Issue Brief:
WORKPLACE RIGHTS OF UNDOCUMENTED WORKERS AFTER THE SUPREME COURT'S *HOFFMAN PLASTIC* RULING

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On March 27, 2002, the Supreme Court ruled in *Hoffman Plastic Compounds, Inc. v. NLRB*, that undocumented workers who are illegally fired for engaging in union organizing activities are not entitled to receive back pay wages, the only monetary remedy available under the National Labor Relations Act (NLRA). The *Hoffman* decision was limited to undocumented workers' right to back pay under the NLRA, but employers have attempted to extend the scope of the decision to threaten workers who complain about discrimination, minimum wage and overtime violations, and health and safety violations. A *Human Rights Watch* report from 2004 stated that, "Employment law in the wake of *Hoffman Plastics* remains in flux, and immigrant workers' rights remain highly at risk."[1]

It is as critical as ever to be educated about the workplace rights of low-wage immigrant workers. Importantly, this involves knowing how to protect workers from employers who try to use the judicial process to inquire into workers' immigration status and who seek to retaliate against them when they complain about workplace violations. What follows is a summary of the current state of the workplace rights of immigrant workers in the post-*Hoffman* era, as well as tips on how to protect and advance the rights of all workers regardless of immigration status.

Right to Unionize and Organize for Better Working Conditions. Even though the *Hoffman* case directly involved the NRLA, the National Labor Relations Board (NLRB) confirmed in a clarifying memo issued after the decision that undocumented workers still are employees under the NLRA, and thus still are protected from unfair labor practices.[2] The *Hoffman* decision does mean, however, that such workers are not entitled to back pay if an employer engages in unfair labor practices, regardless of whether the employer knew the worker was undocumented at the hiring stage. Moreover, the NLRB's memorandum leaves open the question of whether back pay is available to undocumented workers who have been demoted. Nonetheless, all workers regardless of immigration status still have the right to engage in collective bargaining and to unionize for better working conditions. In addition, unions have a duty of fair representation to all workers regardless of immigration status.

Importantly, the NLRB clarified that a worker's immigration status is only relevant <u>after</u> the employer is found liable. This means that questions concerning a worker's immigration status should not be permitted while the NLRB determines whether there was a violation. Moreover, even after an employer is found liable, all employees are presumed authorized to work, and the NLRB regional agents are directed not to inquire into a worker's immigration status on their own. If the employer seeks to raise the issue as a means of limiting back pay, the employer must provide evidence that it now knows or has reason to know the worker is undocumented; only then will the NLRB investigate and give the union and workers an opportunity to respond. As such, although the issue of the worker's immigration status may be brought up during an unfair labor practice complaint, workers and advocates should refuse to offer such information by citing to the NLRB's memorandum clarifying the impact of *Hoffman* on NLRB proceedings.[3]

[1] Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, p. 119 (2004), available at http://www.hrw.org/reports/2005/usa0105/.
[2] See NLRB Memorandum, www.nilc.org/immsemplymnt/emprights/Memo_GC_02-06.pdf.
[3] *Ibid*.

National Immigration Law Center
www.nilc.org

NATIONAL IMMIGRATION LAW CENTER

Los Angeles Headquarters
3435 Wilshire Blvd
Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

Washington, DC
1101 14th Street, NW
Suite 410
Washington, DC 20005
202 216-0261
202 216-0266 fax

Oakland, CA
405 14th Street
Suite 1400
Oakland, CA 94612
510 663-8282
510 663-2028

Right to Minimum Wage and Overtime Pay. Despite the *Hoffman* decision, all employees regardless of immigration status continue to be protected by the Fair Labor Standards Act (FLSA) and state wage and hour laws for "work already performed." Similarly, *Hoffman* does not affect protections provided to migrant and seasonal farm workers under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) concerning pay, working conditions, and work-related conditions. These laws give all workers the right to collect payment of wages they actually earned but were not paid because the employer failed to pay minimum wage or overtime premiums.

In addition to wage and hour rights, undocumented workers are protected by the FLSA's anti-retaliation provision, which provides that employers cannot retaliate against workers who exercise their right to file a suit under the FLSA. This includes employers who contact immigration authorities to retaliate against employees who file complaints. This is the one area in which the *Hoffman* decision has created uncertainty. It is unclear whether courts will find that undocumented workers are entitled to back pay under the FLSA for the time they were unemployed because of their employers' illegal retaliation.

Advocates should be aware that the Department of Labor (DOL) has entered into a Memorandum of Understanding with the INS (Immigration and Naturalization Service, which is now the Department of Homeland Security, or DHS) establishing that the DOL will not report the undocumented status of workers discovered during an investigation triggered by a complaint made by an employer when there is a labor dispute.[4]

An important point about these anti-retaliation protections is that if an employer does report an undocumented worker to the DHS in retaliation for filing a FLSA or any other employment or labor claim, the worker receives no preferential treatment from DHS, meaning the employer's action does not rescind deportation, nor does it bar the DHS from placing the worker in deportation proceedings. However, legal advocates should seek motions to suppress evidence of immigration status in deportation proceedings. In one case, an immigration judge in New York terminated (cancelled) deportation proceedings against two workers on the basis that DHS violated these guidance instructions when apprehending the workers.[5] One important tactic to prevent the disclosure of immigration status to DHS in the first place is to seek protective orders barring the employer to engage in such activity.[6]

It is important to note that DHS has issued field guidance stating that whenever it receives information creating a suspicion that immigration enforcement will interfere with a labor dispute, immigration enforcement agents must try to determine whether a labor dispute is in progress.[7] While the guidance does not prohibit DHS from conducting a worksite enforcement operation, advocates have successfully invoked this guidance to persuade the agency to hold off from engaging in any enforcement activity against the workers in the midst of a labor dispute.

Right to Be Free from Workplace Discrimination. After *Hoffman*, the Equal Employment Opportunity Commission (EEOC), which enforces the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Equal Pay Act, and Title VII of the Civil Rights Act (which prohibits employment

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[4] See DOL Memorandum of Understanding**,** www.nilc.org/immsemplymnt/emprights/MOU.pdf. The DOL may, however, report the undocumented status of workers in an investigation not prompted by a specific complaint, i.e. a random investigation into an industry (such as poultry factories) suspected of wage and hour violations.

[5] *In the Matter of Herrera-Priego*, U.S. D.O.J. EOIR (Lamb, I.J., July 10, 2003). For a summary of this decision, see http://www.nilc.org/immsemplymnt/wkplce_enfrcmnt/wkplcenfrc018.htm . A copy of the decision can be obtained from NILC.

[6] For sample protective order requests, see www.nilc.org/immsemplymnt/index.htm. Courts have granted protective orders prohibiting discovery into immigration status. See *Cabrera v. Ekema d/b/a Five Star Cleaning*, 265 Mich. App. 402 (2005); *Galaviz –Zamora v. Brady Farms*, 230 F.R.D. 499 (W.D.M. Sep. 23, 2005); *Trejo v. Broadway Plaza*, 2005 U.S. Dist. LEXIS 17133 (SDNY Aug. 16, 2005).

[7] Operations Instruction 287.3a, redesignated as Transmittal Memo (SA 00-01), M-490 Special Agent's Field Manual, Dated 4/28/00, available www.nilc.org/immsemplymnt/emprights/Revised_Op_Inst.pdf**.**

discrimination based on race, color, national origin, gender, and religion), reaffirmed that undocumented workers are covered by these federal employment discrimination laws.[8]

While the EEOC has taken the position that *Hoffman* precludes back pay remedies under these statutes, like the NLRB the EEOC has limited inquiries into workers' immigration status by concluding that immigration status might be relevant in determining remedies but has no bearing on liability. In addition, and again mirroring the NLRB's policy, the EEOC has stated that it will not on its own initiative inquire into a worker's immigration status, nor will it consider an individual's immigration status when examining the underlying merits of a complaint. After *Hoffman,* the EEOC has continued to seek other damages such as compensatory and punitive damages on behalf of undocumented workers.

The *Hoffman* decision nonetheless has made workers who file discrimination charges more vulnerable to inquiries and retaliation on the basis of their immigration status inquiries. The first post-*Hoffman* appellate court decision on the issue of inquiring into immigration status of plaintiffs who file discrimination claims affirmed the EEOC's position. In *Rivera, et al. v. NIBCO, Inc*., the Ninth Circuit stated, "the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights . . . outweighed NIBCO's interests in obtaining the information."[9] The court found that were such discovery to be permitted, "countless acts of illegal and reprehensible conduct would go unreported."[10] It therefore is important to take measures to protect workers making such claims. One strategy is to seek a protective order from the court, similar to the one obtained in the *Rivera* case, prohibiting such inquiries or retaliation.[11]

Right to a Healthy and Safe Working Environment. The DOL after *Hoffman* reaffirmed that all workers, regardless of immigration status, continue to be protected by the Occupational Safety and Health Act (OSHA), and the Mine Safety and Health Act. This means that undocumented workers have the right to complain about unsafe workplace conditions.

When a worker needs to be out of work due to a workplace injury, the only recourse available is the state's workers' compensation system. There has been an onslaught of post-*Hoffman* litigation on whether undocumented workers can be compensated for their injuries under state workers' compensation laws. Often the arguments focus on whether *Hoffman* means that the state is pre-empted from covering undocumented workers by its workers' compensation law.

No state court has held that *Hoffman* pre-empts state workers' compensation. Some states (*e.g*. Massachusetts and North Carolina) have ruled that workers, regardless of immigration status, have a right to be fully compensated under

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[8] See EEOC Guidance, www.nilc.org/immsemplymnt/emprights/EEOC_Reaffirms_Commitment.pdf. However, at least one court has questioned an undocumented worker's standing (or legal ability) to bring an ADA claim. *Lopez v. Superflex, Ltd.,* 13 Am. Disabilities Cas. (BNA) 1339 (2002). And in a pregnancy discrimination case in New Jersey, a state court denied a victim back pay, damages for emotional distress, and punitive damages, claiming that the *Hoffman* decision precluded it from awarding economic damages to the plaintiff. *Crespo v. Evergo Corp*., N.J. Super. Ct. App. Div., No. A-3687-02T5 (Feb. 9, 2004).

[9] *Rivera v. NIBCO, Inc.*, 204 F.R.D. 647 (E.D. Cal. 2001).

[10] *Ibid*.

[11] For a copy of the *Rivera* protective order, see http://www.nilc.org/immsemplymnt/rivera/rivera_p_order.pdf. The EEOC also prevailed in a case where it sought and obtained a protective order that prohibited the discovery of the immigration status and tax return information of workers who were suing their former employer for discrimination and retaliation. *Assif Asgar-Ali v. Hilton Hotel Corp.*, 798 N.Y.S. 2d 342 (2004). For an in-depth discussion on litigating discrimination claims on behalf of immigrant workers in the post-*Hoffman* era, *see* Christopher Ho and 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).

state workers' compensation laws.[12] However, other state courts have interpreted *Hoffman* to limit undocumented workers' entitlement to workers' compensation benefits.[13]

In addition to protections under state workers' compensation laws, injured workers also can recover damages in state tort actions. Many courts have addressed the issue of whether undocumented workers are entitled to recover lost wages in tort actions.[14]

Conclusion. Some court cases have limited the potentially damaging impact of *Hoffman* while other courts have expanded its scope. It is important for immigrant and workers' rights advocates to continue organizing to curtail any further erosion of low-wage immigrant workers' rights, and to help workers assert the rights they clearly have.

It is extremely critical to note that in many cases, a worker's status enters the record unnecessarily. It is crucial to educate workers about the importance of remaining silent about such questioning and to let them know that they have affirmative rights if they were wronged, discriminated against, or are injured on the job. Similarly, advocates must do their best to ensure that immigration status information does not get into the record or pleadings.[15]

This document should not be used as a substitute for legal advice. Contact an employment, labor, and/or immigration attorney if you are considering legal action.

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[12] *See, for example, Ruiz v. Belk Masonry Co., et al.*, 559 S.E.2D 249 (N.C. App. 2002) (affirming right of undocumented workers to receive workers' compensation benefits.) See also, *Design Kitchen and Baths v. Lagos*, 388 Md 718, 882 A2d 817 (2005) (undocumented worker injured in a work-related injury accident was an employee covered by Maryland's workers' compensation laws); *Farmer Bros. Coffee v. Workers' Compensation Appeals Bd.*, 133 Cal. App. 4th 533 (Cal. Ct. App. 2005)(state's workers' compensation laws applicable to all workers regardless of immigration status).

[13] A Pennsylvania court held that unlawful immigration status might justify terminating benefits for temporary total disability. *The Reinforced Earth Co. v. Workers' Compensation Appeal Bd.*, 810 A.2d 99 (Pa. Sup. Ct. 2002). A Michigan court limited an undocumented workers' coverage to medical care, while denying weekly wage replacement benefits. *Sanchez v. Eagle* Alloy, 658 N.W.2d (Mich. Ct. App. 2003). See also, *Xinic v. Quick*, et al., 2005 Va. Cir. LEXIS 266 (November 14, 2005)(while finding that immigration status is relevant to recovery under the Virginia workers' compensation law, court ultimately denied the defendant employer's request for information about the worker's immigration status on the grounds that revealing such information could incriminate the worker in violation of his Fifth Amendment right against self incrimination).

[14] See, *Rosa v. Partners in Progress Inc.*, 152 NH 6, 868 A2d 994 (2005) (finding that undocumented workers can make a claim for lost earnings under tort law and that lost earning capacity may be measured by what the worker could have earned in the United States only if the employer knew or should have known of the worker's undocumented status at the time the worker was hired); *Balbuena v. IDR, Realty, LLC*, 2006 N.Y. LEXIS 200; 2006 NY Slip Op 124 (February 21, 2006)(in a tort action the highest court in the State of New York rules that unauthorized workers who were injured while working on construction sites are entitled to recover lost earnings).

[15] Advocates should cite *Rivera, et al. v. NIBCO*, Inc., *supra* note 9, Ninth Circuit decision on an interlocutory appeal concerning a discovery dispute where the court barred the employer's discovery of plaintiffs' immigration status in a discrimination suit. The *Rivera* briefs can be obtained by contacting NILC, which is co-counsel on this case.