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Wage War: Backpay Under the Hoffman Decision

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ABSTRACT

This Article discusses the effect of the *Hoffman Plastic Compounds* decision on backpay as a remedy for illegal immigrants who sue their employers for lost wages. When Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), it believed it struck at the heart of illegal immigration: the search for employment in the United States. However, the IRCA did not accomplish its stated purpose. In 2002, the Supreme Court ruled that lost wages and backpay were not available as remedies to an employee who obtained a job through an IRCA violation and later tried to sue his/her employer. The decision and its progeny left a complicated trail of splits in circuits. This Article explores the implications of *Hoffman* as it relates to awards of backpay to unauthorized workers.

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I. INTRODUCTION

The decision in *Hoffman Plastic Compounds, Inc. v. NLRB*[1] has caused confusion in the federal and state court systems. Courts have struggled to define the limits of the Supreme Court's decision and have often disagreed with each other about its scope with regard to the remedies available to undocumented workers and with how best to reconcile the decision with the Immigration Reform and Control Act of 1986 ("IRCA").[2] This Article begins with an examination of the IRCA and the *Hoffman* decision before discussing different federal court interpretations regarding which type of backpay unauthorized workers may receive, if any, under *Hoffman*. Finally, this Article will discuss the implications and possible effects of the IRCA and *Hoffman* on the rights of undocumented workers, concluding that *Hoffman* complicates the issue, rather than making remedies available to undocumented workers more uniform.

II. EXAMINATION OF IRCA AND THE *HOFFMAN* DECISION

A. The Immigration Reform and Control Act of 1986

Although the numbers are decreasing, a large number of illegal immigrants continue to enter the United States each year, and the majority of whom do so to find employment and send income home to their families.[3] One study found seventy-eight percent of undocumented immigrants are from Latin America, fifty-six percent from Mexico alone.[4] "Perhaps twenty-five to forty percent have overstayed a visa; the balance crossed the border unlawfully. Their labor force participation rates, particularly for men, are high, and concentrated in low-wage, low-skilled positions."[5] These undocumented immigrants "choose the United States as their destination country for many reasons which often pertain to the socio-

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1 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

2 Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324a (2012), *see* discussion *infra* Part II.

3 Angela A. Darmer, Comment, *Reconciling IRCA with the Anti-Retaliation Provisions of the NLRA: How Far Should Hoffman Plastic Compounds, Inc. v. NLRB Be Extended?*, 34 AM. J. TRIAL ADVOC. 687, 691 (2011).

4 Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails,* U. CHI. LEGAL F. 193, 206–07 (2007).

5 *Id.*

economic conditions of their source countries."[6] These reasons often deal with "economic hardship or political instability [and] often induce immigrants to escape their home countries despite the risks associated with becoming undocumented in the United States."[7]

The primary purpose behind passing the IRCA was to eliminate the availability of employment to undocumented immigrants in order to reduce their desire to come to the U.S. unlawfully.[8] This would help reduce the illegal immigrant population by taking away the primary motivation drawing illegal immigrants to the United States.[9] IRCA, 8 U.S.C. 1324a provides, in pertinent part:

> (a) (1) In general, it is unlawful for a person or other entity (A) to hire or to recruit or refer for a fee, for employment in the United States, an alien knowing the alien is an unauthorized alien . . . with respect to such employment, or (B)(i) an individual without complying with the requirements of subsection (b) of this section, (the verification provisions) or, (ii) if the person or entity is an agricultural employer or farm labor contractor (as defined in section 1802 of title 29), to hire or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.
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> (2) It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1) to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.[10]

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6 Phi Mai Nguyen, Comment, *Closing the Back Door on Illegal Immigration: Over Two Decades of Ineffective Provisions While Solutions Are Just a Few Words Away*, 13 CHAP. L. REV. 615, 623 (2010).

7 *Id.*

> For those who are eligible to obtain immigrant visas, the wait times are so long that they significantly discourage many eligible aliens. In addition to significant backlogs on application processing, the United States has statutory ceilings that limit the number of immigrant visas issued each year, prompting aliens to risk residing with their family members without legal status while waiting for their petitions to be processed. Most undocumented immigrants, however, do not have the luxury of waiting for such a long period of time to obtain immigrant visas because they do not have family members or employers whose sponsorship may permit them to apply for immigrant visas.

Id. (citations omitted).

8 Darmer, *supra* note 3 at 691.

9 *Id.*

10 IRCA, 8 U.S.C. § 1324a (2012).

Before IRCA was passed, it was not illegal for an employer to hire an undocumented worker, but it was illegal for the worker to accept a job incompatible with his or her immigration status.[11] The worker was sanctioned based on that immigration status, and the employer was not greatly affected.[12] In fact, Congress was careful to protect employers of undocumented workers from criminal sanctions and "specifically exempted such employers from federal criminal penalties for 'harboring' aliens when these penalties were enacted in 1952."[13]

The IRCA is a comprehensive scheme meant to prohibit the employment of illegal aliens in the United States.[14] After it was passed in 1986, it "'forcefully' made combating the employment of illegal immigrants central to '[t]he policy of immigration law.'"[15] The IRCA defines an unauthorized alien with respect to employment as someone who is not lawfully admitted to the United States for permanent residence or authorized to be employed by the IRCA or the Attorney General.[16] If an employer hires an individual knowing that the person is undocumented or hires someone whose presence in the U.S. later becomes illegal and does not discharge the worker, the employer is subject to criminal prosecution or civil suit by the Attorney General.[17] The provisions stationing violations of the IRCA state:

> (1) Criminal penalty. Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) shall be fined not more than $ 3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.
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> (2) Enjoining of pattern or practice violations. Whenever the Attorney General has reasonable cause to believe that a person or

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11 Charles Gordon et al., 1–7 *Immigration Law and Procedure*, § 7.03 (2010); Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 231 (2d Cir. 2006).

12 Gordon, *supra* note 11, at § 7.03.

13 Wishnie, *supra* note 4, at 198–99 ("To be sure, undocumented immigrants could be arrested in the workplace and deported, as they could be arrested anywhere, but such workers faced no additional immigration or other penalties because of their employment. Nor was the employer acting unlawfully merely by employing such workers.").

14 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

15 *Id.* (quoting INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 (1991)).

16 IRCA, 8 U.S.C. § 1324a(h)(3) (2012).

17 *Id.* § 1324a(f).

> entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a) of this section, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.[18]

Pattern offenders are subject to a more serious sanction, a court order against the offender that the Attorney General can deem necessary.[19] The fines in general are minor, and many employers view them as a cost of doing business.[20] Many employers oppose these sanctions on principle because they view them as "unnecessary regulation of the private workplace and as an unfair deputization of the private sector to conduct public law enforcement."[21] The IRCA was enforced by the Immigration and Naturalization Service ("INS") from the time it was passed until 2003, when the INS and Customs Service were combined under the umbrella of the Department of Homeland Security.[22] The combination of the two formed the agency in charge of enforcing the IRCA today, Immigration and Customs Enforcement ("ICE").[23]

In order to verify that the person being hired is authorized to work in the United States, the employer must examine certain documents as part of an employment verification system.[24] Employees may choose from a list of documents and produce one of the required combinations to prove their work eligibility.[25] Moreover, employers may not demand which combination of documents a potential employee must produce.[26] After the documents have been produced, the employer

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18 *Id.*

19 *See id.*

20 Farhang Heydari, Note*, Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees In the Enforcement of Employer Sanctions*, 110 COLUM. L. REV. 1526, 1533 (2010).

21 Wishnie, *supra* note 4, at 208–09.

22 Darmer, *supra* note 3, at 692.

23 IRCA, 8 U.S.C. § 1324a(h)(3) (2012).

24 *Id.* § 1324a(b) (explaining the employment verification system and documentation that may be submitted to an employer to prove employment authorization and identity).

25 *Id.* (for example, a passport, resident alien card, driver's license, or "such other type as the Attorney General finds, by regulation, provides a reliable means of identification").

26 *Id.*

must attest that the individual applying for the job is not an unauthorized alien based on examination of the individual's documents.[27] The IRCA also entitles employers to an affirmative defense to the hiring, recruiting, or referral of an undocumented worker upon a showing of a good faith attempt to comply with the requirements of the verification system.[28] An employer need only determine that any such document appears genuine on its face and does not need to conduct further investigation.[29] Some employers have expressed that false documents are easy to come by and some just look the other way when presented with such fraudulent papers.[30] However, employers may find themselves between a rock and a hard place. If they refuse to accept documents that look facially valid, they may be charged with document abuse and discrimination.[31]

While the IRCA places a great deal of attention on the employer, the Act also makes it a crime for illegal immigrants to tender fraudulent documentation in order to secure employment.[32] To enforce the IRCA, the Department of Homeland Security has access to workplaces and the power to fine non-compliant employers under the statute, taking the focus off the employer.[33] Although the legislative history of the IRCA indicated an intention not to diminish the protections afforded to unauthorized workers under the National Labor Relations Act ("NLRA"),[34] the "broad protections given to undocumented persons as 'employees' were limited in *Hoffman*."[35]

However, the decision "did not specifically foreclose all remedies for undocumented workers under either the NLRA or other comparable federal labor statutes."[36] "For violations of the NLRA,

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27 *Id.*

28 *Id.* § 1324a(a)(3).

29 *Id.*

30 Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. 571, 590 (2004).

31 *Id.* at 594.

32 IRCA, 8 U.S.C. § 1324c(a) (2011).

33 Lyon, *supra* note 30, at 590.

34 *See* H.R. REP. NO. 99-682, at 58 (1986) (cited for support in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (dissenting opinion)).

35 Gordon, *supra* note 11 (outlining the history of the effect of labor laws on undocumented workers and explaining the impact of IRCA).

36 Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003).

employers may face reinstatement orders, backpay awards, cease and desist orders, court ordered injunctions, and other remedies."[37] Decisions made under the NLRA can be appealed.[38] Moreover, without laws specifically prohibiting their obtaining employment, "illegal aliens who do not commit fraud to gain work are as legally entitled to United States wages as any other member of the workforce and will always be entitled to payment for completed work."[39] It is unsettled whether an unauthorized immigrant who has entered the country without permission is automatically precluded from an award of lost earning capacity damages.[40]

B. The Hoffman Decision

1. The Majority

In 1992, the National Labor Relations Board ("NLRB") found that Hoffman Plastic Compounds, Inc. unlawfully terminated four employees, including Joe Castro, because they were union supporters.[41] In doing so, Hoffman Plastic was in violation of the NLRA.[42] At a compliance hearing before an Administrative Law Judge ("ALJ"), Castro testified that he submitted the birth certificate of a friend who was born in Texas to obtain a Social Security Card, in order to fraudulently obtain employment in the United States.[43] The ALJ applied the Court's reasoning in *Sure-Tan Inc. v. NLRB*, and held that backpay or reinstatement for Castro would conflict with the IRCA.[44] In *Sure-Tan*, the Court overturned an NLRB award which was similar to the award in *Hoffman*.[45] In *Sure-Tan* the Court explicitly

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37 Thomas J. Walsh, Hoffman Plastic Compounds, Inc. v. NLRB*: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 318 (2003).

38 *Id.*

39 Hugh Alexander Fuller, *Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages After* Hoffman Plastic Compounds, Inc. v. NLRB, 58 BAYLOR L. REV. 985, 1001 (2006).

40 *Id.*

41 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

42 *Id.* (citing 29 U.S.C. § 158(a)(3) ("[T]he NLRA prohibits discrimination 'in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.'")).

43 *Id.* at 141.

44 *Id.*

45 *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

addressed the possibility of an inconsistency between the goals of the NLRA and federal immigration policy.[46]

Four years after the decision in *Sure-Tan*, the NLRB reversed regarding backpay, explaining that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."[47] Hoffman Plastic twice petitioned for review and was denied, after which the Supreme Court granted *certiorari* and ruled in Hoffman Plastic's favor.[48]

The Supreme Court reasoned that the Board's award of backpay to illegal aliens would go against explicit statutory prohibitions which are critical to federal immigration policy.[49] Moreover, it would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[50] The Court explains that under the IRCA, an undocumented worker could not obtain employment without either a violation by an employer who ignored the verification system requirements, or an employee who tendered fraudulent documentation to establish work eligibility.[51] Additionally, Castro was unable to mitigate his damages because in order to gain employment after he was terminated from Hoffman Plastic, he would have to violate the IRCA again by using false documents to obtain another position.[52] Moreover, the Court ruled that it could not "allow [the NLRB] to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[53]

The Court further concluded that while the NLRB could fashion remedies for NLRA violations, its authority was not unbounded, especially when other policy concerns such as immigration became

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46 *Id.* at 892–94.

47 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002) (internal citations committed).

48 *Id.* at 142.

49 *Id.* at 151.

50 *Id.*

51 *Id.* at 148.

52 *Id.* at 151.

53 *Id.* at 149 (examining that the NLRB wanted the Court to overlook these facts and deciding that doing so would run counter to the policies of IRCA).

involved.[54] The Court then held that "the award [of backpay] lies beyond the bounds of the Board's remedial discretion" and set the award aside.[55] The Court did point out that while it would not allow backpay to be imposed on the employer, it did allow the Board to subject the employer to other "significant sanctions . . . including orders to cease and desist its violations of the NLRA, and to post a conspicuous notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices."[56] Therefore, while the employer was not subject to backpay, it was shamed and ordered to cease its unfair labor practices.

2. The Dissent

Three justices joined the dissent by Justice Breyer, which supports the NLRB's decision, finding that it did not run counter to the IRCA.[57] In fact, the dissent states that backpay "reasonably help[s] to deter unlawful activity that both labor laws and immigration laws seek to prevent."[58] The Board was said to have "especially broad discretion in choosing appropriate remedies" because of its expertise, and "must therefore be given special respect by reviewing courts."[59] The dissent argued that the IRCA did not create a policy that called for the Court to lessen the remedial power of the NLRB.[60] The remedial power of the Board includes not only monetary sanctions, but also deterrence.[61] This makes the enforcement of labor laws credible.[62] The dissent also noted that the IRCA is silent on how a violation by an employer or an employee should affect the enforcement of other laws, such as labor

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54 *Id.* at 147 (explaining that *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942) established that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield.").

55 *Id.* at 149.

56 *Id.* at 152.

57 *See id.* at 153 (Breyer, J., dissenting).

58 *Id.* at 153.

59 *Id.* (citing NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258 (1969)).

60 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 154 (2002).

61 *Id.* at 153–54 ("Those purposes involve more than victim compensation; they also include deterrence, i.e. discouraging employers from violating the Nation's labor laws.").

62 *Id.* at 154.

laws.[63] Thus, the majority cannot rest its decision on explicit statutory language.

Justice Breyer further noted that the majority did not consider that an employer may be willing to violate the IRCA, because the majority's decision would allow employers to do so with impunity since the NLRB could not assess a monetary penalty in the form of backpay.[64] Knowing that the NLRB could not award backpay would lower the cost of an initial labor law violation to the employer because it would increase the incentive to seek out and hire illegal immigrants.[65] As to potential illegal workers the dissent points out that they enter the United States "in the hope of getting a job, not gaining the protection of our labor laws."[66]

The dissent also discussed how one of the labor related purposes of the IRCA is to combat the willingness of illegal immigrants to work in substandard conditions and for substandard wages (which are illegal).[67] By denying backpay as a remedy, the majority allows this practice to continue because employers know they will not incur a monetary penalty for subjecting illegal workers to such conditions.[68]

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63 *Id.* at 154–55.

64 *Id.* at 154 (citing A.P.R.A. Fuel Oil Buyers Grp. Inc., 320 N.L.R.B. 408 (1995)) (explaining that "without a potential backpay order an employer might simply discharge employees who show interest in a union 'secure in the knowledge' that the only penalties were requirements 'to cease and desist and post a notice'.").

65 *Id.* at 155; Jennifer S. Berman, *The Needle and the Damage Done: How Hoffman Plastics Promotes Sweatshops and Illegal Immigration and What To Do About It*, 13 KAN. J.L. & PUB. POL'Y 585, 601–02 (Summer 2004).

> Removing the ability to award reinstatement or back pay leaves the NLRB with almost nothing in its remedial arsenal where undocumented workers are concerned. The only remaining remedy is the issuance of a cease and desist order. Under a cease and desist order, an employer is ordered not to violate certain statutory provisions. If the employer violates the order, he or she is subject to sanctions and contempt. As such, a cease and desist order is forward-looking; it does not address or remedy past violations.

Id.

66 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155 (2002) (quoting Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988)).

67 *Id.* at 156; *see also A.P.R.A. Fuel Oil Buyers Grp. Inc.*, 320 N.L.R.B. at 414.

68 *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 154.

A final point the dissent argues is that precedent does not help the majority's decision.[69] The dissent cites *ABF Freight System, Inc. v. NLRB*, for the proposition that the Court has in the past upheld an award of backpay to an unlawfully discharged employee guilty of the serious crime of perjury during the Board's internal proceedings.[70] However, as the majority explained while differentiating *ABF Freight*, the conduct of the employee in *ABF Freight* was "serious, but not at all analogous to misconduct that would render the underlying employment relationship illegal" as in *Hoffman*.[71] Further, that case involved internal proceedings of the Board and did "not implicate federal statutes administered by other agencies."[72]

3. Sure-Tan Majority

The precedent most connected with *Hoffman* is *Sure-Tan Inc. v. NLRB*.[73] In *Sure-Tan*, the Court discussed the NLRA and its application to unauthorized workers.[74] In this case, plaintiff was a member of a group of employees that voted to unionize.[75] The employers were small leather processing firms.[76] After the union election, the employer asked the employees whether they had valid immigration papers, to which many of the employees answered that they did not.[77] The employer used this information to contest the election with the NLRB.[78] He also admitted that he knew of the employees' illegal presence in the U.S. for several months.[79] After the employer's objections to the election were overruled by the Board, the employer sent a letter to the INS asking them to look into the immigration status of the workers.[80] The Board charged the employer with unfair labor practices for contacting the INS, and an

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69 *Id.* at 157.

70 *Id.* (citing ABF Freight System, Inc. v. NLRB, 510 U.S. 317 (1994)).

71 *Id.* at 158.

72 *Id.* at 146.

73 Sure-Tan Inc. v. NLRB, 467 U.S. 883 (1984).

74 *Id.*

75 *Id.* at 886.

76 *Id.*

77 *Id.* at 886.

78 *Id.* at 887.

79 *Id.*

80 *Id.*

administrative law judge heard the charges.[81] The ALJ found that the employer had committed unfair labor practices, and this was affirmed by the Board. [82]

When the case reached the Supreme Court, the Court began by noting that undocumented immigrants are "employees" within the meaning of the NLRA.[83] The Court made note of the fact that acceptance of substandard wages and working conditions can depress wage scales and working conditions of authorized workers.[84] Employment under such conditions can also diminish the effectiveness of labor unions.[85] The Court further discussed that the exclusion of undocumented workers from participation in union activities and protections would create a "subclass of workers without a comparable stake in the collective goals of their legally resident coworkers . . . eroding the unity of all the employees and impeding effective collective bargaining."[86] The Court found no conflict in applying the NLRA to undocumented aliens.[87]

The Board ordered the employees reinstated and given backpay.[88] The Court agreed.[89] Moreover, a potential conflict with the INA was avoided by conditioning employees' offers of reinstatement on legal reentry into the United States.[90] "Similarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[91] The Court thus found that backpay is not allowed for undocumented workers for the time they were not legally present in the United States.[92] The Court reversed the judgment of the Court of Appeals

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81 *Id.* at 887–88.

82 *Id.*

83 *Id.* at 891.

84 *Id.* at 892.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 902.

89 *Id.* at 902–03.

90 *Id.* at 903.

91 *Id.*

92 *Id.*

insofar as it imposed a minimum backpay award and mandated certain specifics of the reinstatement offers.[93]

III. DIFFERENT INTERPRETATIONS UNDER *HOFFMAN*

A. What is Backpay?

Courts are divided as to what constitutes "backpay." The discussion below outlines how some courts have arrived at the decision that backpay as payment for work already performed furthers the goals of the IRCA, and is consequently legal under the Fair Labor Standards Act ("FLSA"), whereas backpay for lost future wages in a tort action is not legal under *Hoffman* and IRCA. Moreover, some courts have found that no form of a backpay award is available to undocumented workers under *Hoffman* because such an award goes against the IRCA by making illegal immigration and subsequent employment in the United States more attractive.

B. Lost Future Wages

The following cases illustrate how many courts feel about awarding lost wages as a backpay award to illegal workers after the *Hoffman* decision.

In *Veliz v. Rental Serv. Corp.*, the estate of a deceased illegal worker filed suit in federal district court to recover the lost wages the deceased worker would have earned had he survived injuries sustained during employment, even though he obtained employment by illegally tendering fraudulent identification.[94] The court found that "[a]warding lost wages is akin to compensating an employee for work to be performed."[95] Applying *Hoffman,* the court reasoned that such wages could not lawfully have been earned on a job obtained by fraudulent documentation, and awarding them would run contrary to the IRCA.[96] The court then denied the claim.[97] However, despite not receiving lost wages, the decedent's estate did receive workers' compensation death benefits.[98] This is one example of how not all avenues of receiving compensation for work are closed to illegal workers.

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93 *Id.* at 906.

94 Veliz v. Rental Serv. Corp. USA, 313 F. Supp. 2d 1317 (M.D. Fla. 2003).

95 *Id.* at 1336.

96 *Id.* at 1337.

97 *Id.*

98 *Id.* at 1321.

In *Estate of Figueroa v. Williams*, an illegal immigrant died when the smuggler helping him enter the U.S. abandoned the truck where the immigrant was hidden.[99] The court ruled that the estate of the immigrant could not sue for lost wages under U.S. laws.[100] The court discussed that "[i]f Plaintiffs are entitled to collect damages that are exponentially higher than would be recoverable under the laws of the decedent's home country, it [would encourage] that the key to fortune is entry into the United States."[101] So reasoning, the court ruled that "respecting Mexico and Honduras' limitation on damages would support the needs of the international system by furthering all three countries' interest in peacefully dissuading illegal immigration."[102]

In another case, the plaintiff Escobar, an unauthorized worker, was employed as a security guard by the defendant.[103] When he rebuffed the company president's sexual advances, his hours were reduced and his employment was eventually terminated.[104] Because Escobar was undocumented, his claims for backpay under Title VII were dismissed by the court when it applied *Hoffman.*[105] The court reasoned however, that Escobar's other claims, including front pay and reinstatement, were not barred under *Hoffman* because he became authorized after his termination, and because *Hoffman* or any other authority at the time did not speak to the availability of these remedies to someone with Escobar's status.[106]

Another plaintiff sued under the Americans With Disabilities Act ("ADA").[107] The plaintiff worked in the defendant's hose factory, and was diagnosed with kidney failure.[108] When he tried to return to work after starting dialysis, he was terminated without consideration of whether he could still perform his job or any other job in the company.[109] The plaintiff filed suit but withdrew his claims for

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99 Estate of Figueroa v. Williams, 2010 U.S. Dist. LEXIS 133729 (S.D. Tex. 2010).

100 *Id.*

101 *Id.*

102 *Id.*

103 Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896 (S.D. Tex. 2003).

104 *Id.*

105 *Id.* at 897.

106 *Id.*

107 Lopez v. Superflex, Ltd., 2002 U.S. Dist. LEXIS 15538, at *2 (S.D.N.Y. 2002).

108 *Id.*

109 *Id.*

backpay and reinstatement due to *Hoffman*.[110] The court invited the defendant to file a motion to dismiss on the grounds that "an ADA claim cannot be based solely on punitive damages and emotional distress without requesting backpay or reinstatement."[111] The defendant did so, including in its motion questions as to whether the plaintiff had standing to sue if he was illegally present in the United States.[112] While the court did not rule on this issue, it hinted in dicta that if this issue came before it, the plaintiff may be denied benefits under *Hoffman* and possibly deported.[113]

Courts in such cases concentrate on whether the job was obtained legally, and the image an award of backpay would create of the U.S. for illegal workers. Courts do not want potential undocumented workers to think that they may be able to gain monetarily if they just make it into the country. For undocumented immigrants who do obtain jobs and work, some courts stress that not all avenues are closed to them. However, after the *Hoffman* decisions, there are "reports of employers mentioning the decision to employees as support for the proposition that unauthorized workers have no right to pay for time worked."[114] The above mentioned cases shed light on these concerns and raise more questions than create uniformity in the law.

C. Wages for Work Already Performed

Courts have drawn a distinction between backpay for future wages, and unpaid wages for work already performed.[115] They have often held that undocumented workers can recover unpaid wages for work they have already performed.[116] Courts have applied the Fair Labor Standards Act ("FLSA") to all employees[117] and found that the

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110 *Id.* at *23.

111 *Id.* at *3.

112 *Id.* at *7–8.

113 *Id.*

114 Lyon, *supra* note 30, at 601–02.

115 Christine D. Smith, Note, *Give Us Your Tired, Your Poor: Hoffman and the Future of Immigrants' Workplace Rights*, 72 U. CIN. L. REV. 363, 379–80 (2003).

116 *Id.*

117 In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) ("[I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant."); Montoya v. S.C.C.P. Painting Contractors, Inc., 530 F. Supp. 2d 746, 749 (D. Md. 2008) ("[T]he protections of the Fair Labor Standards Act are available to

immigration status of an individual is irrelevant when it concerns damages consisting of wages for work already performed because it would undermine the goals of the FLSA.[118] The FLSA regulates the minimum wage paid by employers in interstate commerce.[119] The following cases show some courts' perspectives on wages due for work already performed by an undocumented worker before and after *Hoffman*.

In *Flores v. Albertsons Inc.*, service workers at several grocery stores sued the chains for unpaid wages under the FLSA, which are comparable to unpaid wages under the NLRA.[120] The defendants requested information on the immigration status of the class of plaintiffs, and the court barred the request because "the documents were irrelevant and their compelled production could cause a miscarriage of justice."[121] The court acknowledged that there is an *in terrorem* effect of producing these documents, and their production would likely cause undocumented workers to withdraw from the case so as not to face deportation.[122] The court discussed that production of immigration status would not assist the defendant in avoiding an award of backpay, as "*Hoffman* does not establish that an award of unpaid wages to undocumented workers for work actually performed runs counter to IRCA."[123] The court went to explain that unlike in *Hoffman*, the plaintiffs here were not terminated, and were seeking wages for work they had already performed, which were owed to them under the FLSA.[124]

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citizens and aliens alike, regardless of documented or undocumented status."); Contreras v. Corinthian Vigor Ins. Brokerage, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998); Flores v. Albertsons, Inc., 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. 2002).

118 *In re Reyes*, 814 F.2d at 171 (5th Cir. 1987) (under the FLSA); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (The "risk of injury to the plaintiffs if such information [immigration status] were disclose outweighs the need for its disclosure."); Galaviz-Zamora v. Brady Farms, Inc., 2005 U.S. Dist. LEXIS 22120 (W.D. Mich. 2005); Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002).

119 *Liu*, 207 F. Supp. 2d at 191.

120 Flores v. Albertsons, Inc., 2002 U.S. Dist. LEXIS 6171, at *4 (C.D. Cal. 2002).

121 *Id.* at *15.

122 *Id.* at *20–21.

123 *Id.* at *19.

124 *Id.* at *18.

In *Liu v. Donna Karan International Inc.,* the defendant attempted to discover immigration status of plaintiffs who were suing for overtime and unpaid minimum wages for work they already performed.[125] Plaintiffs worked for other clothing manufacturers that provided clothing for sale to Donna Karan.[126] They were paid by the hour or by each piece they produced.[127] Plaintiffs alleged they worked eighty hour weeks yet were never paid overtime and made less than minimum wage.[128] The court held that discovery of immigration status was irrelevant because the risk of injury to the plaintiffs was greater than the benefit to the defendants.[129]

In these cases, the courts often find that the FLSA furthers the goals of the IRCA instead of conflicting with them. Even the *Liu* decision, which was reached after *Hoffman*, is still followed. In general, it appears that trying to discover a worker's immigration status has an *in terrorem* effect and will not be allowed by the courts, and wages for work performed will be granted.[130]

D. Non-Discharge Situations

In a memorandum, the NLRB has advanced that the *Hoffman* decision does not bar backpay in situations where an employee was not terminated from employment.[131] In such a situation, the employee remains with the employer but is often subject to unlawful working conditions.[132] *Hoffman* expressly restricts backpay for work not

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125 Liu v. Donna Karan Int'l, Inc., 2000 U.S. Dist. LEXIS 18847 (S.D.N.Y. 2000).

126 *Id.* at *2.

127 *Id.*

128 *Id.*

129 *Id.*

130 Several district courts have been faced with this issue; some have simply declined to answer. *See, e.g.*, Anderson v. Cnty. of Salem, No. 09-4718, 2010 WL 3081070, at *15 (D.N.J. 2010) (declining to address the issue in the absence of evidence of plaintiff's alleged undocumented status); Davila v. Grimes, No. 2:09-CV-407, 2010 WL 1737121, at *3 (S.D. Ohio 2010) (declining to decide on a motion to compel, but held that immigration status is relevant to claim for lost wages in tort action); Zuniga v. Morris Material Handling, Inc., No. 10-C-696, 2011 WL 663136, at *4 (N.D. Ill. 2011) (holding that "inquiry into Zuniga's immigration status could lead to admissible evidence bearing on any claim or defense").

131 ARTHUR F. ROSENFELD, OFFICE OF THE GEN. COUNSEL MEMORANDUM, GC 02-06 (July 19, 2002).

132 Shahid Haque, Note, *Beyond* Hoffman Plastic*: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79

performed.[133] The NLRB posits that if an employee is not discharged, but not compensated properly for work that was actually performed, backpay is an appropriate remedy.[134] In such a situation, the employee is not required to mitigate damages because there was no termination of employment.[135] A specific example of this situation would be rather than firing an employee, "an employer demotes or [for some other reason] lowers the pay of an employee in retaliation for union activity."[136] The Board also encourages remedies specific to individual employees in the form of settlements and agreements between an employer and the unauthorized workers, especially if the employer knowingly hired an undocumented worker.[137]

E. Un/knowingly Hiring an Unauthorized Worker

In *Hoffman,* the majority noted that the employer in that case had "only learned about the worker's undocumented status after the proceedings before the ALJ had begun."[138] That the Court recorded that observation "could be taken to suggest two things: first that employers who were not aware of their workers' undocumented status should receive more sympathy for not knowingly violating immigration law; and second, that a case involving knowing violators of immigration law would be decided differently."[139] Along those lines in his dissent, Justice Breyer discussed that the question of whether backpay is available if an employer knowingly hires undocumented workers was not before the Court.[140] This may have been an attempt by Justice Breyer to safeguard the backpay remedy against employers who knowingly hire undocumented workers and then exploit them.[141]

CHI.-KENT L. REV. 1357, 1374 (2004) ("[C]ommon examples of unlawful working conditions include being paid a lower wage than what is owed or being discriminatorily demoted to a lower paying position for engaging in union activities.").

133 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

134 Haque, *supra* note 132, at 1374.

135 *Id.* at 1374–75.

136 Lyon, *supra* note 30, at 600–01.

137 *Id.* at 601.

138 Robert I. Correales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?*, 14 LA RAZA L.J. 103, 134 (2003).

139 *Id.*

140 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 15556 (2002) (Breyer, J., dissenting).

141 Correales, *supra* note 138, at 134.

It is difficult to prove that an employer unknowingly hired an undocumented worker. The IRCA has a high bar to reach in proving a knowing violation.[142] With document fraud occurring on a regular basis, it is difficult for employers who want to comply with the IRCA to be sure they are doing the right thing.[143] However, document fraud can also be an excuse for unscrupulous employers to claim ignorance if their workers end up being undocumented.[144] This type of situation would limit ICE to going after employees more than employers.[145]

F. Workers' Compensation Benefits

"Workers' compensation is a form of labor protection that requires the payment of medical costs, lost wages, and other benefits to injured employees regardless of fault."[146] It can be a quick and adequate substitute to tort litigation.[147] States have enacted statutes explaining the requirements for entitlement and established administrative agencies for hearing claims.[148]

Some courts have found that unauthorized workers are eligible for workers compensation claim awards.[149] However, this may change over time; if the Supreme Court was concerned that the "possibility of backpay at issue in *Hoffman* would encourage violations of the immigration laws, seemingly stronger arguments can be made that workers' compensation benefits, which are far more certain remedies than backpay under the NLRA, could also serve to lure unauthorized immigrants to the U.S."[150] Most jurisdictions have not allowed immigration status to serve as a bar to workers' compensation claims.[151] Courts have generally held that there is no causal nexus between the concealment of true immigration status and work

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142 Heydari, *supra* note 20, at 1538.

143 *Id.*

144 *Id.*

145 *Id.*

146 Jason Schumann, Note*, Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA L. REV. 709, 714 (January 2004).

147 *Id.*

148 *Id.*

149 Correales, *supra* note 138, at 151.

150 *Id.*

151 *Id.* at 155.

injury.[152] The following cases outline the approach taken by many federal and state courts regarding this issue.

In *Bollinger Shipyards Inc. v. Dir., OCWP*, plaintiff Rodriguez injured himself while working for Bollinger.[153] He obtained employment falsely by presenting a fake social security card and claiming that he was a U.S. citizen.[154] Bollinger argued that Rodriguez should not receive benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA") because of his undocumented status and his use of fraudulent documents to obtain employment.[155] The court reasoned that the "plain statutory language of the LHWCA broadly defines the term 'employee' and specifies that nonresident 'aliens' are entitled to benefits in the same amount as other claimants."[156] Further, the court explained that "LHWCA claimants are not required to mitigate their damages by working. Rather, an employee's compensation rate may be reduced if the employer can demonstrate that the employee is physically capable of returning to work."[157]

The court found the *Hoffman* line of cases distinguishable for at least three reasons:

> Unlike discretionary backpay under the NLRA, workers' compensation under the LHWCA is a non-discretionary, statutory remedy; (2) unlike the NLRA, the LHWCA is a substitute for tort law, abrogating fault of either the employer or the employee; and (3) awarding death or disability benefits *post hoc* to an undocumented immigrant under the LHWCA does not unduly trench upon IRCA, as Congress chose to include a provision in the LHWCA expressly authorizing the award of benefits in the same amount to nonresident aliens.[158]

The court then ruled that Rodriguez was eligible to receive workers' compensation benefits.[159]

In *Asylum Co. v. D.C. Department of Employment Services*, a plaintiff was injured when a bottle was thrown and hit him in the eye

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152 *Id.*

153 Bollinger Shipyards, Inc. v. Dir., OCWP, 604 F.3d 864, 867 (5th Cir. 2010).

154 *Id.*

155 *Id.*

156 *Id.* at 873.

157 *Id.* at 879.

158 *Id.* at 877.

159 *Id.* at 879.

during the course of his employment.[160] The employer found out that the plaintiff was undocumented, and terminated his employment after giving him a small amount of money to cover some of his medical bills.[161] The employer argued that the plaintiff was not eligible for workers' compensation benefits because he was undocumented.[162] The Administrative Law Judge found that unauthorized workers qualified under D.C. law to receive workers compensation benefits.[163] The D.C. Court of Appeals noted that this was "consistent with the language of the Act, specifically, D.C. Code § 32-1501 (9) (2001), which excepts certain specified categories of workers from the definition of 'employee,' but otherwise sets out a broad definition that neither excludes undocumented aliens nor makes a worker's immigration status relevant."[164] The court further found that "state courts have almost uniformly held that workers' compensation awards are not an obstacle to the accomplishment and execution of the policy and purposes of IRCA and have generally concluded that uniform application of workers' compensation laws best serves the interests of both federal and state law."[165]

G. State Law

That federal immigration policy and regulations preempt state laws is well established.[166] The federal government's regulation of immigration issues is comprehensive and critical enough that states may not interfere.[167] If the state law does not conflict with the federal law, it is not preempted.[168] Where the goals of the state law conflict with those of federal statutes or policy, the state law is preempted by the federal statute.[169] Thus the IRCA preempts state laws that conflict with its text or federal immigration policy. It contains an express preemption clause, which states that it "preempts any state or local law

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160 Asylum Co. v. D.C. Dep't of Empl. Servs., 10 A.3d 619, 623 (D.C. 2010).

161 *Id.* at 623–24.

162 *Id.*

163 *Id.* at 625.

164 *Id.* at 626.

165 *Id.* at 633 (internal citations omitted).

166 U.S. CONST. art. I, § 8, cl. 4 (establishing that Congress has the authority to create a "uniform rule of naturalization").

167 Nyquist v. Mauclet, 432 U.S. 1, 10 (1977).

168 *See* Plyler v. Doe, 457 U.S. 202, 219 (1982).

169 Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151–52 (2002).

imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[170] However the *Hoffman* decision is meant to be narrow and does not discuss state law, mainly discussing the powers of the NLRB.

Some courts have determined that *Hoffman* is inapplicable to state tort law claims for an award for lost earnings to undocumented workers.

A Texas state court of appeals ruled in *Tyson Foods v. Guzman* when the issue came before it, holding that *Hoffman* "only applies to an undocumented worker's remedy for an employer's violation of the NLRA and does not apply to common law personal injury damages."[171] The court further clarified that "Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity."[172] Despite this line of reasoning, perhaps trying not to fully ignore the effects of the *Hoffman* ruling on the situation, the court stated that a federal preemption defense was waived because it was not raised at trial.[173] Through this ruling the court limited *Hoffman's* affect to when an employer violates the NLRA and shifts responsibility fully onto the employer. However, in the court's brief mention of the preemption defense, it implied that the IRCA could ban the recovery of lost wages if preemption had been raised at trial.

In *Kalyta v. Versa Products*, a district court in New Jersey found that the defendant employer had "not identified any New Jersey authority that states legal employment is in fact a prerequisite to recovering lost wages in a personal injury action."[174] In the absence of that authority, the court concluded that "neither IRCA nor New Jersey law prohibits lost wages damages for undocumented workers in the personal injury tort context,"[175] and allowed the plaintiff to pursue the remedy.[176] Similar to the aforementioned cases, this court also allowed lost wages in a personal injury context, even though the damages arose

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170 8 U.S.C. § 1324a(h)(2) (2011).

171 Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App. 2003).

172 *Id.*

173 *Id.*

174 Kalyta v. Versa Prods., Inc., 2011 U.S. Dist. LEXIS 27719 (D.N.J. 2011).

175 *Id.*

176 *Id.* at *39.

from an employment relationship between an undocumented worker and a U.S. employer.

However, a federal district court decided otherwise when a plaintiff undocumented worker tried to sue for future lost wages in a personal injury action based on a violation of state law.[177] In *Ambrosi v. 1058 Park Ave., LLC.*, the plaintiff filed suit for violations of New York state labor law when he fell from a sidewalk bridge and was injured while working and sustained permanent injuries.[178] He alleged that because he would be unable to return to work as a laborer, the defendant was liable to him for future lost wages.[179] The court ruled that because the plaintiff had violated the IRCA by tendering false documentation in order to obtain employment with the defendant, he was precluded from receiving lost wages.[180]

While many state courts allow for personal injury awards to undocumented workers, if the issue reaches a federal court, *Hoffman* may preclude recovery.

IV. IMPLICATIONS AND EFFECTS ON THE RIGHTS OF UNDOCUMENTED WORKERS

Have the IRCA and *Hoffman* met their overall intended goal of peacefully dissuading illegal immigration and saving legal workers from unfair competition and discriminatory hiring practices? Probably not.

Roughly two thirds of the unauthorized immigrant population in the United States is in the workforce, and those workers are more likely to suffer labor violations than their authorized counterparts.[181] "In 1990, a Government Accountability Office ("GAO") study concluded that employer sanctions had prompted significant discrimination in employment."[182] This included discrimination in the

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177 Ambrosi v. 1085 Park Ave., LLC, 2008 U.S. Dist. LEXIS 73930 (S.D.N.Y. 2008); *see also* Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (N.Y. 2006) (holding that national immigration policies do not require setting aside New York Labor Law's allowance of recovery of lost wages by undocumented workers as long as the employee did not violate IRCA).

178 *Ambrosi*, 2008 U.S. Dist. LEXIS 73930, at *3–4.

179 *Id.* at *35.

180 *Id.* at *42.

181 Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1090–91 (2011).

182 Wishnie, *supra* note 4, at 208.

form of not hiring applicants because of accents in speech or having a birthplace other than the United States, which led employers to worry about the applicant's work authorization.[183] The GAO attributed this discrimination to the employers' lack of understanding of the IRCA requirements and prevalence of fraudulent documents, among other things, but not to anti-immigrant practices and beliefs.[184]

Some have voiced concerns that the IRCA and the decision in *Hoffman* would strengthen the power of employers by making them the force of immigration enforcement.[185] Employers are required to check the documents of workers they hire, and one concern related to that task is that if immigrants try to form a union or otherwise pursue their interests in the workplace, employers may try to "reverify" their documents to make sure they are authorized to work.[186] This would have an *in terrorem* effect on the workers. "[W]orkers' ignorance of employment or labor protections plus fear of ICE and unfamiliarity with the language, are often enough to deter at an early stage workers' efforts to organize and even to assert more basic rights."[187] Another idea is that *Hoffman* and IRCA enforcement have "deterred immigrants from communicating with labor and employment agencies about unlawful activity they have suffered or witnessed."[188] Moreover, many unauthorized workers who were smuggled into the United States and are working to pay off their smugglers' fees may fear violence against themselves or their families if they assert their rights and are deported.[189]

Some workers are held as prisoners and tied to the employer.[190] In explaining an "inspection of the INS' efforts to combat harboring and employing of undocumented immigrants in sweatshops, the Department of Justice reported that undocumented immigrants compose a large number of the sweatshop workforce in the U.S."[191] Moreover, these findings are confirmed by the U.S. Department of Labor, which similarly found that violations of the labor and

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183 *Id.*

184 *Id.*

185 *Id.* at 215.

186 *Id. See also* Correales, *supra* note 138, at 112.

187 Correales, *supra* note 138, at 111.

188 Wishnie, *supra* note 4, at 213.

189 Lyon, *supra* note 30, at 595.

190 *Id.*

191 Correales, *supra* note 138, at 136.

immigration laws are widespread in places like the garment industry.[192]

Along these lines, the IRCA may have "weakened or sever[ed] the civic ties that would otherwise connect millions of immigrants to agencies and officials whose public mission has nothing to do with immigration enforcement,"[193] because illegal immigrants may be afraid of deportation and losing their jobs if they come forward and their status is made public.[194] Deportation proceedings are costly and often involve detention for long periods of time,[195] and since many unauthorized workers send money home to their families, this is not something they can afford. Because of the high percentage of unauthorized workers employed in agriculture, they may be disproportionately affected by the IRCA.[196] Their fear often keeps them from reporting work-related injuries within the statute of limitations period.[197] However, all unauthorized workers who are excluded from Legal Services Corporation funded assistance are subject to having their rights undermined further.[198]

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192 *Id.*

193 Lyon, *supra* note 30, at 595.

194 *Id.* at 596. *See also* Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355 (2008) (An article that outlines issues faced by unauthorized workers, such as: "they could be reported to the Bureau of Immigration and Customs Enforcement and deported, charged criminally and/or barred from reentering the country.").

195 Lyon, *supra* note 30, at 596.

196 *Id.*

197 *Id.* at 597.

> In farm labor camp presentations, even when supervisors are not present, few potential cases emerge on the spot; workers report that everything is fine, passively accept business cards, then call days or months later, often after they have moved to a new job. As a result, workers with on-the-job injuries that did not necessitate immediate emergency room care often miss the statute of limitations to notify their employers about the injury. [T]he dollar figure of a settlement or award can be negatively affected if the client is unauthorized, [and] because clients are anxious to stay out of court and limit their involvement with formal processes that might expose them to deportation.

Id. at 596–97.

198 *Id.*at 595.

Some employers may misuse the ruling in *Hoffman*, "such as by informing employees that U.S. labor laws do not protect illegal workers, or demanding immigration documents when a worker alleges a violation of workplace rights."[199] In fact, employers may decide to specify what documents employees must produce for the IRCA verification system, and many employees may not understand that the employer cannot do so. In such situations, "courts continued application of remedies such as FLSA protections seems a more effective course toward reducing illegal employment [than strict IRCA enforcement]."[200] In fact, the NAACP and AFL-CIO have recanted their support for the employer sanctions approach in the IRCA, and have publicly declared their opposition to it.[201] This is at least partially due to evidence that sanctions under the IRCA caused discrimination.[202] Common cases involve employers hiring undocumented workers, abusing them, and then using the threat of deportation against them.[203] An amicus brief filed on behalf of Castro in *Hoffman*, cited numerous examples of such abuses.[204]

One hypothetical situation that the IRCA does not deal with regards an illegal worker who is not officially hired, and thus does not need to present false documents. Such a worker would not violate the IRCA because the IRCA does not expressly criminalize an undocumented worker's seeking or accepting employment[205] unless the worker does something to violate the statute in the process. As long as an employer does not knowingly officially hire an undocumented worker and violate the provisions in the IRCA, no law has been broken. Along those lines, denying workers' compensation to unauthorized workers can encourage evasion of workplace safety rules, which would harm both legal and illegal workers alike.[206] In fact, it may make unauthorized workers more desirable to employers

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199 Smith, *supra* note 115, at 387.

200 *Id.*

201 Wishnie, *supra* note 4, at 208.

202 *Id.*

203 Correales, *supra* note 138, at 137.

204 *Id.*

205 Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 140 (2009).

206 Correales, *supra* note 138, at 155.

who know they can exploit them, which will lessen the number of jobs available to legal residents.[207]

Moreover, even fixing *Hoffman* by allowing immigrants to be eligible for backpay is not helpful, "because so long as immigration law forbids the employment of unauthorized immigrants, the traditional make-whole remedy of reinstatement will be unavailable."[208] It appears that even if an employer violates the IRCA, it may still "invoke the formidable powers of the government's law enforcement apparatus to terrorize its workers and suppress worker dissent under threat of deportation."[209]

V. CONCLUSION

Many courts have applied the *Hoffman* decision to deny backpay to undocumented workers. However, the courts that allow it seem to rely on state laws and the application of statutes other than the IRCA, such as the FLSA. *Hoffman* reasons that backpay for undocumented workers for work not performed is illegal under the IRCA. In applying the FLSA, courts have allowed undocumented workers to pursue lost wages claims for work already performed, even though *Hoffman* deems undocumented workers as unavailable for work during the period they are illegally present in the United States. Most jurisdictions have allowed undocumented workers to recover workers' compensation despite their immigration status, finding that the immigration status has nothing to do with an injury suffered in the course of employment.

Other courts have applied state personal injury laws to allow undocumented workers to raise claims of unpaid future wages under tort law. Some have reasoned that Congress did not intend to surpass such state personal injury laws, and others have reasoned that unless preemption is expressly brought up by the employer, it is waived as a defense. For example, under a 2002 California statute, state labor protections apply to all workers regardless of immigration status, and the statute authorizes state courts and agencies to rule on a worker's claim of backpay. The statute provides a civil penalty in the form of backpay against an employer found liable for unfair treatment.

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207 *Id.*

208 Wishnie, *supra* note 4, at 216.

209 *Id.*

Moreover, "[i]n cost-sensitive, labor-intensive industries that rely on low-wage workers, employers who obey labor and immigration laws are at a competitive disadvantage with firms that hire undocumented workers and violate labor standards laws."[210] The actual risk of being fined for an IRCA violation is low, and the cost-savings from employing an undocumented worker is substantial since there is no risk of a high monetary fine in the form of backpay.[211] Thus, unscrupulous employers have done so and gained the unfair competitive advantage that such a practice allows.[212] As a result of this practice, law-abiding employers often hire undocumented workers indirectly through subcontractors to avoid suffering the consequences of unfair competition.[213] Unscrupulous employers can also decide to close shop and terminate all employees if they receive a cease and desist order.[214] They could then reopen under a different name with no cease and desist order on their record, continuing this practice indefinitely.[215] It would be almost impossible to prove a knowing violation of the IRCA by an employer.

As such, instead of making the law regarding remedies for undocumented workers more uniform, *Hoffman* has created further complications in the analysis courts pursue regarding this issue. Short of the Supreme Court considering the FLSA and preemption of state tort law with regard to the IRCA similar to its consideration of the IRCA and the NLRA in *Hoffman,* there is no remedy that can readily surface for undocumented workers.

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210 *Id.* at 213.

211 *Id.*

212 *Id.*

213 *Id.* at 213–14.

214 Berman, *supra* note 65, at 602.

215 *Id.*