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CHECKLIST FOR ATTORNEYS ADVISING OR REPRESENTING IMMIGRANT WORKERS

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Introduction

In *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the U.S. Supreme Court held that a worker who is undocumented cannot recover the remedy of back pay under the National Labor Relations Act (NLRA). Employers, and the defense attorneys representing them, have tried to extend the *Hoffman* ruling to argue that immigration status is always relevant, as a way to argue that undocumented workers are not entitled to protection or remedies under employment and labor law. As outlined in “*Issue Brief: WORKPLACE RIGHTS FOR UNDOCUMENTED WORKERS*” (SECTION 3), workers regardless of their immigration status continue to be protected under U.S. employment and labor laws.

Now more than ever, attorneys need to properly advise workers of the potential immigration consequences of filing a labor or employment claim. One of the most serious risks is retaliation, i.e. an employer calling immigration authorities on the worker. Another potential risk is the worker admitting during the course of the claim to have worked without proper authorization, or that s/he procured employment by using fake documents.¹ A worker could also admit to unlawfully re-entering the U.S. after having been deported, an act that is both a criminal felony violation and that can have serious immigration consequences for the worker.²

The following is a checklist for attorneys advising or representing an immigrant worker who is considering filing a labor claim. The purpose of the information provided below is to provide guidance on how labor attorneys can help immigrant workers access their labor rights while still protecting themselves from potential retaliation or other immigration-related consequences.

Your initial interviews with the client

- It is critical to know worker’s immigration status, as well as the immigration status of any potential witnesses to determine how to handle discovery, the trial, and damages.

¹ An admission regarding the use of false documents to obtain employment is a violation of 8 U.S.C. § 1324c.

² An admission to unlawful re-entry could expose the worker to a criminal felony violation charge pursuant to 8 U.S.C. §1326. It can also render the worker deportable pursuant to 8 U.S.C. §1227, or inadmissible pursuant to 8 U.S.C. §1182.

- ☑ You should also determine whether the worker has obtained work authorization, and whether it is still valid. Although someone may be "in status," that is eligible for work authorization, that person may not have applied for work authorization.
- ☑ Remember that immigration status is not static; make sure you have current information by checking in with your client periodically, especially if s/he has a pending immigration petition or is in proceedings in immigration court.
- ☑ Know which documents your clients used to obtain work. This includes asking whether the worker filled out I-9 at time of hire, and if so which documents s/he presented to the employer.
- ☑ Know whether the worker has obtained employment using another name(s), and if so, which documents they used in those instances.
- ☑ Find out what the employer knew concerning the worker's immigration status. If the employer "found out" at any point that the worker is undocumented, determine precisely when the employer obtained this knowledge. This information is important, for example, for the defense of after-acquired evidence and for retaliation claims.
- ☑ Find out what the employer currently knows, including whether the employer has the worker's current home address, new work information, or any other current contact information. This information will help you advise the worker about his/her vulnerability of actual retaliation by employer (especially the danger of the employer calling immigration authorities).
- ☑ Advise the worker about immigration consequences. Explain that the risks are more significant if s/he has a final order of deportation, or if s/he has been deported before, and re-entered illegally.³
- ☑ Provide a list of reputable immigration attorneys/legal service agencies that represent immigrants, in the instance where the worker needs or wants more in-depth immigration advice.

Drafting the complaint

- ☑ Do not admit to the immigration status of your client. This includes pleading facts about nationality, where the client was born, etc. In national origin claims, rather than pleading the nationality of the client, you can plead that the client is of a certain "ancestry" (e.g. is Latino(a), instead of from Guatemala).
- ☑ Consider not asking for a back pay remedy or reinstatement if status is an issue and is relevant (e.g. not asking for back pay but instead for compensatory and punitive damages).
- ☑ Submit motions in limine or other pre-trial motions to limit the scope of discovery, trial testimony, etc.

³ *Ibid.*

- ☑ File for protective order against employer to shield your client from retaliation. *Copies of briefings can be obtained by contacting the National Immigration Law Center. Members of the AFL-CIO Lawyer's Coordinating Committee may also obtain copies from the LCC.*

Limiting discovery

- ☑ File for a protective order for both written discovery and depositions to limit the scope of discovery. *Copies of briefings can be obtained by contacting the National Immigration Law Center. Members of the AFL-CIO Lawyer's Coordinating Committee may also obtain copies from the LCC.*
- ☑ Once you learn that the defendant is making immigration status an issue in the case, you should consider contacting the Department of Homeland Security (DHS) to invoke Internal Operating Instruction 287.3a (the "OI"), which is intended to prevent DHS from getting involved in labor disputes. *For assistance in strategizing/use of the OI, you can contact the National Immigration Law Center. LCC members may seek assistance through the LCC.*
- ☑ When status is irrelevant to the claim or remedy, you can often limit discovery.
 - If the worker is not seeking back pay or reinstatement, immigration status is clearly not relevant. *See Table of Authorities, (SECTION 3).*
- ☑ You can potentially also limit discovery of a worker's immigration status by asserting that the information is privileged under the 5th Amendment.
 - Federal Rules of Civil Procedure, Rule 30 permits a party to instruct a deponent not to answer when it is necessary to preserve a privilege.
 - An inquiry as to how the worker entered the U.S. could prompt an answer that compels the worker to admit to an unlawful activity.⁴

When immigration status may be relevant

- ☑ No court or administrative agency has yet ruled that *Hoffman* applies to instances where the employer "knowingly" hired undocumented workers. If faced with a situation where your clients are forced to disclose their status, you should consider conducting broad discovery into the employer's hiring practices, including its I-9 compliance practices in an effort to show a "knowing" violation of IRCA.
- ☑ You should also consider contacting DHS or other appropriate authorities to attempt to obtain immigration relief for your clients.

⁴ For example, the worker may be admitting to illegal entry, a violation of 8 U.S.C. §1325(a), illegal re-entry, a violation of 8 U.S.C. §1326(a), illegal acquisition of immigration status through a sham marriage, a violation of 8 U.S.C. §1325(c), or use of false documents to obtain employment, a violation of 8 U.S.C. §1324c.