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Employment Rights of Undocumented Workers

By Christopher A. Callanan

The availability of work is the engine that drives illegal immigration into the United States. All indications are that the engine will continue to drive illegal, undocumented workers to this country to seek and perform work. As Congress and the Courts struggle to reconcile the individual protections of employment law with the restrictions of immigration law, employers will continue to be challenged by conflicting policies when addressing employment issues and immigration status. When the Supreme Court decided *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) many commentators predicted imminent doom for the rights of undocumented workers. The reality for employers responding to claims made by undocumented workers has been more complex. The following addresses the concerns and issues employers and their lawyers must consider when dealing with potentially undocumented workers.

In 1984, the Supreme Court decided *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1986). There, the Court held that undocumented employees were protected by the National Labor Relations Act (NLRA). It also determined that the employer committed an unfair labor practice by reporting undocumented employees to the Immigration and Naturalization Service in retaliation for engaging in protected union activities, namely participating in a union election. Finally, it approved the Court of Appeals' award of back pay, but conditioned receipt of the back pay award to the individuals' lawful re-entry into the United States. Therefore, although illegal while working in the United States, the employees could recover back pay so long as they properly re-

entered the country.

In 1986, Congress passed The Immigration Reform & Control Act (IRCA). Although rarely enforced against employers, IRCA provisions become relevant when employers deal with claims made by undocumented workers. IRCA obligates employers to implement a document verification procedure whereby each new hire must present documents that “reasonably appear” to be genuine. Employers need not submit such documents to the government, but must maintain them. IRCA makes it a crime for an employer to knowingly hire an employee who is not authorized to work in the United States. It also makes it a crime for an individual to deceive a prospective employer as to immigration status. These IRCA provisions become especially significant when Courts weigh the rights and obligations of employers and undocumented employees in employment disputes.

In 2002, the Supreme Court decided *Hoffman Plastic Compounds v. N.L.R.B.*, 535 U.S. 137 (2002). The *Hoffman* case involved a worker subsequently determined to be illegal. Jose Castro and other employees were terminated after engaging in union organizing activities. The union filed an unfair labor practice charge against Hoffman Plastic with the National Labor Relations Board (“the Board”). An Administrative Law Judge (“ALJ”) found that Hoffman Plastic had committed an unfair labor practice in firing the employees. The Board adopted the ALJ’s findings and ordered Hoffman Plastic to cease and desist from further violations, to post a “notice to employees” regarding the remedial order, and to offer reinstatement with back pay to the aggrieved employees. Because of a dispute over the calculation of back pay, the ALJ held a hearing during which Castro admitted that he had borrowed his friend’s birth certificate to obtain employment with Hoffman Plastic and that he in fact was not legally permitted to work in the United States. The ALJ held that the award of

back pay conflicted with IRCA. The Board reversed and the Appeals Court upheld the Board’s decision.

The Supreme Court held that as an undocumented worker, Castro was not entitled to back pay because such a remedy conflicts with immigration law, particularly IRCA. The Court stated that the Board’s authority to fashion remedies, although broad, is not unlimited, especially when it “trenches” upon policy beyond the bounds of the Board’s competence. In this instance, Federal immigration law, specifically IRCA, makes it impossible for an undocumented worker to obtain employment in the United States without someone breaking the law – either the employer for not verifying documents or the employee for submitting false documents. Therefore, awarding back pay to an undocumented worker violates IRCA because the worker admittedly was not legally permitted to work in the United States for the time period the back pay would cover.

Following *Hoffman*, many commentators feared that the decision would deprive undocumented workers of any significant rights or remedies. In practice, that has not happened. Undocumented workers retain rights under Title VII, the Fair Labor Standards Act (FLSA), The Americans with Disabilities Act, (ADA), The Age Discrimination in Employment Act (ADEA), and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA). Undocumented workers are entitled to minimum wage and overtime protection under the FLSA. This includes FLSA “back pay” – pay for work actually performed. The tangible loss that undocumented workers suffered from the *Hoffman* decision is the inability to seek reinstatement or an award of back pay for work that would have been performed following a wrongful discharge.

The issue most commonly arises when an employer attempts to discover a plaintiff’s immigration status. Employers typically argue

that immigration status is relevant to the plaintiff's standing to sue. Plaintiffs typically argue that immigration status is not relevant to claims other than for back pay or reinstatement. Even if relevant, the chilling effect of such discovery on the right to bring such claims far outweighs any relevance. Most District Courts that have heard the issue find in favor of plaintiffs. Courts generally find that immigration status is not relevant so long as the plaintiff does not seek back pay or reinstatement. In cases brought under the FLSA, courts nearly always enter protective orders because it is clear that undocumented workers are entitled to pay for work performed under the FLSA. Courts also have specifically recognized the chilling effect of permitting discovery on immigration issues to employees who bring such claims. Instructive decisions include: *Flores v. Albertsons Inc.*, 2002 WL 1163623 (C.D. Cal 2002); *Liu v. Donna Karan*, 207 F. Supp. 2d 191 (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); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

Even when an employer innocently becomes aware of an employee's status, Courts will be reluctant to permit the employer to use the discovery process against an employee. A recent sexual harassment case in the Federal District Court in Minnesota illustrates the point. An employee claimed that she had been sexually harassed by a supervisor who increased her workload and cut her hours when she refused his advances. During the employer's investigation, the employee indicated that she had not complained earlier because she feared she would be reported to immigration authorities. The employer then felt compelled to fully investigate given its obligations under IRCA. District Judge John R. Tunheim overturned a Magistrate Judge's Order compelling discovery finding that the employee's immigration status was not relevant to her claims at this stage of the litigation because she was not seeking back pay, front pay or reinstatement. He determined that

her claim for emotional distress damages remained unaffected by her immigration status and should be handled separately. *Perkins v. EEOC*, No. 05-1656 (D. Minn. Aug. 18, 2006).

In addition to discovery prohibitions, employers must be mindful that their own actions in dealing with undocumented workers can lead to retaliation claims. When an employee is first hired, employers must carefully conduct the document verification process so as not to create grounds for a retaliation claim. IRCA specifically prohibits an employer from requiring "more or different" documentation from some workers than others. Employers must also administer document verification procedure so that they do not disparately impact different classes of employees. *Sure-Tan* and similar cases show that reporting employees to immigration authorities (or threatening to) in retaliation for exercising protected rights constitutes actionable retaliation. The various District Court decisions entering protective orders against discovery of immigration status suggest that employers' attempts to use the discovery process to pressure undocumented workers may also constitute actionable retaliation.

Given the continued prevalence of and political debate about illegal immigration, Congress may pass legislation to more clearly define the employment rights of undocumented workers. Until then, employers must proceed with caution. Employers are ill advised to attempt to gain advantage in employment litigation based on an employee's immigration status. Employers are best served by careful compliance with IRCA and by focusing their responses to claims made by undocumented workers on the merits of such claims, rather than on immigration status.