or prosecution for trafficking; (4) would suffer extreme hardship involving unusual and severe harm without the visa if removed from the United States; (5) has not committed a severe form of trafficking; and (6) is not inadmissible to the United States (although waivers are available). 8 C.F.R. § 214.11(b).

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[82] Press Release, U.S. Citizenship and Immigration Services, USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010 (Jul. 15, 2010), http://1.usa.gov/L40Wef.