

## RIGHTS AND REMEDIES FOR UNDOCUMENTED WORKERS IN ORGANIZING

For immigrant workers, unions, and workers centers who are engaged in organizing campaigns, it is especially important to know how to defend labor rights in the face of aggressive employer tactics.

The National Labor Relations Act (NLRA) provides protections for workers who are engaged in organizing a union or who take collective action at work to improve working conditions. Workers who are retaliated against for organizing or taking such actions may file a “charge” with the National Labor Relations Board (NLRB). The NLRB and its Regions adjudicate and enforce the NLRA.

In *Hoffman Plastic Compounds, Inc. v. NLRB (2002)*, the United States Supreme Court said that undocumented workers who are fired for activity protected by the NLRA do not have the right to receive “backpay” (their wages they would have continued to earn had they not been unlawfully fired), or the right to be reinstated to their job they were illegally fired from. These are common remedies awarded to workers whose employers violate the NLRA.

Although the decision places some limits on the possible remedies available to undocumented immigrants under the NLRA, it is important to know that:

- ✓ Undocumented workers are covered and protected by the NLRA and nearly every other state and federal labor law.
- ✓ An employer who fires an employee in violation of the NLRA has violated the law regardless of the employee’s immigration status.
- ✓ Immigration status is never relevant during the filing or merits stages of a labor board charge. It is only during the compliance (remedy) stage that a worker’s immigration status *may* become relevant, and only if reinstatement and backpay are at issue.
- ✓ Although the remedies for violating the NLRA may be limited for undocumented workers (regarding backpay and reinstatement) the Board has said that the *Hoffman* ruling has no effect on other “significant sanctions.”<sup>1</sup>
- ✓ The NLRB has recently indicated that it will seek deferral of immigration action and/or visa remedies (such as U and T visas) for workers or witnesses in appropriate cases.

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<sup>1</sup> NLRB General Counsel, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens after *Hoffman Plastic Compounds, Inc.* (Jul. 19, 2002), <http://www.lawmemo.com/nlrb/gc02-06.htm>

**The following are some frequently asked questions regarding rights of undocumented workers under the NLRA:**

**Will I have to disclose my immigration status in order to file a NLRB charge?**

A worker who files an NLRB charge will not have to disclose immigration status when filing this charge, or during the merits stage of the proceeding (when the Board is determining whether the employer violated the law). It is only during the compliance (remedy) stage, after the employer has been found to have violated the law and the Board is determining what remedies a worker is entitled to, that immigration status may become relevant, but only if the Board is seeking backpay or reinstatement for an unlawful firing. Undocumented workers are still protected by the NLRA and there are other remedies available (see p. 5), but in practice this means that in many situations undocumented workers are not protected from illegal firings because they are not entitled to reinstatement and monetary remedies.

Following the *Hoffman* decision in 2002, the NLRB's General Counsel issued a memorandum stating that evidence of work authorization or immigration status is "irrelevant to a respondent's liability under the Act and [] questions concerning that status should be left for the compliance stage of the case."<sup>2</sup> The Board's Regions are instructed to presume that employees are lawfully authorized to work. They are to refrain from conducting an immigration investigation and should object to questions concerning the workers' immigration status except if it is relevant during the compliance stage.<sup>3</sup>

**What if my employer threatens to turn me in to immigration authorities for filing a charge?**

Although it is illegal for an employer to retaliate against workers by calling immigration, many employers either attempt or threaten to do this when immigrant workers begin organizing. However, Immigration and Customs Enforcement (ICE) agents are instructed to take extra precautions if they receive a tip about a workplace in which there is reason to suspect a labor dispute is occurring.<sup>4</sup> Recently, ICE issued new guidelines that go even further, instructing its enforcement staff to exercise favorable discretion for workers, 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.<sup>5</sup>

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<sup>2</sup> *Id.* at note 1.

<sup>3</sup> *Id.* See also Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings. Office of the General Counsel, June 7, 2011, <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b>

<sup>4</sup> Formerly INS Operating Instruction. 287.3(a), now designated as Special Agent Field Manual 33.14(h) <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-61072/0-0-0-61097.html>

<sup>5</sup> John Morton Director, U.S. Immigrations and Customs Enforcement, Memorandum: "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs." Policy Number: 10076.1. June 17, 2011. <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>

Additionally, if an employer illegally retaliates against protected activity with threats to call immigration authorities or threats to “blacklist” employees, immigration remedies such as the U or T visa may be available.<sup>6</sup> U and T visas can provide temporary work authorization, family member visas, and a path to becoming a lawful permanent resident. This will be discussed further below.

The NLRB has also requested that its Regions contact its Division of Operations-Management, the Board’s internal division responsible for immigration remedies, in cases where an employer is taking advantage of immigration status in an attempt to abuse the NLRB process. Ways that an employer may take advantage of immigration status include citing immigration status as a pretext for an unlawful firing.<sup>7</sup>

You should immediately tell your union, workers’ center, or lawyer about any threat relating to immigration authorities.

### **How does my immigration status become relevant during the compliance (remedy) stage of a Board proceeding?**

For remedies that do not include reinstatement after an unlawful firing or backpay for lost wages during that time, immigration status is not relevant. For example, the NLRB’s case handling manual instructs agents to continue to seek compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions (for example, a unilateral change of pay or benefit).<sup>8</sup> Remedies such as notice postings, and cease-and-desist orders likewise will not involve immigration status.

If the Board is seeking reinstatement after an unlawful firing and backpay for lost wages during that time, an employer may be able to raise the issue of immigration status at this stage – the compliance stage – to argue that it cannot re-hire workers who are unauthorized to work in this country, and that it is not liable to pay the workers backpay. However, Regions are instructed to inform the Division of Operations-Management if an employer alludes to immigration status in a menacing or suggestive way during representation or unfair labor practice proceedings.<sup>9</sup>

Additionally, the Board has said that the burden is on the employer when raising immigration status to show that there is a “substantial immigration issue”, and that it has a reasonable basis for believing that the workers are undocumented.<sup>10</sup> What constitutes a substantial immigration issue is still being determined. A 2003 Board case said that the fact that an employer may have received a Social Security “no-match letter” is not sufficient to provide this reasonable basis.<sup>11</sup>

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<sup>6</sup> Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings. Office of the General Counsel, June 7, 2011, <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b>

<sup>7</sup> *Id.*

<sup>8</sup> National Labor Relations Board Case Handling Manual, Part Three, Compliance Proceedings, 2011.10560.7 <http://www.nlr.gov/sites/default/files/documents/44/compliancemanual.pdf>

<sup>9</sup> Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings. Office of the General Counsel, June 7, 2011, <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b>.

<sup>10</sup> *Id.* at note 1.

<sup>11</sup> *Tuv Tamm*, 2003 WL 22295361 (Sep. 30, 2003).

However, a recent 2011 case in the Federal Court of Appeals for the Second Circuit said that immigration-related questioning by an employer is relevant during the compliance stage and cannot be precluded by the Board.<sup>12</sup>

If the employer legitimately raises the issue of immigration status the Board may still order a “conditional” reinstatement, meaning the employer can offer reinstatement on the condition that a worker show work authorization. The Board may also seek deferral of immigration action and/or visa remedies in appropriate cases.

**If the NLRB tells the employer to “reinstate” (rehire) me, can the employer make me show employment authorization?**

If the NLRB tells the employer to offer reinstatement to the workers that the employer unlawfully fired, it may also allow the employer to “condition” this offer upon those workers showing proof of work authorization, but only if those workers never provided the proper documentation when they were initially hired. The employer must give workers a reasonable time to provide the proper documents. If the employer makes a proper conditional offer of reinstatement, and a worker is not able to provide the proper documentation in a reasonable time, then the worker cannot be rehired.

**What if my employer knew all along I was undocumented or never asked for work authorization documents? Can I then be entitled to backpay?**

An August 2011 Board decision states that the *Hoffman* case prevents undocumented workers from receiving backpay even when the employer knew that the worker was undocumented or did not ask for work authorization as it was required to do under immigration law, and even in cases where the worker did not give the employer false documentation in violation of immigration law.<sup>13</sup>

**What remedies are still available to undocumented workers?**

Although reinstatement and backpay may not be available for undocumented workers, both the Supreme Court and the NLRB have said that the *Hoffman* case has no effect on “other significant sanctions” provided by the Board. In its 2002 memorandum, the NLRB’s General Counsel stated that cease-and-desist orders remain viable in situations involving undocumented workers. The memorandum also instructs the Board’s Regions to seek a formal settlement in these kinds of cases so that the Board can then bring contempt proceedings against the employer if it violates the cease-and-desist order. Regions can also seek to compel an employer to continue to assist an undocumented worker in his or her efforts to adjust immigration status where the action taken against the worker was the employer’s withdrawal

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<sup>12</sup> *NLRB v. Domsey Trading Corp.*, 646 F.3d 33 (2d Cir. 2011).

<sup>13</sup> *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. No. 47 (2011). The Board’s decision reversed an earlier judge’s decision, which had said that employers could be required to pay backpay if they knew their workers were undocumented. *Mezonos*, 2006 WL 3196754 (N.L.R.B. Div. of Judges) (Nov. 1, 2006).

of its previous support.<sup>14</sup> Regions can also submit cases to the Advice Division of the NLRB for more extraordinary remedies such as union access to employees or employee rosters.<sup>15</sup>

Additionally, the Board has recently indicated that it is committed to seeking the assistance of immigration agencies to advance enforcement of the NLRA. 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.<sup>16</sup> U and T visas can provide temporary work authorization, family member visas, and a path to becoming a lawful permanent resident.

### **What are examples of situations in which the NLRB may seek to defer immigration action or certify visas for undocumented workers?**

The General Counsel of the NLRB has advised its Regions to discuss certain situations with its Division of Operations-Management, the division that will be 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.<sup>17</sup>

### **What is a U or T visa and in which kind of cases might these visas be available for workers or witnesses involved in NLRB proceedings?**

Both U and T visas can provide temporary work authorization, family member visas, and a path to becoming a lawful permanent resident.

T visas may be available where an applicant is the victim of "severe forms of trafficking of persons," and the victim must be present in the United States because of the trafficking. This visa could be applicable in some cases before the NLRB. For example, where a worker is brought into the country under false pretenses and confined in sweatshop conditions, a T visa may be available.

U visas may be available where an applicant is the victim of a "qualifying crime." Qualifying crimes that may arise in the workplace, which also constitute violations of the Act in some cases, include peonage, involuntary servitude, unlawful criminal restraint, false imprisonment, blackmail, extortion, felonious assault, witness tampering, obstruction of justice, perjury or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

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<sup>14</sup> See e.g. *French American School of the Pacific Northwest*, 2010 WL 5313289 (N.L.R.B. Div. of Judges) (Dec. 27, 2010) ordering employer to resume efforts to obtain a work visa for a worker whose NLRA rights had been violated.

<sup>15</sup> *Id.* at note 1.

<sup>16</sup> *Id.* at note 6.

<sup>17</sup> *Id.*

In cases where a U or T visa may be applicable, the Board has stated that Regions should immediately contact the Division of Operations-Management, and in a recent memorandum, has provided guidance on how Regions should certify such visa petitions.<sup>18</sup> If you believe that you may be eligible for such a visa, you may also contact NELP for assistance.

**Can I be a voting member of the union without showing employment authorization?**

Yes. Immigration status is not relevant in establishing whether a worker can vote in a union election, belong to a union/bargaining unit, or in proceedings challenging the result of an election. (e.g., representation cases).

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<sup>18</sup> Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings. Office of the General Counsel, June 7, 2011, <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b>