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National Employment Law Project

# Immigration Status And Access To Workplace Rights



### About the National Employment Law Project

The National Employment Law Project (NELP) is a national not-for-profit organization that has advocated on behalf of low-wage workers, the poor, the unemployed and other groups that face significant barriers to employment and government systems of support since 1969. To learn more, visit NELP's website at <http://www.nelp.org>.

**Table of Contents:**

Introduction	<b>4</b>
The Right To Organize And Bargain Collectively	<b>5</b>
The Right To Be Paid	<b>6</b>
Workers' Compensation	<b>8</b>
Employment Discrimination	<b>11</b>
Discovery: timing and strategy of protective measures	<b>13</b>
Immigration Status and Class Representation	<b>17</b>
Appendix: Fact Sheet, <i>Recovery of Unpaid Wages for Undocumented Workers: Tax Reporting and Payment Issues</i>	<b>18</b>

### Introduction

For the most part, all workers are covered by the same labor and employment laws, regardless of immigration status. Despite these legal rights, immigrants' lack of access to information about their rights, their lack of access to means of enforcing those rights, their linguistic, cultural, or geographical isolation, and their fear of jeopardizing their immigration status or of being reported to Immigration and Customs Enforcement (ICE) often cause their rights to go unenforced.

In March 2002, the U.S. Supreme Court ruled in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) that an undocumented worker could not recover back pay under the National Labor Relations Act (NLRA). Although workers' rights to protection and to remedies under most other labor and employment law thus far remain unchanged, the decision has caused consternation among immigrant workers and their advocates. Some employers and their lawyers have incorrectly interpreted *Hoffman* as eliminating all labor rights for undocumented workers. This is not true.

In the majority of labor-related lawsuits, the worker's immigration status is irrelevant to the employer's liability as well as to what remedies are available to that worker. However, workers may be concerned about providing information in a labor or employment dispute they believe may lead to their deportation and possible detention in subsequent immigration proceedings. Moreover, all noncitizens --whether they are here lawfully or unlawfully -- can still be subjected to removal or deportation proceedings if they violate certain criminal laws, fail to maintain their immigration status, engage in marriage fraud, or engage in document fraud.

Workers and their attorneys have reason to be concerned that defendants in employment actions will seek discovery of immigration-related information in the context of employment disputes, not for legitimate defense-related reasons, but to intimidate workers who seek to enforce their rights. This concern has gained additional weight following the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*. In the wake of *Hoffman*, a number of employers and their lawyers have invoked that decision, claiming that it means undocumented workers are no longer eligible for some, if not all, remedies under the various labor and employment laws, and arguing that plaintiffs are thus required to provide immigration status-related information. They have also sought discovery of immigration status, social security and tax information on the grounds that it is relevant to a worker's suitability as a class representative, economic damages, credibility or the equitable defense of "unclean hands."

The primary and best source of protection for the worker is the use of protective orders limiting discovery of immigration status and diligent contesting by workers' attorneys of improper and harassing questions relating to immigration status. Attorneys should also seriously consider how best to draft pleadings to ensure that immigration status will not be considered relevant to the action.

## The Right To Organize And Bargain Collectively

*Coverage: workers are covered regardless of immigration status*

It is well-established that undocumented workers are “employees” within the meaning of the NLRA.

- *Sure-Tan v. NLRB*, 467 U.S. 883 (1984);
- *Local 512 ILGWU (Felbro) v. NLRB*, 795 F.2d 705 (9th Cir. 1986);
- *NLRB v. Kolkka*, 170 F.3d 937, 940 (9th Cir. 1999) (clarifying that the adoption of employer sanctions in 1986 did not change the NLRA definition of “employee.”).

Employer use of workers’ immigration status to threaten, intimidate or remove workers in retaliation for the workers’ organizing activities constitutes an unfair labor practice in violation of §8(a)(3) of the NLRA.

- *Sure-Tan*, 467 U.S. 883;
- *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992).

*Remedies: reinstatement and backpay for work not performed due to unlawful termination are not available to undocumented workers.*

NLRB has limited discretion to provide remedies. Rather than righting private wrongs, the NLRB’s authority permits it only to redress violations of the NLRA and maintain the integrity of the law. The NLRB does not have broad authority to provide affirmative relief to redress individuals for the wrong they have experienced.

- *International Union, United Auto., etc. v. Russell*, 356 U.S. 634, 643 (1958) (“Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.”).

The NLRA Remedy of backpay for work not performed due to unlawful termination (“post-termination pay”) is unavailable to undocumented workers.

- *Hoffman Plastic Compounds v NLRB*, 535 US 137 (2002).

In *Hoffman*, the Court considered whether the NLRB had authority under the NLRA to award the relief of backpay to a wrongfully terminated worker, who had presented false documents when hired, but was subsequently discovered to be undocumented. The Supreme Court concluded that the NLRA did not have that authority, holding that the award of backpay, in that case, “is foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).” 535 U.S. at 140.

### The Right To Be Paid

*Coverage: Workers are covered regardless of immigration status.*

Pre-*Hoffman* case is still controlling: *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989).

Post-*Hoffman* decisions:

- *Flores v. Albertsons*, 2002 US Dist LEXIS 6171, at \*18-19 (CD Cal, Apr. 9, 2002);
- *Liu v. Donna Karan International, Inc.*, 2002 WL 1300260 (S.D.N.Y. 2002); *Valadez v. El Aguila Taco Shop*, No. GIC 781170 (San Diego, Cal. Superior Ct. 2002);
- *Singh v. Charanjit Jutla, et al.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002);
- *Cortez v. Medina's Landscaping, et al.*, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D.IL. Sept. 30, 2002).

Post-*Hoffman* Federal Agency Statement:

- US DOL WHD, 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, at <http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>

Post-*Hoffman* State Agency Statement:

- Formal Opinion No. 2003-F3,2003 N.Y. AG LEXIS 20 at \*12: "a backpay award to an undocumented worker for work that was not actually performed is fundamentally different from an award mandating payment of wages for work that the undocumented worker has already performed for the employer."

Post-*Hoffman* State Legislation:

- California state legislature enacted a law clarifying that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state." CAL. GOV'T CODE § 7285.

*Overtime pay is also available regardless of immigration status.*

- *Renteria v. Italia Foods, Inc.*, 2003 WL 21995190 (N.D. Ill. Aug. 2, 2003);
- *Flores v. Amigon d/b/a La Flor Bakery*, 233 F.Supp.2d 462 (E.D.N.Y. 2002).

### Contract Claims

- One state court, sitting in small claims in New York, placed limitations, in a published decision, on workers' ability to recover unpaid wages after Hoffman. In *Ulloa v. Al's All Tree Service, Inc.*, 2003 WL 22762710 (N.Y. Dist. Ct. Sep. 22, 2003), the court limited a landscape worker to recovery of minimum wage only, not the contract wage the worker claimed was promised.
- A similar decision by the same small claims court was overturned by the Appellate Division in

*Garcia v. Pasquareto*, 2004 WL 3587284 (N.Y. Sup. App. Term, Dec 1, 2004). The court held that there was no basis for any limitation on recovery of wages based on a contract claim due to the worker's status.

- The Tennessee Court of Appeals has held, in the context of a claim for breach of contract and intentional misrepresentation, that *Hoffman* could not be read to deny standing in court to an undocumented immigrant. *Chopra v. U.S. Professionals*, No. W2004-01189-COA-R3-CV (TN Ct. of Appeals Feb 2, 2005). In that case, the worker had entered the country on an employer-sponsored H-1B visa and found himself working undocumented due to the actions of his employer.

### *Prevailing Wage*

- The Nevada Supreme Court has held that immigration status does not impact a worker's right to be paid the prevailing wage on a public works contract. *City Plan Development v. Labor Commissioner*, 117 P.3d 182 (Nev. 2005).

### *Retaliation prohibited.*

The FLSA protects workers against retaliation for attempting to enforce his or her rights under that law. 29 USC § 215(a)(3).

Courts have found employers' reporting workers to immigration to be retaliation under FLSA when it is done because the worker tried to enforce his or her rights.

- *Singh v. Charanjit Jutla, et al.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002);
- *Contreras v. Corinthian Vigor*, 103 F.Supp2d 1180 (N.D.Cal. 2000)
- *Centeno-Bernuy v. Perry*, 302 F.Supp.2d 128 (W.D.N.Y. 2003)

Additionally, employers may be engaging in retaliation if they require workers to re-verify their work authorization or take action based on a Social Security no-match letter following a workers' efforts to enforce their rights under the FLSA.

### *Remedies for Retaliation available to undocumented workers:*

Compensatory and punitive damages:

- *Renteria v. Italia Foods*, No. 02 C 495, 2003 U.S. Dist. LEXIS 14698 (N.D. IL Aug. 25, 2003)
- *Singh v. Charanjit Jutla, et al.*, 214 F.Supp.2d 1056 (N.D. Cal. 2002).

Injunctive relief:

- *Centeno-Bernuy v. Perry*, 302 F.Supp.2d 128 (W.D.N.Y. 2003).

### *Remedies less likely to be available to undocumented workers for retaliation:*

Backpay and Frontpay.

- *Renteria v. Italia Foods*, No. 02 C 495, 2003 U.S. Dist. LEXIS 14698 (N.D. IL Aug. 25, 2003)

(holding backpay and frontpay not available).

### *Discovery issues:*

Immigration status is not relevant in a claim for unpaid minimum wages or overtime.

- *Zeng Liu v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002), citing *In Re Reyes*, 814 F. 2d 168 (5th Cir. 1987);
- *Flores v. Albertsons, Inc.* 2002 WI 1163623 (C.D. Cal. April 9, 2002);

Counsel should be very careful about seeking backpay, frontpay or reinstatement as this might result in a determination that immigration status is relevant.

- *See, Renteria v. Italia Foods*, No. 02 C 495, 2003 U.S. Dist. LEXIS 14698 (N.D. IL Aug. 25, 2003)

Even where backpay is sought, there may be limitations on the extent of immigration status inquiries.

- *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002) (defendants Motion to Compel production of documents confirming plaintiff's legal authorization to work during time employed by defendant and production of documents of plaintiff's current work authorization was denied as irrelevant to the question of post-termination backpay which was for a limited period).

Discovery of Social Security Number:

- A Michigan court has held that a worker's Social Security Number is not relevant in a claim for unpaid wages for work already performed. *Cabrera v. Ekema*, No. 03-000063, 2005 WL 562627 (Mich. App. March 10, 2005).

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## Workers' Compensation

### *Coverage:*

Worker's Compensation is a state scheme, and each state has its own law. Most states either explicitly or implicitly include undocumented workers in their statutes. This makes sense, because workers' compensation schemes represent a compromise way of ensuring that workers have access to relief from the costs of industrial accidents, that employers are protected from the costs associated with liability in tort and that states are not left bearing the burden of caring for indigent injured workers. These systems work best if all workers are covered.

### *Exception*

- Wyoming has a partial limitation in its statute relating to coverage of undocumented workers: a worker is covered only if the employer had knowledge of his or her status. Wyo. Stat. § 27-14-102

A number of courts have specifically held that undocumented workers continue to be covered by state



workers' compensation following *Hoffman*. See. *e.g.*,

- *Silva v Martin Lumber Company*, No. M2003-00490-WC-R3-CV, 2003 Tenn. LEXIS 1047( Tenn. Sup. Ct. Nov. 5 2003);
- *Continental Pet Technologies, Inc. v. Palacias*. BL, A04A1491, 2004 Ga. App. LEXIS 1225, at \*9 (Ga Ct. App. Sept. 13, 2004);
- *Cherokee Industries, Inc. v. Alvarez*, 84P.3d 798, 801 (Ok. Ct. App. 2003);
- *Correa v. Weymouth Farms, Inc.*, 664 N.W.2d 324 (2003);
- *Safeharbor Employer Services Inc., v. Velazquez*, 2003 WL 22326966 (Fla. App. 2003);
- *Guzman v. Tyson Foods*, 2003 WL 21773844 (Tex.App.-Tyler, July 31,2003);
- *Wet Walls, Inc., et al. v. Ledezma*, 598 S.E. 2d 60, 63 (Ga. Ct. App., 2004).

*Rationale:*

Following *Hoffman*, courts around the country have underlined the distinction between a worker seeking backpay under the NLRA for time not worked from the situation where a worker is seeking a remedy for an injury incurred during work that was actually performed.

Numerous courts have concluded, post *Hoffman*, that neither IRCA nor the Supreme Court's decision in *Hoffman* pre-empted or foreclosed states' ability to interpret and implement their own laws, and to provide remedies to undocumented workers injured on the job.

*Remedies Available:*

*Wage replacement:* Two state courts have restricted access to wage replacement for undocumented workers under worker's compensation.

- *Sanchez/Vazquez v. Eagle Alloy*, 658 N.W.2d 510 (2003), *leave to appeal denied*, 684 N.W.2d 342 (2004) the Michigan Court of Appeals held that a particular provision of the statute precludes an undocumented worker who provided false documents in order to obtain employment from recovering benefits for lost wages.
- *The Reinforced Earth Company v. Workers' Compensation Appeal Board*, 810 A. 2d 99 (Pa. 2002), the Pennsylvania Supreme Court held that an employer may seek suspension of its requirement to provide wage-loss benefits without showing that available employment exists that the injured worker is capable of performing.

*Vocational Rehabilitation:* Courts in California, Nevada and Nebraska, have found that undocumented workers are not entitled to vocational rehabilitation benefits under certain circumstances:

- *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (Nev. Sup. Ct. 2001)
- *Del Taco v. Workers' Comp. Appeals Bd.*, 79 Cal. App. 4th 1437 (2000); *Foodmaker v. Workers' Compensation Appeals Board*, 78 Cal. Rptr.2d 767 (Cal Ct. Apps, Div 2 1999).
- *Ortiz v. Cement Products*, 270 Neb. 787 (Neb. 2005)

A court in North Carolina dissects what is possible and what is not given IRCA with respect to voc rehab:

- *Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346 (2002)

Maine has a limitation on voc rehab access in its statute. 39-A M.R.S. § 218

*Effect of worker's presentation of false documents:*

A Kansas court has held that this creates a problem with worker's compensation:

- *Doe v. Kansas Dep't of Human Resources*, 90 P.3d 940 (Sup. Ct. Kansas 2004).

Other state courts, including Tennessee's, have held that this does not present a problem for worker's compensation:

- *Silva v. Martin Lumber*, No. M2003-00490-WC-R3-CV, 2003 Tenn. LEXIS 1047 (Nov. 4, 2003) (no causal relationship between the misrepresentation and the injury);
- *Cherokee Industries v. Alvarez*, 84 P.3d 798 (OK Ct App 2003)

*Related Issue: Personal Injury*

Some state courts have concluded that immigration status is not relevant to a claim for lost earnings in tort.

- *Guzman v. Tyson Foods*, 2003 WL 21773844 (Tex.App.-Tyler, July 31, 2003)
- *Pontes v. N. England Power*, No. 03-00160A, 2004 Mass. Super. LEXIS 340

The New York Court of Appeals recently held that undocumented workers are not precluded from recovering lost earnings in tort.

- *Balbuena v IDR Realty LLC*, 2006 N.Y. LEXIS 200; 2006 NY Slip Op 1248 (N.Y. Feb 21, 2006). However, in its discussion, the court suggests that a jury can consider immigration status as a factor in determining damages.
- This ruling has led to the determination that an injured worker's immigration status is relevant and discoverable when the worker makes a claim for future lost earnings. *Barahona v Trustees of Columbia University*, 816 N.Y.S.2d 851 (2006).

New Hampshire's highest court has placed limitations on recovery. The NH Supreme Court took a slightly modified approach, holding that an undocumented worker who can show that his or her employer knew of his or her status and continued to employ him or her can recover lost earnings at U.S. wage rates.

- *Rosa v. Partners in Progress*, No. 2004-232, 2005 N.H. LEXIS 35 (N.H. Mar. 2, 2005)

Federal Courts in Kansas and Florida considering the issue of whether compensation for lost earning capacity should be available to an undocumented immigrant concluded that it should not.

- *Hernandez-Cortez, et al. v. Hernandez*, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780, at \*17 (D.Kan. Nov. 4, 2003)
- *Veliz v. Rental Service Corporation USA*, 313 F.Supp 2d 1317, (M.D. Fl. 2003).

## Employment Discrimination

*Coverage: Right to be free from discrimination not impacted by Hoffman*

Post-*Hoffman* Federal Agency Statement:

- The EEOC stated that "*Hoffman Plastics*...does not affect the government's ability to root out discrimination against undocumented workers" and "...directed its field offices that claims for all forms of relief, other than reinstatement and back pay for periods after discharge or failure to hire, should be processed in accord with existing standards, without regard to an individual's immigration status." EEOC Press Release, "*EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination*". June 28, 2002.

In practice, EEOC has continued to pursue actions against employers who violate the anti-discrimination laws, regardless of the immigration status of the employees who suffer the discrimination. See, "*EEOC and DeCoster Farms Settle Complaint for \$1,525,000*", EEOC Press Release, September 30, 2002.

Pre-*Hoffman*, there was a split among the Circuits on whether undocumented workers were covered by Title VII protections. Courts in the Ninth, Seventh and Second Circuits held that they were.

- *EEOC v. Switching Sys. Div. of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Plaintiff plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally");
- *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585, 593-94 (E.D. Ca. 1991) (explaining that "the protections of Title VII were intended by Congress to run to aliens, whether documented or not").
- *Rios v. Enter. Assoc. Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988)
- *Timm v. Progressive Steel Plating, Inc.*, 137 F.3d 1008, 1009 (7<sup>th</sup> Cir. 1998).

However, the Fourth Circuit held that an undocumented worker was not protected against discrimination in hiring due to his status.

- *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187-88 (4th Cir. 1998) (affirming district court's granting of summary judgment to defendants because plaintiff undocumented alien was not "qualified" for the job by virtue of his illegal status).

*Question of what remedies are available to undocumented workers*

*Injunctive relief to prevent future discrimination.*

*Hoffman* should not affect this remedy.

*Punitive damages:*

Prior to *Hoffman*, the Second and Seventh Circuits had held that punitive damages are recoverable under Title VII even in the absence of any other damage award.

- *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 354 (2d Cir. 2001);
- *Timm v. Progressive Steel Plating, Inc.*, 137 F.3d 1008, 1009 (7<sup>th</sup> Cir. 1998).

### *Backpay:*

No court has specifically ruled post-*Hoffman* that back pay is not available in a Title VII proceeding involving an undocumented worker. Pre-*Hoffman*, the Ninth and Second Circuits held that it was.

- *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (affirming district court's award of backpay to undocumented workers in Title VII action);
- *Rios v. Enter. Assoc. Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (concluding that undocumented workers may receive backpay in Title VII class action).

The Ninth Circuit has questioned whether the Supreme Court's decision limiting back pay under the NLRA extended to Title VII as well.

- *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), "[w]e seriously doubt that Hoffman is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases. The NLRA and Title VII are different statutes in numerous respects. Congress gave them distinct remedial schemes and vested their enforcement agencies with different powers." *Note:* the *Rivera* court did not decide this issue though given that the main issue on appeal was a discovery one.

### Post-*Hoffman* state agency statements:

- California Department of Industrial Relations clarified that it will continue to seek back pay for undocumented workers. That statement was followed by enactment of a state law that reaffirms that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment who are or who have been employed, in this state." It also reaffirms that:

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

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

### Post *Hoffman* State Court Decision:

- A New Jersey court held that a worker claiming discriminatory termination under New Jersey's Law Against Discrimination (LAD) was not entitled to claim economic or non-economic damages because she could not be lawfully employed. In that case, the plaintiff had left work on maternity leave and her employer refused to reinstate her after the leave. In reaching its conclusion, the New Jersey Superior court observed that the plaintiff did not allege any harassment or

discriminatory misconduct other than her termination and recognized that there might be cases where “the need to vindicate the policies of the LAD ... and to compensate an aggrieved party for tangible physical or emotional harm” might lead to concluding that an individual should be able to seek compensation for that harm. *Crespo v. Evergo Corp.*, No. A-3687-02T5, 2004 N.J. Super. LEXIS 61 at \*15 (Feb 9, 2004).

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### Discovery: timing and strategy of protective measures

#### *In general*

Disclosure of workers' status in litigation is almost always unnecessary, could have dire consequences for the worker, and implicates attorneys' duties to fairly represent their clients. However, in many cases workers have needlessly disclosed their immigration status in litigation and exposed themselves to immigration risks. In many of the reported cases discussing immigration status, the workers had admitted their status in the course of litigation.

Because of attempts by unscrupulous employers to avoid liability under the law and get a “free pass” by arguing that immigration status is relevant, it is important in the first instance to resist discovery requests aimed at an injured workers' immigration status, and to resist any argument that immigration status is relevant. This is true even when some of the workers you are representing in an action are documented. Allowing discovery of certain workers' immigration status will make it harder to prevent discovery of the other workers' status.. It is important to have a good understanding of the law governing the relief that is sought and to make efforts to structure pleadings to avoid discovery of immigration status.

It is also useful to explain to opposing counsel that immigration status is irrelevant to the underlying claim and that any threats to turn a worker in to ICE will be considered retaliation under many state and federal laws.

- *Sure-Tan v. NLRB*, 467 U.S. 883 (1984)(NLRA);
- *Contreras v. Corinthian Vigor Ins. Co.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998)(FLSA),
- *Singh v. Jutla*, 214 F.Supp.2d at 1061;
- *Centeno-Bernuy v. Perry*, 302 F.Supp.2d 128 (W.D.N.Y. 2003).

#### *Immigration status is not relevant.*

As discussed above, many courts have ruled that immigration status is not relevant to coverage under state and federal labor and employment laws. Careful pleading for relief can make status irrelevant

If the plaintiff is not seeking post-termination backpay or reinstatement or is simply seeking pay for work already performed, there is a growing body of caselaw stating that immigration status is not relevant.

- *Zeng Liu v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y. 2002), citing *In Re Reyes*, 814 F. 2d 168 (5th Cir. 1987) (granting mandamus overturning district court decision which allowed inquiry into documentation of alien petitioners for purposes of determining coverages under the FLSA;

- *Flores v. Albertsons, Inc.* 2002 WI 1163623 (C.D. Cal. April 9, 2002) (Hoffman does not support discovery of plaintiff's immigration status);
- *Ansoumana v. Gristede's Oper. Corp.* 201 FRD 81 (S.D.N.Y. 2000) (unpub. order; hearing tr.) (Granting plaintiffs' motion disallowing deposition questions as to plaintiff's immigration status).
- *See also, De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002) (defendants Motion to Compel production of documents confirming plaintiff's legal *authorization to work during time employed by defendant and production of documents of plaintiff's current work authorization was denied as irrelevant to the question of post-termination backpay which was for a limited period*); *see backpay remedies discussion above.*

*Discrimination Cases.* Discovery relating to immigration status of plaintiffs is generally prohibited, particularly in early stages of civil rights cases.

- *EEOC v The Restaurant Company, No. 05-1565, 2006 U.S. Dist. LEXIS 58376* (D.Minn. August 18, 2006), at \*4.
- *Rivera v. NIBCO*, 364 F.3d 1057, 1069-70 (9th Cir. 2004)
- *EEOC v. KCD Constr. Inc*, CV No. 05-2122 (D. Minn. Feb 24, 2006)
- *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. 2005)
- *EEOC v. First Wireless Group*, 225 F.R.D. 404 (E.D.N.Y. 2004)

A federal court in Illinois has granted a protective order barring and employer from seeing information regarding current employees' immigration status directly or indirectly (the employer requested that all employees fill out I-9 forms following initiation of Title VII class action) until termination of action or subsequent order. *EEOC v. City of Joliet*, No. 05-C-5568 (N.D. IL, May 5, 2006) (on file with NELP).

Counsel should be very careful about seeking post-termination backpay, frontpay or reinstatement as this might result in a determination that immigration status is relevant.

- *See, Renteria v. Italia Foods*, No. 02 C 495, 2003 U.S. Dist. LEXIS 14698 (N.D. IL Aug. 25, 2003) (holding backpay and frontpay not available).

Even where backpay for time not worked is sought, there may be limitations on the extent of immigration status inquiries.

- *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002)

*Note:* In cases where back pay is minimal and the "make whole" relief would come primarily from compensatory and punitive damages, counsel should consider whether it is worth seeking back pay as part of the remedy. This might simplify the litigation and ensure that immigration status does not become an issue.

*Discovery of immigration status can have an in terrorem effect.*

Courts have denied discovery of immigration status on the grounds that requiring an employee to reveal immigration status (particularly where it is not relevant) will have an *in terrorem* effect.



- *Flores v. Albertsons, Inc.* 2002 WL 1163623 (C.D. Cal. April 9, 2002)(emphasis added).
- *Zeng Liu v. Donna Karan International, Inc.*, supra.

Discovery of immigration status may even be denied due to the chilling effect even where it may be relevant.

- *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002) (granting protective order and refusing defendant's discovery request to inquire immigration status even when immigration status may be relevant because of *in terrorem* effect).

#### *Social Security Number is not relevant*

- A Michigan court has held that a worker's Social Security Number is not relevant in a claim for unpaid wages for work already performed. *Cabrera v. Ekema*, No. 03-000063, 2005 WL 562627 (Mich. App. March 10, 2005).

#### *Discovery on a range of topics is inappropriate if the goal is really to uncover immigration status*

- A Michigan court granted a protective order covering discovery of : 1) Federal, State or Local tax returns under all of the workers' identities; 2) W-2 or 1099 forms under all of their identities; 3) all identification documents and information regarding worker status, alien status, social security cards, visas, national origin, and alien identifications; 4) each date and time that Plaintiffs crossed the U.S./Mexico border, including any visa or passport stamp record showing these borer crossings; and 5) any documents or information likely to lead to the discovery of Plaintiffs' immigration status. In doing so, the court stated that plaintiffs' immigration status was not relevant for the purposes of standing, damages or ability to represent other class members. The court also stated that even if immigration status was relevant to credibility, the damage and prejudice caused by the discovery would outweigh the minimal legitimate value of the discovery. *Galaviz-Zamora v Brady Farms*, No. 1:04-CV-661, 2005 WL 2372326 (W.D. Mich. Sept 23, 2005)

#### *Protective orders*

Many protective orders that have been issued across the country, both before and after Hoffman Plastic, against unnecessary, embarrassing, and irrelevant discovery into workers' immigration status in litigation. See, e.g.,

- *Rivera et al. v. NIBCO*, 204 FRD 647, affirmed 2001 U.S. Dist. Lexis 22261; 2001 WL 1688880 (E.D. Cal. 2002); affirmed 364 F.3d 1057 (9th Cir. 2004) 2004 WL 771283, 93 FEP Cases (BNA) 929 (protective order issued barring inquiry into immigration status during deposition on the ground that, inter alia, the employer has an opportunity at hire to verify immigration status and that the discovery process is not the means to obtain "after acquired" evidence). Any inquiry into plaintiff's immigration status where such status is irrelevant would create "the danger of intimidation, the danger of destroying the cause of action and would inhibit plaintiffs in pursuing their rights."
- *Zeng Liu v. Donna Karan International, Inc.* 207 F. Supp. 2d 191 at 193 (S.D.N.Y. 2002).
- *Ansoumana, et al. v. Gristede's Operating Corp. et al.*, No. 00 CV 0253 (AKH)(S.D.N.Y. Nov. 28, 2001);
- *Flores et al. v. Albertsons, Inc. et al*, 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. Apr. 9, 2002),

- *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);
- *Cortez v. Medina's Landscaping*, 2002 WL 31175471 (N.D. Ill. 2002).
- *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002) supports seeking a protective order in Title VII litigation.
- *EEOC v. First Wireless Group, Inc.* 03-CV-4990 (SDNY Nov. 19, 2004);
- *Galaviz-Zamora v Brady Farms*, No. 1:04-CV-661, 2005 WL 2372326 (W.D. Mich. Sept 23, 2005).
- *EEOC v The Restaurant Company, No. 05-1565, 2006 U.S. Dist. LEXIS 58376* (D.Minn. August 18, 2006), at \*4.

### *Motions in limine*

- *Rodriguez v. The Texan*, 2002 WL 31061237 (N.D.Ill. 2002), *supplemented by* 2002 WL 31103122 (N.D. Ill. Sep. 16, 2002), an employee sued his employer under the Fair Labor Standards Act. Just before trial, the plaintiff asked for a motion *in limine*. The employer, who had never pled any issue regarding failure to mitigate damages was barred from presenting this defense at trial, because it is affirmative defense that must be pled or it is waived.

### *Sealing records*

Consider this as a backup position in negotiation if unable to prevent discovery of immigration status related information.

- See discussion in *Zeng Liu v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002). "Even if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery, as Donna Karan suggests, there would still remain 'the danger of intimidation, the danger of destroying the cause of action' and would inhibit plaintiffs in pursuing their rights."

### *Fifth Amendment Privilege*

If a motion for a protective order is denied or certain immigration status-related information is deemed to be relevant by the court, the continued availability of the Fifth Amendment privilege may provide a worker with additional protection against the consequences of revealing immigration status during employment proceedings.

The Fifth Amendment privilege is available to everyone, regardless of immigration status *Matthews v. Diaz*, 426 U.S. 67, 77 (1976). The privilege protects an individual from being compelled to provide testimony that would incriminate him or her. *Garner v. United States*, 424 U.S. 648,654 (1976).

While deportation proceedings are civil, not criminal actions, individuals may fear criminal punishment as well as deportation for certain actions, such as: use of false or someone else's identification documents, 18 U.S.C. § 1546(b); failure to depart the U.S. within 90 days of an order of deportation, 8 U.S.C. § 1253; unlawful entry or attempted entry into the country, 8 U.S.C. 1325(a); unlawful re-entry after being deported or denied admission, 8 U.S.C. § 1326; false representation of self as a U.S. citizen, 18 U.S.C. § 911, as well as others. This is significant because the Fifth Amendment privilege only protects a person



from being compelled to testify against him or herself with regard to any matter that could result in his or her conviction for a crime.

- A federal court in Michigan granted a protective order to plaintiffs, prohibiting discovery relating to immigration status or employment authorization in an employment dispute based, in part on their assertion of Fifth Amendment privilege. *Andrade, et al. v. Madra's Café Corp., et al.*, No. 04-71024, 2005 U.S. Dist. LEXIS 22122 (E.D. Mich. August 3, 2005).

Attorneys have an obligation to inform their clients of the availability of this privilege and to be aware that the privilege must be asserted in a timely manner or it can be lost. The privilege “can be affirmatively waived, or lost by not asserting it in a timely fashion.” *Maness v. Meyers*, 419 U.S. 449, 466 (1975) (observing that an attorney has a duty to advise her client that it is available).

There are a number of pros and cons associated with invoking the Fifth Amendment. The good thing about the Fifth Amendment is that it can be a way to keep immigration status out of the record. Some bad things include adverse inferences that can be drawn against someone who pleads the Fifth Amendment and the effect pleading the Fifth Amendment may have on the credibility of a witness.

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### Immigration Status and Class Representation

Defendants' attorneys may try to argue that immigration status is relevant to the question of workers' ability to represent a class. For the reasons discussed in previous sections, immigration status, for the most part, does not impact a worker's standing to sue under labor and employment laws. Moreover, discovery of immigration status is discouraged for the purposes of impeaching a worker's credibility.

In the context of a Title VII class action, a federal court in Illinois granted a protective order prohibiting direct or indirect efforts to obtain immigration status of current employees, recognizing the chilling effect that would have on enforcement of civil rights. *EEOC v. City of Joliet*, No. 05-C-5568 (N.D. IL, May 5, 2006) (on file with NELP).

#### *Typicality and Adequacy of Representation*

Following *Hoffman*, some courts have addressed the question of whether immigration status is relevant to a worker's ability to adequately represent a class in an action for violations of wage and hour laws and the Migrant and Seasonal Agricultural Worker Protection Act.

- Immigration status is not relevant to the question of a worker's ability to adequately represent a class in an action for violations of workplace rights. *Galaviz-Zamora, et al. v. Brady Farms*, 230 F.R.D. 499 (W.D. MI 2005)
- Status as an undocumented workers does not mean that an individual cannot adequately represent a class of workers in claims based on violations of wage and hour laws. *Martinez v Mecca Farms*, 213 F.R.D. 601 (S.D. FL 2002)

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### Recovery of Unpaid Wages for Undocumented Workers Tax Reporting and Payment Options

Undocumented workers and their advocates continue to win back-pay awards for unpaid minimum wages and overtime and other monetary remedies from employers. This is because a worker's immigration status and/or lack of a Social Security Number (SSN) do not relieve employers' obligation to pay workers for all work performed.

When workers succeed in reaching a settlement for unpaid wages or get a court or agency order requiring employers to pay them, both employees and employers have tax reporting and payment requirements. Increasingly, employers are attempting to use these tax reporting and payment obligations to delay or in some cases avoid altogether paying monies owed to workers. Ironically, these tactics are often used against undocumented workers even when employers did not withhold or report taxes for the workers when they were employed. Such tactics should not succeed.

#### Employers' Tax Obligations in Settlements

Employers must report to the IRS all payments to employees and former employees, withhold FICA and income taxes and pay the employer portion of FICA and FUTA on all wages paid.<sup>1</sup> In a typical agreement to pay unpaid wages and other damages, monies owed are allocated between wages and non-wage income (including liquidated or punitive or other damages). In simple cases, employers issue a check to the worker, along with two IRS Forms: a 1099 MISC Form with the non-wage income listed and no taxes withheld, and a W-2 Form with the wage income and appropriate amounts withheld.

If the workers to whom money is owed have not provided the employer with a Social Security Number (SSN) or have provided an SSN that the employer believes is false, the employer may try to delay or stop payment of the agreed-upon funds until the workers provide it with appropriate tax reporting numbers.

### **Workers' Tax Reporting Numbers**

If the employer required the employee to fill out an IRS Form I-9 upon hire, the worker should simply tell the employer to use the number provided on the I-9. If the employer refuses, workers can offer to provide the employer with an IRS Form W-9.

Workers should use an IRS Form W-9, at <http://www.irs.gov/pub/irs-pdf/fw9.pdf> to provide the paying employer with the tax reporting number the worker wishes the employer to use when it issues the IRS Forms 1099 MISC and W-2. The W-9, "Request for Taxpayer Identification Number and Certification," permits any person, including "resident aliens" as broadly defined under the tax laws, to provide a taxpayer identification number to an employer required to report payments to the IRS. Workers can put their SSN or their individual taxpayer identification number (ITIN) in the taxpayer identification number box in Part I of the form.

**Practice Tip: If a worker does not have a SSN or an ITIN, he can put "applied for" in the space provided for the taxpayer number.**

The instructions on the Form W-9 clearly state on page three: "If you are asked to complete Form W-9 but do not have a TIN, write "Applied For" in the space for the TIN, sign and date the form, and give it to the requester." The worker then has 60 days to get an ITIN and provide it to the requestor. For more information about ITINs and how to apply for one, see <http://www.nelp.org/document.cfm?documentID=584>

**There is no reason for the employer to delay payment of the settlement amount once it has a completed W-9 Form.**

The last step in filling out the Form W-9 is to certify, under penalty of perjury, that the number provided on the form is correct. But, the W-9 instructions clearly state that workers who are not receiving interest and dividends do not need to sign the form. This means that while they are required to provide a correct TIN (either an SSN or an ITIN, or note that you are applying for an ITIN), workers receiving only unpaid wages and other damages may use the Form W-9 without signing the certification.