Creative, Cost-Effective Advocacy In Low-Wage, Immigrant & Undocumented Worker Cases

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Immigration Enforcement Policies and Practices Related to Labor and Employment Claims

Did you know that . . .

Sometimes immigration enforcement gets in the way of labor enforcement?
Ey what's up! I give you back the tools! Now I want my pay!?

Sent: May 1, 2:03 PM

I had every intent of paying everyone!! I haven't got paid yet. Play games with me!! Now I will use the people I know from the days I worked at the

May 31, 9:31 PM

Prison! My friends work in SA with INS, your the only one that won't get sent back, tell that to them!!!

May 31, 9:32 PM

Don't worry, my lawyers told me that you'd say that, ! So we're not afraid

You might want to tell the guys who filed the lien, I'm going to do whatever it takes to have them sent back to Mexico!! and his attorney can't

May 31, 10:24 PM

Stop or help them!! started this big problem. Ins will go to where they bought their trucks and come to where they live!! No more work with

May 31, 10:25 PM

I'm going to tell INS and the texas work comission abt giving them work, if I get in trouble everybody is in trouble!!
Even ICE doesn’t like that.

ICE “respects the labor rights of workers, regardless of immigration status.”

“When information is received concerning the unauthorized employment of aliens, consideration should be given to whether the information is being provided for the purpose of interfering with a genuine labor organizing campaign or employment dispute between workers and the management or ownership of the business or organization.”
Overview

Immigration Enforcement Policies and Practices Related to Labor and Employment Claims

- ICE Enforcement priorities
- ICE Guidance on Non-Interference in Labor Disputes
- MOU between DHS (ICE) and Labor Agencies
- Prosecutorial Discretion
- U and T Visas
And then . . .
Trump’s immigration strategy

“Anyone who has entered the United States illegally is subject to deportation. That is what it means to have laws and to have a country. Otherwise we don’t have a country.”

“You’re going to have a deportation force.”

“Day one, my first hour in office, those people are gone. And you can call it deported if you want...you can call it whatever the hell you want, they're gone.”
Trump’s immigration strategy

“There could certainly be a softening because we're not looking to hurt people. We have some great people in this country.”

“No, I would not call it mass deportations.”
ICE Enforcement Priorities

Pre-Trump

- Reality: can’t deport 11 million people
- 2014 DHS Memo
  - Enforcement priority tiers
    - 1) threats to national security, border security, and public safety;
    - 2) misdemeanants and new immigration violators; and
    - 3) other immigration violations
- DACA: deferred action for childhood arrivals
ICE Enforcement Priorities

Now that America is great again

  - “Cannot . . . exempt classes or categories of removable aliens from potential enforcement.”
- Secretary shall hire 10,000 new immigration officers
  - Subject to the availability of appropriations
  - So far, appropriations not available
  - Reality: still can’t deport 11 million people
ICE Enforcement Priorities

Now that America is great again

Jan. 25, 2017 EO Priorities:

(a) Have been convicted of any criminal offense;
(b) Have been charged with any criminal offense, where such charge has not been resolved;
(c) Have committed acts that constitute a chargeable criminal offense;
(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.
ICE Enforcement Priorities

Now that America is great again

- Essentially labels all undocumented immigrants as “criminal aliens.”

- Summary: Everything is a priority.
  - **Priority**: (noun) something given or meriting attention before competing alternatives
  - **Oxymoron**: (noun) a combination of contradictory or incongruous words

- Q: How will ICE use its limited resources?
  - A: Unpredictably.
Prosecutorial Discretion

Pre-Trump

- 2011 ICE Memo
  - Examples:
    - Canceling a notice of detainer or Notice to Appear (NTA);
    - Focusing enforcement resources on particular violations or conduct;
    - Deciding whom to stop, question, arrest, or release;
    - Settling or dismissing a proceeding;
    - Granting deferred action, granting parole, or staying order of removal;
    - Joining in a motion to grant relief or a benefit.
Prosecutorial Discretion

Pre-Trump

- 2011 ICE Memo
  - Consider various factors, including “whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.”

- Effort to establish protocol for proactive requests
Prosecutorial Discretion

Now that America is great again

- Feb. 20, 2017: DHS Memo implementing EO
  - “shall be made on a case-by-case basis”
  - “shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement.”
  - “all existing conflicting directives . . . are hereby immediately rescinded—to the extent of the conflict.”
Prosecutorial Discretion

Now that America is great again

- Feb. 20, 2017: DHS Memo implementing EO
  - Q: To what extent did any “existing conflicting directives” conflict?
U and T Visas

8 U.S.C. §§ 1101(a)(15)(T), (U)

- **T Visas**: victims of human trafficking
- **U Visas**: victims of certain crimes
  - 28 qualifying crimes or similar criminal activity, including:
    - Fraud in Foreign Labor Contracting, Trafficking, Sexual Assault, Extortion, Obstruction of Justice, Witness Tampering, Perjury
  - Helpful to government/law enforcement investigation or prosecution
    - Government/law enforcement agency must certify
      - DOL, EEOC, NLRB, judges, prosecutors
  - Suffered substantial physical or mental abuse
U and T Visas

- Government *generally* prohibited from disclosing info
  - Includes labor agencies, DHS, DOJ, State Dept.
  - Some vague exceptions “for legitimate law enforcement” or agency purposes
- But individual litigants might have to produce application documents in discovery
  - See *Cazorla v. Koch Foods* (5th Cir. 2016).
U and T Visas

Now that America is great again

- Will DHS exploit exceptions to prohibition on disclosure?
- Feb. 20, 2017 Memo implementing interior enforcement EO:
  - DHS “will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents.”
  - DHS “will develop new guidance specifying the appropriate treatment of personal information DHS maintains in its record systems.”
ICE Guidance on Non-Interference in Labor Disputes

Pre-Trump

- 1996 - 2016: Operating Instruction 287.3a, Questioning Persons During Labor Disputes
  - List of questions to ask informants
    - Whether ongoing labor dispute
    - Names of informants
    - How the informant obtained info
  - If ongoing labor dispute, no action without higher approval
MOU between DHS (ICE) and Labor Agencies

- 2011 MOU between DHS and DOL
  - Revised a 1998 MOU
- 2016 Addendum: EEOC and NLRB joined
- Purpose: reduce conflict between labor enforcement and immigration enforcement
MOU between DHS (ICE) and Labor Agencies

- If DOL has ongoing investigation/proceedings
  - DOL notifies ICE of worksites under investigation
  - ICE refrains from worksite enforcement activities
  - ICE allows DOL to interview detained persons
  - ICE considers DOL requests for parole/deferred action
- Implementation: slow and piecemeal
MOU between DHS (ICE) and Labor Agencies

- ICE “agrees to be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes.”

- “ICE will continue its existing practice of assessing whether tips and leads it receives concerning worksite enforcement are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws.”
ICE Guidance on Non-Interference in Labor Disputes

Pre-Trump: May 19, 2016 ICE memo
- Superseded OI 287.3a
- Eliminated list of questions
- Follow MOU deconfliction process
  - Assess whether tips made improperly to:
    - manipulate labor dispute,
    - retaliate against workers, or
    - frustrate enforcement of labor laws.
ICE Guidance on Non-Interference in Labor Disputes

Pre-Trump: May 19, 2016 ICE memo

- If no active investigation by DOL, EEOC, or NLRB
  - “there is no prohibition for enforcing immigration law even when a labor dispute is in progress.”

- Qualifications
  - Refer to all relevant existing policies
    - Treatment of victims and witnesses
    - Enforcement priorities
ICE Guidance on Non-Interference in Labor Disputes

Pre-Trump

- May 19, 2016 ICE memo
  - And the overarching guidance . . .
    - “Consideration should be given to whether the information is being provided for the purpose of interfering with a genuine labor organizing campaign or employment dispute.”
    - ICE “respects the labor rights of workers, regardless of immigration status.”
ICE Guidance on Non-Interference in Labor Disputes

Now that America is great again

- DHS MOU with labor agencies still in effect
- 2016 Memo still in effect
  - Main point: take ongoing labor disputes into consideration
  - Refer to Enforcement priorities
    - Little meaningful guidance under Trump
- Greater discretion to individual ICE offices/agents
  - Less predictability
Enforcement practices

Now that America is great again

- Increased enforcement in the interior of the country
- Enforcement at courthouses
  - Almost only hearings on criminal cases
  - El Paso incident: woman arrested at hearing seeking DV protective order
    - several felony convictions and previous deportations
Trump’s immigration strategy

“What we are going to do is get the people that are criminal and have criminal records, gang members, drug dealers, we have a lot of these people, probably two million, it could be even three million.”

“We're getting really bad dudes out of this country, and at a rate that nobody's ever seen before. And they're the bad ones. And it's a military operation.”
Trump’s immigration strategy

“President Obama has mass deported vast numbers of people — the most ever, and it's never reported. I think people are going to find that I have not only the best policies, but I will have the biggest heart of anybody.”

“Not very flexible. No, not very flexible. ... But there's always give and take. ... But we need give and take in government. If you don't have give and take, you're never going to agree on anything.”
Claims and Remedies Available to Undocumented Immigrants

A review of why taking on representation of undocumented immigrant and/or low wage clients can be both good for the soul and the good for your wallet.

Beardall and NELP

Maximizing results of fee-shifting statutes

Collecting on Judgments

Remember to tailor the damages/remedies you seek in light of Plaintiffs’ immigration status.

Litigation & Immigration Issues

➢ Tried and True Resources (Beardall / NELP outlines)

➢ Be ready to confront issues related to immigration status early on in litigation and discovery
  ➢ An in-depth intake is crucial to your ability to do this. Ask the hard questions early and of all plaintiffs, class members, etc.

➢ Did the client use an alias? A false SSN?
  ➢ See e.g. Rodriguez v. City of Highland Park, et al., 2002 U.S. Dist. LEXIS 22232 (N.D. Ill.) (November 14, 2002) (denying Defendants’ motion to dismiss and finding the use of a true alias, the name under which the Plaintiff was arrested, to fall short of a fraud on the court); Sanchez v. Litzenberger, 2011 U.S. Dist. LEXIS 18528, at *16-17 (S.D.N.Y. Feb. 24, 2011)
  ➢ See e.g. Bautista Hernandez, et al. v. Tadala’s Nursery, Inc., 34 F. Supp. 3d 1229 (S.D. Fla. 2014) (Judgement entered despite Defendant’s argument that the named Plaintiff could not recover under the FLSA because he utilized false documentation to secure and retain his employment and made false representations regarding withholdings on his IRS W-4 forms

➢ Protective Orders - how and when to use them
Litigation and Discovery, cont.

*Cazorla v. Koch Foods*, 838 F.3d 540 (5th Cir. 2016)

Lessons and Food for Thought

Conceding undocumented status

Discovery regarding U-Visa and Immigration Status is not necessarily prohibited per se despite 5th Circuit’s recognition that is “may have a chilling effect extending well beyond this case…”

The importance of identifying “Friend v. Foe” in Administrative Agencies

- This will likely vary based on venue, locale, and agency. Do your homework!
Litigation and Discovery, cont.

Streamlining your case and discovery to increase value

Keep it simple – Narrowly target the discovery you really need to prove your case

Using 30(b)(6) depositions and Requests for Admissions to focus discovery and fact issues

Screw the Defendant, Subpoena a 3rd Party!

Offers of settlements early / Regularly revisit to demonstrate reasonableness of your fees at the close of litigation.

Prepare arguments regarding future earnings, if requested, that address Plaintiffs immigration status

Counseling Clients About the Immigration-Related Risks of Pursuing Employment Claims

➢ EVALUATING RISK

▪ Real v. Perceived Risk (Fear in the face of Trump’s Propaganda)

▪ Likelihood of Employer Reporting to ICE

▪ Likelihood of ICE Responding to Employer Reports

▪ Enforcement Priorities and Your Client
Fighting Back when Employer Tries to Put Employee on ICE

➢ Causes of Action (FLSA, Title VII, AWPA, NLRA, state law retaliatory discharge claims, etc.)


➢ What constitutes retaliation?


◦ The plaintiff need only show "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

◦ “CONTEXT MATTERS.”
Fighting back, cont.

Examples of Retaliation:

At Employment

Usual Suspects: Termination, Failure to rehire/blacklisting, Terminating family members, Reducing pay, and Demotion


Deportation (real v. threatened)

Fighting back, cont. - “Any Person”

*Jose Arias v. Anthony Raimondo*, 2014 U.S. Dist. LEXIS 88024 (E.D. Cal. June 25, 2014) (holding Defendant’s attorney not an “employer” under the FLSA despite reporting employee to ICE on Defendant’s behalf)

v.

*Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 984 (M.D. Tenn. 2009) (holding employees stated a cause of action under FLSA for retaliation against County/Sheriff defendants for working in concert with employer)

“Again, the language of the FLSA provision at issue is very broad, prohibiting ‘any person’ from ‘discriminat[ing]’ against ‘any employee,’ because the employee has filed a covered workplace complaint.”
Fighting back, cont.

Litigation Tactics

Counter-claims
Discovery into immigration status
Discovery/Reporting potential criminal violations (e.g., use of false SSN, docs):

Beckham v. Grand Affair, 671 F. Supp. 415, 419 (W.D.N.C 1987)
Fighting back, cont.

Protective Orders and Sanctions for Witness Tampering / Intimidation


Ethical Constraints

Rule 4.4 of the Model Rules of Professional Conduct

Rule 4.4 (state rules) – prohibits threatening “criminal charges”
Counseling Clients About the Immigration-Related Risks, Cont.

➢ Interacting with Immigration Enforcement

➢ Contingency Planning:

➢ POAs, G-28s, Immigration Attorneys, etc.

➢ Balancing Risk v. Value of Enforcing Employment Rights – When is the reward worth the risk?
RESOURCES
AND GUIDES

NELP
- [http://www.nelp.org/content/uploads/2015/03/RightsandRemediesforUndocumentedWorkersinOrganizing.pdf](http://www.nelp.org/content/uploads/2015/03/RightsandRemediesforUndocumentedWorkersinOrganizing.pdf)
- *Workplace Rights and Remedies For Undocumented Workers: A Legal Treatise* - Haeyoung Yoon, Tsedeye Gebreselassie, and Rebecca Smith
- Join NELP!

NILC - National Immigration Legal Center

Equal Justice Center - “Practical Issues in Employment Litigation by Immigrant Employees” (in materials)
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I. INTRODUCTION

The application of employment law to immigrant workers – especially undocumented workers – and their employers is necessarily evolving as the law and our legal institutions struggle to catch up with the rapidly evolving economic and social reality. That reality includes the presence of approximately 11 million undocumented immigrants in the United States, including nearly 2 million in Texas, who now are a permanent and integral part of our workforce and our communities.¹ This paper attempts to outline the basic legal principles that apply to immigrant workers and their employers. The paper starts with the basic rule that immigrant workers – including undocumented workers – are generally covered by the same employment protections as other workers. The paper then discusses the significant qualifications, complications, and adaptations that arise, first, from the federal statutory prohibition on the hiring of undocumented workers; second, from the U.S. Supreme Court’s 2002 ruling in NLRB v. Hoffman Plastic Compounds, Inc.; and third, from the pragmatic need to reconcile our basic social ideals of employment fairness with the challenges posed by our rapidly transnationalizing society, economy, and labor market.

II. THE BASIC RULE: EQUAL EMPLOYMENT RIGHTS, REGARDLESS OF IMMIGRATION STATUS

Subject to the important qualifications discussed below in sections III and IV, the basic rule under U.S. and Texas law has been and remains that all employees are protected by the same fundamental employment rights, regardless of their immigration status. This includes U.S. citizens, lawful permanent residents, temporary residents (e.g. guestworkers, refugees, and asylees), and undocumented immigrant workers.

A. Basic Rule: Fair Labor Standards Act

The minimum wage and overtime provisions of the FLSA cover all employees without regard to immigration status – including undocumented workers.2 In addition the U.S. Department of Labor has indicated that it will fully enforce the FLSA (along with other employee protective statutes enforced by the USDOL) without regard to whether an employee is documented or undocumented.3

B. Basic Rule: Title VII and Anti-Discrimination Statutes

Protection of covered employees under Title VII and other federal anti-discrimination statutes generally extends to all such employees regardless of their immigration status – including undocumented immigrants.4 Although the law is still unsettled as to whether undocumented workers may seek certain remedies (See section IV.D. below), the Equal Employment Opportunity Commission has cited “the settled principle that undocumented


workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work.”

The Texas Supreme Court has stated that Texas Courts interpreting the Texas Commission on Human Rights Act (TCHRA) should follow federal precedent interpreting Title VII.

C. Basic Rule: National Labor Relations Act

Immigrant employees – including undocumented workers – are “employees” within the meaning of the NLRA and it is an unfair labor practice for an employer to discriminate against such immigrant employees in violation of the Act, regardless of their immigration status. As statutory employees, even undocumented workers "enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status." Undocumented employees may file charges with the NLRB, and the Board and the courts have authority to hold an employer liable for violations and impose remedies – except for the remedies of reinstatement and back pay, which may not be imposed where the employer unknowingly hired the undocumented worker and the worker obtained the job by providing false documents. (See, section IV. A. and B. below for further discussion of remedies.)

5 EEOC policy statement, at http://www.eeoc.gov/policy/docs/undoc-rescind.html. This policy statement, which was issued to revise previous EEOC policy statements in light of the Supreme Court’s Hoffman Plastic decision, goes on to declare: “When enforcing these laws, EEOC will not, on its own initiative, inquire into a worker's immigration status. Nor will EEOC consider an individual's immigration status when examining the underlying merits of a charge. The Commission will continue vigorously to pursue charges filed by any worker covered by the federal employment discrimination laws, including charges brought by undocumented workers, and will seek appropriate relief consistent with the Supreme Court's ruling in Hoffman. Enforcing the law to protect vulnerable workers, particularly low income and immigrant workers, remains a priority for EEOC.” Id.

6 The TCHRA explicitly invokes Title VII, articulating as its first purpose “to provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.” Tex. Lab. Code § 21.001(1); see Chevron Corp. v. Redmon, 745 S.W.2d 314, 316 (Tex. 1987) (affirming this legislative purpose). Texas courts look to federal law in construing the TCHRA. NME Hosps., Inc. v. Rennels, 994 S.W.2d 142, 144 (Tex. 1999) (because the TCHRA “purports to correlate state law with federal law” in the area of employment discrimination, “we look to analogous federal precedent for guidance when interpreting the Texas Act”) (citations and internal quotation marks omitted); Azubuike v. Fiesta Mart, 970 S.W.2d 60, 65 (Tex. App. Houston 14th Dist. 1998) (since the TCHRA embodies Title VII, there is a correlation of state law with federal law in the area of employment discrimination).


9 Id.
D. Basic Rule: Employment Claims under Texas Common Law and under Workers’ Compensation Laws

Immigrant employees – including undocumented workers – are entitled to sue and recover damages for common law tort and contract liability, regardless of their immigration status.10 (See, section IV. E. below for further discussion related to measuring lost earnings as a remedy in tort claims.)

With respect to workers’ compensation claims, the Texas Workers’ Compensation Act specifically provides that “a resident or nonresident alien employee or legal beneficiary is entitled to compensation,” Tex. Lab. Code §406.092(a), and administrative decisions by the Workers’ Compensation Commission have consistently held the Act to apply fully to immigrant employees – including undocumented employees.11 This is consistent with rulings in other jurisdictions where courts have nearly uniformly held that federal immigration law does not preclude undocumented immigrants from receiving workers’ compensation benefits.12 Similarly, the Fifth Circuit recently held in Bollinger Shipyards Inc. v. Director, Office of Worker’s Compensation Programs, 604 F.3d 864, 2010 (5th Cir., 2010), that the Longshore and Harbor Workers’ Compensation Act and its remedies are fully applicable to undocumented immigrants, based on reasoning that would seem to apply to most other workers’ compensation statutes as well.13 (See, section IV. E. below for further discussion related to measuring lost earnings under workers’ compensation statutes.)

III. THE IMMIGRATION REFORM AND CONTROL ACT (IRCA) AND EMPLOYERS’ DUTY TO VERIFY THE WORK-AUTHORIZED STATUS OF EMPLOYEES: AN EXCEPTION TO THE BASIC RULE

A. Under the IRCA Employers are Prohibited from Knowingly Hiring Unauthorized (Undocumented) Aliens

Although the basic rule underlying federal and state employment law is that all workers enjoy the same employment protections regardless of immigration status, a significant exception - and complication - was introduced in 1986 with enactment of the Immigration Reform and


12 See e.g., Economy Packing Co. v. Illinois Workers’ Compensation Comm’n, 387 Ill.App.3d 283 at 190; 901 N.E.2d 915, at 923 (Ill.App. 1 Dist., 2008).

13 As the Bollinger court explained: “[L]ike most other workers’ compensation statutes, the LHWCA’s remedial scheme, is a substitute for the tort claims that an injured employee could otherwise bring against his employer.” 604 F.3d at 878. Therefore, “it would not only be illogical but it would also serve no discernable purpose to accord illegal aliens the right to bring affirmative claims in tort for personal injury but deny them the right to pursue the substitutionary remedy for personal injuries sustained in the workplace.” Id. (quoting Mendoza v. Monmouth Recycling Corp., 288 N.J.Super. 240, 672 A.2d 221, 225 (1996)).
Control Act (IRCA). IRCA enacted sweeping changes to the U.S. immigration system. In what is arguably its most consequential revision, the IRCA established a comprehensive scheme designed to prohibit employers from knowingly employing undocumented immigrants. However, as it has turned out, many of this provision’s consequences have been unintended.

B. The IRCA Requirements for Verifying the Work-Authorization of All New Employees

The heart of the IRCA scheme for preventing the hiring of undocumented immigrants is a requirement that employers verify the work-authorized status of all newly hired employees at the time of hire. The specific IRCA verification requirements are detailed at 8 C.F.R. 274a.1, et seq. The key elements of the verification requirements are as follows:

- Employers are required to verify the work-authorization of all employees, normally within three days of hiring the employee.
- Employers must document their verification of each employee’s work-authorized status using Department of Homeland Security Form I-9, which the employer then must keep on file.
- One section of the form I-9 is completed and signed by the employer’s authorized representative; another section is completed and signed by the employee.
- As part of the I-9 verification process, the employer is required to examine and verify specified documents, produced by the employee, showing the employee’s picture identification and the employee’s authorization to work in the United States. The employer’s signature on the I-9 form attests under penalty of perjury that the employer has examined the appropriate documents.
- The acceptable forms of documentation which the employee may produce to document her work-authorized status are listed on the Form I-9 itself. For example, the employee may produce a single document that shows both picture-identification and employment eligibility (such as a passport or permanent resident card); or the employee may show two separate documents: one establishing her picture identification (such as a driver’s license) and a second document establishing her employment eligibility (such as a Social Security card).
- The employer is only required to examine the documents produced by the employee and determine that the documents reasonably “appear to be genuine” on their face. If the documents appear to be facially genuine, the employer is not required to investigate further.

15 Technically speaking, employers are prohibited from hiring employees who are “not work-authorized.” Immigration law experts will recognize that there are some narrow categories of aliens who are “documented” in the sense that they possess immigration documents allowing them to be lawfully present in the U.S., but whose documents not give them authority to work in the U.S. (Holders of a temporary tourist visa are an obvious example, though there many others.) However, for simplicity this paper uses the term “undocumented” synonymously with “not work-authorized,” since this usage, though imprecise, better comports with common parlance among employers, employees, and their attorneys and is unlikely to lead to confusion except in rare and technical circumstances.
• Even where the employee produces documents which appear to be facially genuine, the employer is prohibited from hiring an employee whom the employer knows to be unauthorized – either by virtue of actual knowledge or “constructive knowledge.” Constructive knowledge includes: (i) failure to properly complete the Form I-9; (ii) information available to the employer that would indicate that the worker is not authorized to work (to constitute constructive knowledge, such information must be grounded in actual facts or circumstances known to the employer as opposed to speculation or supposition.); or (iii) reckless or wanton disregard of the consequences of permitting someone else to bring unauthorized workers into the employer’s work force. “Constructive knowledge” is to be narrowly construed and requires “positive information that the employee was undocumented.”¹⁶ Interpreting constructive knowledge more broadly would risk encouraging the employer to avoid liability by engaging in prohibited discrimination. (See section III. D. below).

• The employer’s obligation to verify work authorization does not normally extend to independent contractors or the employees of independent contractors, absent actual or constructive knowledge that the contractor or the contractor’s employees are not work-authorized.

• The employer must verify the work-authorization of all new hires and may not single out employees who look, sound, or seem “foreign.”

• Ordinarily the employer may only verify an employee’s work-authorization once – at the time of hire – and after that may not re-verify the employee’s status absent special circumstances.

• The employee gets to choose which of the specified documents (or combination of documents) the employee will show to the employer. So long as the documents shown by the employee are among those specified as acceptable, the employer is prohibited from asking the employee to show more or different documents.

• The law places the obligation to verify work-authorization on the employer, not on the employee. If the employer fails to verify the employee’s work-authorization, then the employer is in violation of the IRCA, but the employee is not in violation.

• If the employee shows the employer work-authorization documents which are not genuine or makes a knowing misrepresentation on the Form I-9, then the employee may be in violation of the document fraud provisions of the IRCA.

• If the employee provides false documents to the employer and the employer knowingly hires the unauthorized employee, then both are in violation of the IRCA.

¹⁶ Aramark Facility Services v. SEIU Local 1877, 530 F.3d 817, 825 (9th Cir. 2008).
After an employer hires an employee in accordance with the I-9 procedures, it is unlawful for the employer to continue to employ the employee, if the employer knows the employee is or has become an unauthorized alien. On the other hand, an employer may continue to employ an employee who was properly verified at the time of hire, based on unexpired documents that appeared reasonably genuine on their face, unless the employer has since acquired positive information that the employee is undocumented. Moreover, under most circumstances, an employer is not allowed to later re-verify the status of an employee once the employee’s status has been properly verified at the time of hire.17

C. The Failure of the IRCA to Ensure that all Employees are Work-Authorized

Although the IRCA was supposed to ensure that all employees hired after 1986 would be work-authorized citizens or legal immigrants, in reality the participation of undocumented immigrants in the U.S. workforce has continued to increase more or less steadily since 1986. There are now approximately 11 million undocumented immigrants in the U.S., the vast majority of whom are employed. It is beyond the scope of this paper to discuss the economic, social, and political realities that appear to have overwhelmed the goals and mechanisms of the IRCA or to assess the array of alternative policy proposals currently being debated under the general rubric of “comprehensive immigration reform.”

However, there is at least one aspect of the current social and economic reality that it is vital for employment lawyers handling immigrant labor cases to understand, namely: What are the mechanisms through which all these millions of undocumented immigrants get hired into jobs in the U.S., notwithstanding the proscriptions of the IRCA? There are four primary mechanisms: (1) Undocumented job applicants present false work authorization documents and social security numbers which appear reasonably genuine on their face and which are readily obtainable through an underground industry that has sprung up in response to the market created by the IRCA. While many employers are genuinely unaware of the invalidity of these documents, a very large number of employers and their undocumented workers have tacitly adopted a “don’t ask/don’t tell” approach to compliance, so long as the documents seem reasonably genuine on their face; (2) In some cases the worker is hired using work-authorization documents that were once valid for that worker, but have since expired either prior to or after the date of hire; (3) A very large proportion of undocumented workers are hired without any real attempt by the employer to verify work-authorization, recognizing that detection and enforcement of non-compliance has been very low overall. In most, though not all such cases, the workers are employed off-the-books and paid in cash without employment records or participation in the payroll tax system; (4) Many businesses manage to employ undocumented workers while maintaining the semblance of compliance with work-authorization requirements by misclassifying undocumented workers as “independent contractors” or by contracting with an intermediary business or individual to act as the “independent” employer of the potentially undocumented workers. Of course some such independent contractor relationships may be legitimate; but many of these supposed independent contractor relationships - especially those motivated in substantial part by the desire to avoid work-authorization requirements - turn out on

17 Guidance for employers seeking to comply with the above requirements can be found at Look at the Facts, not at the Faces: Your Guide to Fair Employment, (U.S. Department of Justice, Civil Rights Division, Office of Special Counsel) http://www.usdoj.gov/crt/osc/pdf/publications/en_guide0507.pdf
closer inspection to be invalid under the established law defining employment and joint employment relationships.

D. The E-Verify Program: A Voluntary and Supplemental Method for Verifying the Work-Authorization of All New Employees

The E-Verify program (formerly called the “Basis Pilot program”) is a voluntary, internet-based program designed to supplement the I-9 employment-authorization procedures and to overcome the problem of undocumented workers being hired with false documents. Employers who voluntarily enroll in E-Verify still are required to follow all of the I-9 procedures for paper verification of newly-hired employees’ work-authorization; however, E-Verify enrollees are then also allowed to electronically verify the employee’s work-eligibility using databases maintained by the Department of Homeland Security (DHS) and Social Security Administration (SSA). The E-Verify program has been assiduously promoted by the DHS as a solution for the problem of the use of false documents by work applicants. E-Verify has also been strenuously criticized by many business, labor, and civil rights organizations, citing documented inaccuracies in the DHS and SSA databases and potential misuse of the database information. Key points about E-Verify include:

- With a few significant exceptions (noted below), employer participation in E-Verify is voluntary. Currently around 4% of America’s roughly seven and a half million employers have enrolled in the E-Verify program. Use of the E-Verify system is mandatory for:
  - Most employers in Arizona, Mississippi, Alabama, and South Carolina by virtue of state legislation;
  - Certain employers with large federal contracts that come under the Federal Acquisition Regulation and that contain a specific clause requiring E-Verify use;\(^{18}\)
  - Employers who contract with government agencies in sixteen states plus certain localities. (The Texas Legislature has on multiple occasions declined to enact such a requirement, though legislation has been introduced perennially.);
  - Employers required to use E-Verify as a consequence of a previous conviction (or plea bargain) for hiring unauthorized workers or engaging in unfair immigration-related employment practices.

- To enroll in E-Verify, an employer is required to execute a Memorandum of Understanding (MOU) with DHS and SSA agreeing to certain terms and restrictions governing the employer’s use of the system.

- To use the E-Verify system, the employer first must make a job offer to the employee, then must complete the I-9 form, and then must enter certain employee identification information from the I-9 (including name, date of birth, and Social Security number) into a form on the E-Verify website. The E-Verify system compares the employee information to information in DHS and SSA databases, and then either confirms that the employee is work-authorized or issues a “tentative non-confirmation” notice indicating that the system cannot confirm that the employee is work-authorized. The employer must notify the employee of a tentative non-confirmation notice. The employee then has eight federal working days to challenge the

\(^{18}\) Generally E-Verify participation is required for federal contracts over $100,000, lasting 120 days or more.
tentative non-confirmation. The employer cannot terminate or discriminate against an employee during the time she is contesting the tentative non-confirmation, no matter how long it takes the government to resolve the contest. If the employee does not contest a tentative non-confirmation, after receiving notice, then the non-confirmation becomes final and the employer must terminate the employee or run the risk of being found in violation of work-authorization laws.

- The E-Verify system is the subject of considerable ongoing political and policy debate relating to its accuracy, its potential discriminatory impact, the burdens it imposes on business, its potential for misuse by employers, its low efficacy as a check on use of false documents, and whether it should be made mandatory for additional categories of employers – or even all employers.19

E. The IRCA Prohibits Citizenship Discrimination

The IRCA contains provisions protecting U.S. citizens generally from employment discrimination based on national origin or perceived citizenship status, and protecting them in particular from discriminatory application by employers of the work-authorization verification requirements.20 Immigrants without work authorization are excluded from the protection of the Unfair Immigration-Related Employment Practices Act.21 This Act was adopted as a companion to the IRCA, and was intended to protect documented immigrants from discrimination that might result from the imposition of the IRCA’s employer sanctions provisions.

F. The Tension Between Enforcement of Employment Rights and the IRCA Prohibition Against Hiring Undocumented Workers

Considerable confusion, complexity, and instability have been introduced into the application of employment law to immigrant workers by the tension between (i) the basic rule that undocumented immigrant workers enjoy the same employment rights notwithstanding their immigration status; and (ii) the illegality under IRCA of hiring undocumented workers. Most of this tension is practical: Undocumented workers are often reluctant to enforce their legitimate employment rights because of their unauthorized status; Employers are insecure about hiring workers whom they know or suspect may be undocumented; Some employers exploit the fears of undocumented workers to lower wages and working conditions or to violate those workers’ employment rights, counting on the workers’ probable unwillingness to complain. From a specifically legal standpoint, the primary tension arises from the U.S. Supreme Court’s 2002 ruling in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) and revolves around (i) the question of the permissible remedies for violation of employment laws and (ii) the discoverability of complaining workers’ immigration status. These issues are addressed in the following section.

19 See, e.g., Chamber of Commerce v Whiting, 563 U.S. 582 (2011).
IV. **Hoffman Plastic: The Other Principal Exception to the Basic Rule**

As noted above the basic general rule in U.S. and Texas law has been and remains that all employees are protected by the same fundamental employment rights, regardless of their immigration status. One prominent exception to this basic rule emerged in 2002 with the U.S. Supreme Court’s ruling in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137; 122 S.Ct. 1275 (2002). The *Hoffman Plastic* decision introduced new uncertainties and disputes particularly with respect to the employment law remedies available to undocumented immigrants and the scope of allowable discovery related to a plaintiff-employee’s immigration status. This section focuses on those uncertainties and the resolutions that are still gradually evolving.

A. **Hoffman Plastic Restriction on Back Pay and Reinstatement Remedies under the NLRA**

*Hoffman Plastic* involved an employer that had committed a clear violation of the National Labor Relations Act by illegally terminating a worker for engaging in union organizing activity protected under the NLRA. The normal remedy for such a violation would have been reinstatement and back pay to compensate the worker for the employment he lost as a consequence of his illegal termination. However, because the worker was undocumented and had obtained the job by fraudulently providing the employer with false documents, and because the employer had not known the worker was undocumented at the time the worker was hired, the Supreme Court ruled 5-4 that the National Labor Relations Board (NLRB) could not order reinstatement or back pay as a remedy. The Court held that the worker was indeed covered by the NLRA, that the employer had indeed violated the Act, and that the Board could mandate remedies for the violation other than reinstatement and back pay. However, in the Court’s view the federal policy (embodied in the IRCA) prohibiting employment of undocumented workers, would be undermined if the employer were required to reinstate the worker or provide back pay for work the employee could not legally have performed and obtained only by fraudulently providing the employer with false documents. In essence the Court ruled that – at least under these facts – the federal IRCA work-authorization policy trumped the NLRB policy of relying on reinstatement and back pay as the Board’s most effective remedy for unfair labor practices.\(^{22}\)

The *Hoffman Plastic* decision has given rise to considerable subsequent controversy, litigation, and administration policy-making pertaining to the applicability of the Court’s ruling to enforcement actions under both the NLRA and under other employment laws. While the scope of the *Hoffman Plastic* precedent is still evolving, some general patterns have taken shape, as suggested below.

B. **Post-Hoffman Plastic Law on NLRA Claims**

Since the *Hoffman Plastic* decision, the Labor Board and the courts of appeal have continued to recognize the status of undocumented immigrants as “employees” covered by the National Labor Relations Act.\(^{23}\) The general counsel (GC) of the NLRB has issued guidance

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\(^{22}\) 535 U.S. 137, 146-152; 122 S.Ct. 1275, 1282-1285.

\(^{23}\) *Agri-Processor Co. Inc., v. NLRB*, 514 F3d 1 (D.C. Cir. 2008).
interpreting how *Hoffman Plastic* affects the agency’s practice and procedures. The NLRB GC has reaffirmed that undocumented workers are covered by the NLRA, and that an employer who discharges an employee in violation of the NLRA is liable regardless of the worker’s immigration status. The same GC statements indicate that undocumented workers will not be entitled to back pay for any period of time during which they lacked work authorization. Nor will reinstatement be ordered for undocumented workers who are illegally fired, unless they can show that they now have lawful employment status. Under the GC’s policy statements, back pay is unavailable to undocumented workers who “obtain employment with false documents,” whether or not the employer hired the workers knowing at the time they were undocumented, even though the Supreme Court in *Hoffman Plastic* did not address the rule that would apply where an employer had “knowingly employed” undocumented workers.

While the GC statements announced that the *Hoffman Plastic* decision ordinarily precludes back pay for “work not performed” as a remedy for undocumented workers, it did say that an undocumented worker could recover back pay where the worker’s pay or benefits have been illegally reduced in violation of the NLRA. This is because such a remedy makes the worker whole for work “they have already performed and for which they did not receive proper compensation.” On the other hand the GC policy statements left open the question of whether back pay is available to an undocumented worker who has been unlawfully demoted into a lower-paying position.

As for reinstatement, the GC policy statements indicate that “[c]onditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented discriminatees whom an employer knowingly hires.” The concept of “conditional reinstatement” was established in the Board’s pre-*Hoffman Plastic* ruling, *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408, 415 (1978), enfd. 134 F.3d 50 (2nd Cir. 1997); where conditional reinstatement is ordered, a previously undocumented worker is given a “reasonable period of time” to establish work eligibility and to comply with I-9 requirements, but would not be entitled to back pay during the period of time the worker was undocumented.

In a sequence of post-*Hoffman Plastic* administrative cases involving an employer who did knowingly hire undocumented workers, NLRB administrative law judges initially found that back pay was appropriate. However, these decisions were subsequently overruled by the National Labor Relations Board. The employees in these cases had not violated the IRCA and were employed by employers who failed to properly comply with their I-9 obligations. The ALJs had understood the workers to have been undocumented, but taking into account the fact that the employer had knowingly hired them, the ALJs had awarded the workers back pay up until the time that the workers received a valid offer of reinstatement. The Board, however, disapproved

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25. Id.

26. Id.

27. Id.

28. Id.

29. Id.

30. Id.
any such exception to the *Hoffman Plastic* rule - which the *Hoffman Plastic* decision itself had left open – ruling that even under these circumstances the back pay remedy is unavailable to undocumented workers under the NLRA.\(^{31}\)

On the other hand, from a practical standpoint perhaps the most significant post-*Hoffman Plastic* interpretation coming from the Labor Board is the NLRB GC statement that:

> “[T]he NLRA protects covered employees regardless of immigration status. Therefore, immigration status (or lack thereof) is generally not relevant either in representation proceedings or at the merits stage of unfair labor practice proceedings. … Regions generally should presume that employees are lawfully authorized to work. They should refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the discriminatee’s immigration status at the merits stage. Regions should investigate the discriminatee’s immigration status only after a respondent establishes the existence of a genuine issue [during the remedial stage].”\(^ {32}\)

Since the great majority of unfair labor practice charges never reach the remedy stage, but rather are resolved through settlements at the merits stage – before any question of the employee/discriminatee’s immigration status is permitted to arise – the question of the employee’s immigration status never enters the picture before the employee and employer typically find it prudent to settle an otherwise meritorious claim.\(^ {33}\)

Although the NLRB GC memorandum limits somewhat the reach of the *Hoffman Plastic* ruling, nevertheless *Hoffman Plastic* does potentially deprive undocumented workers of the most effective remedy – and the only monetary remedy – available in the NLRA scheme. Back pay may be the only substantial out-of-pocket cost that an employer incurs by illegally firing a worker. The NLRB has no authority to award punitive damages or any other remedy that would punish employers.\(^ {34}\) Critics of the *Hoffman Plastic* ruling contend that an employer who violates the Act may well do so without suffering significant economic consequences and workers will in many cases be less likely to exercise their remaining rights. Moreover, unscrupulous employers will have little reason to respect those rights, and law-abiding employers will be tempted to violate the law or face a competitive disadvantage.\(^ {35}\)


\(^{33}\) It is important to remember that undocumented employees do have the right to file a charge with the Labor Board to enforce their rights under the NLRA; they simply lack the right to invoke the normal reinstatement and back pay remedy should their charge ever proceed through the merits phase and reach the remedy phase. *Hoffman Plastic, Id.*

\(^{34}\) *Phelps Dodge Corp. v. NLRB*, 397 U.S. 99 (1970).

\(^{35}\) After *Hoffman*, the following remedies remain available to undocumented immigrants in the U.S.: an employer who illegally fires an unauthorized worker could still be ordered to post a notice about the violations of the law, and be told to “cease and desist” violating the law. In certain cases, an employer who violates the law again, would be subject to penalties
C. Post-Hoffman Plastic Law on Minimum Wage, Overtime, and Similar Wage-Hour Claims

Recovery by undocumented workers of “back pay” under the Fair Labor Standards Act minimum wage and overtime requirements have not been limited by the Hoffman Plastic decision. The Hoffman Plastic Court objected to the payment of back wages of the type that compensate for work the undocumented employee “had never performed.” In contrast, back pay under the FLSA represents unpaid wages that the employee actually earned, for work which the employee has already performed, but for which she was not properly compensated. Although there has been no reported case law or other authority, post-Hoffman, under the Texas Minimum Wage Act, the Texas Payday Law, or Texas Prevailing Wage Law, the same principles would logically apply to permit full recovery of unpaid wages without regard to the employee’s immigration status.

To avoid superficial confusion arising from ambiguous use of the term “back pay” in the post-Hoffman Plastic environment, many wage-hour practitioners have found it pragmatic to use the term “unpaid wages” – rather than “back pay” – when referring to unpaid minimum wages and overtime due to the employee for work that has already been performed.

[Section V.B. of this paper, discusses claims by undocumented workers for “back pay” as a remedy for employer retaliation violating the FLSA’s anti-retaliation provision.]

D. Post-Hoffman Plastic Law on Title VII and Similar Discrimination Claims

The Hoffman Plastic decision has encouraged arguments by employers that undocumented workers have no remedies under federal and state anti-discrimination laws. This argument was anticipated by Justice Breyer who, during oral argument of Hoffman Plastic, speculated that the majority’s position in that case would deny workers protection of “every labor law under the sun.”

for contempt of court. Importantly, the GC has left open the possibility that “extraordinary remedies” may be available to undocumented workers. Those remedies traditionally have been available only in cases where an employer committed pervasive or outrageous unfair labor practices. Fieldcrest Cannon v. NLRB, 97 F.3d 65, 74 (4th Cir. 1996). In those cases, the Board has required, for example, that the plant manager sign and read the cease-and-desist order directly to workers; that the employer publish the notice in local newspapers; that the employer grant the union access to the plant during an organizing campaign; that the union have equal time to respond to the employers’ speeches to workers on company property, and that the employer give the union the workers’ names and addresses. Three Sisters Sportswear Co., 312 NLRB 853 (1993). Villareal v. El Chile, Inc., 266 F.R.D. 207 (N.D.Ill., 2010); Chellen v. John Pickle Co., Inc., 434 F.Supp. 2d 1069 (N.D. Okla. 2006); Ponce v. Tim’s Time Inc., 2006 WL 941963 (N.D. Ill., 2006); Zavala v. Wal-Mart Stores, Inc., 393 F.Supp. 2d 295, 325 (D.N.J. 2005); Galaviz-Zamora v. Brady Farms, 230 F.R.D. 499 (W.D. Mich. 2005); Bernal v. A.D. Willis Company, Inc., No. SA-03-CA-196-OQ (W.D. Tex., San Antonio Div., April 1, 2004, unpublished order denying motion to compel)(attached); Renteria v. Italia Foods, Inc., 2003 WL 21995190 (N.D. Ill. Aug. 2, 2003); Flores v. Amigon, 233 F.Supp.2d 462 (E.D.N.Y. 2002); Zeng Liu v. Donna Karan International, Inc., 207 F.Supp.2d 191 (S.D.N.Y. 2002), citing In Re Reyes, 814 F. 2d 168 (5th Cir. 1987); Flores v. Albertsons, Inc., 2002 WL 1163623 (C.D. Cal. April 9, 2002); Singh v. Jutla, 214 F.Supp.2d 1056 (N.D. Cal. 2002); Cortez v. Medina’s Landscaping, No. 00 C 6320, 2002 U.S. Dist. LEXIS 18831 (N.D.IL. Sept. 30, 2002).

36 Tex. Lab. Code, Chapter 62
37 Tex. Lab. Code, Chapter 61
38 Tex. Govt. Code, Chapter 2258
Title VII of the federal Civil Rights Act (Title VII) and Texas Commission on Human Rights Act (TCRCH) protect workers’ rights to be free from discrimination based on several factors: sex, color, race, religion and national origin. \(^4^1\) The Age Discrimination in Employment Act (ADEA) protects workers’ rights to be free from discrimination based on age.\(^4^2\) The Americans with Disabilities Act (ADA) protects workers’ rights to be free from discrimination based on disabilities.\(^4^3\) The Unfair Immigration-Related Employment Practices Act protects certain immigrants from discrimination based on national origin and citizenship.\(^4^4\) Though the case law development post-

Hoffman Plastic is mixed and still far from conclusive, a key Ninth Circuit decision and a growing number of district court rulings following that decision, lend weight to the argument that Hoffman Plastic has no impact on discrimination claims.

1. **Title VII Pre-Hoffman: Undocumented workers entitled to the full range of remedies.**

After enactment of the IRCA, the courts had to take into consideration employer arguments that the relationship between an employer and an undocumented immigrant is illegal, and that undocumented immigrants are therefore not entitled either to the protection of the laws, or to the same remedies as are documented workers. Established case law, prior to Hoffman, largely held that undocumented workers are protected by federal employment discrimination laws.\(^4^5\)

2. **Title VII and other anti-discrimination laws post-Hoffman: EEOC reaffirms coverage, brings into question entitlement to back pay.**

Soon after the U.S. Supreme Court’s ruling in Hoffman, the EEOC clarified that undocumented workers are entitled to the protection of the laws it enforces. However, at the same time, the EEOC rescinded its former Guidance which clearly called for a back pay remedy. Entitlement to compensatory and punitive damages has not been addressed directly by the EEOC, though these remedies should remain available.

\(^4^2\) 29 U.S.C.A. § 621 et. seq.  
\(^4^3\) 42 U.S.C.A. § 12101 et. seq.  
\(^4^4\) 8 U.S.C.A. § 1324b.  

On the other hand, prior to Hoffman, the Fourth Circuit had held that pursuant to IRCA, at least in the hiring context, no one is entitled to Title VII protection unless he or she was qualified for employment. Egbona v. Time Life Libraries, Inc., 153 F.3rd 184 (4th Cir. 1998), cert. denied, 119 S.Ct. 1034 (1999). In Egbona, the employee’s work authorization had expired. When he re-applied for employment, he was rejected. Without analyzing whether or not the employer knew that Egbona was ineligible for employment or whether their was a “mixed motive” for its failure to rehire him, the Court made a broad statement that Egbona had no “cause of action” because he was not eligible to be employed in the United States. The same court had also held that the Age Discrimination in Employment Act did not protect foreign national applying for a job from outside the United States under the H-2A visa program because he was not authorized to work at the time of his job application, and therefore not qualified for the job. Reyes-Gaona v. North Carolina Growers’ Ass’n., 250 F.3d 861 (4th Cir. 2001).
After the *Hoffman Plastic* ruling, the EEOC rescinded its former “Enforcement Guidance on Remedies Available to Undocumented Workers,” which strongly favored enforcement on behalf of undocumented workers. In doing so, the EEOC reaffirmed that it will continue to enforce its statutes on behalf of all employees, including undocumented workers. The EEOC stated that “[t]he Supreme Court’s decision in *Hoffman Plastic* in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes.” The Guidance does not clearly say that the EEOC considers the undocumented no longer eligible for back pay. However, it does say that the EEOC’s previous determination that undocumented workers were entitled to back pay was based on the NLRA.

In practice, the EEOC has continued to pursue actions against employers who violate the anti-discrimination laws, regardless of the immigration status of the employees who suffer the discrimination. See, “EEOC and DeCoster Farms Settle Complaint for $1,525,000”, EEOC Press Release, September 30, 2002. Accordingly, most courts that have interpreted *Hoffman Plastic* in the employment discrimination context have focused on what remedies are available to undocumented workers.


Potentially undocumented plaintiffs’ entitlement to back pay under Title VII received favorable treatment in the Ninth Circuit’s decision in *Rivera et al. v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), *cert. denied, NIBCO, Inc. v. Rivera*, 544 U.S. 905 (2005). There, the defendants had argued that after *Hoffman Plastic* plaintiffs could no longer claim back pay for violation of the anti-discrimination provisions of Title VII, and that the defendant employer was therefore entitled to disclosure of the workers’ status in discovery. The Ninth Circuit upheld a protective order issued by the lower court, and in favorable *dicta*, said that “we seriously doubt” that *Hoffman Plastic* applies to Title VII cases, given that (1) Title VII depends on private causes of action, rather than the actions of the NLRB, (2) Title VII includes remedies designed to punish employers; and (3) federal judges, not the NLRB, decide appropriate remedies in Title VII cases.

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47 The EEOC enforces Title VII, the ADA, the ADEA, and the Equal Pay Act.


49 *Id.*; One court has indicated that it might distinguish back pay under the NLRB from back pay under Title VII; however, the issue was not squarely addressed and ruled on in that particular case. *De la Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002).

50 See also, *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (C.D. Ill. 2002) (defendant’s Motion to Compel production of documents confirming plaintiff’s legal authorization to work during time employed by defendant and production of documents demonstrating plaintiff’s current work authorization was denied as irrelevant to the question of post-termination back pay which was for a limited period). The *De La Rosa* court noted, “Back pay may only be denied for reasons which ‘if applied generally would not frustrate the central statutory purposes of eradicating discrimination...and making persons whole. [Citations omitted]. Coupled with the authority of a federal court as opposed to the NLRB, the Court cannot conclude at this time that Hoffman is dispositive of the issues raised in the motion to compel and plaintiffs’ responses.” 210 F.R.D. at 239. (Emphasis added).
Following *Rivera v. NIBCO*, a number of other courts have held that immigration status is not relevant to claims under Title VII at least at the liability phase of trial. Nevertheless, the right of undocumented plaintiffs to obtain back pay and front pay remedies for violations of Title VII remains unclear. Several courts have, like *Renteria*, considered extending *Hoffman Plastic* to other contexts such as FLSA and Title VII claims, to deny back pay to plaintiffs. In other cases, plaintiff’s counsel elect to forego these remedies in order to keep questions about the plaintiff’s immigration status out of the litigation.

Undocumented workers’ rights to compensatory and punitive damages remain unclear post-*Hoffman Plastic*. The 4th Circuit’s ruling in *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 186-87 (4th Cir. 1998) (discussed supra) stands in stark contrast to *Rivera*, and can be read to bar undocumented workers’ rights to any recovery under Title VII. Furthermore, the Supreme Court’s decision in *Hoffman Plastic* could be read broadly to disallow any recovery by undocumented workers based on “work not performed.” *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 149 (2002). Still, much case law suggests that both compensatory and punitive damages, at least, should be available to undocumented claimants. For example, in *Chellen v. John Pickle Co.*, 446 F.Supp.2d 1247, 1277, 1287-88, the court granted the Plaintiffs, all undocumented workers, both compensatory and punitive rights under their § 1981 and Title VII claims. *Chellen* dealt with egregious violations against Plaintiffs who were misled by their employer to think that their visas obtained by the Defendants allowed them to work legally. *Id.* at 1277-78. The court did not even consider *Hoffman Plastic* in its analysis assessing compensatory and punitive damages. *Id.* at 1287-88.

Since compensatory damages are not related to an individual’s legal ability to work, they should not be affected by the Court’s ruling in *Hoffman Plastic*. In an analogous context, two federal courts – in California and Illinois – have held that compensatory and punitive damages are available to unauthorized immigrants for retaliation under the Fair Labor Standards Act. In

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53 See, e.g., *Escobar v. Spartan Security Service*, 281 F.Supp.2d 895 (S.D. Tex., 2003)(where the Title VII plaintiff conceded in response to Defendant’s motion for summary judgment that he was not entitled to back pay, but the court nevertheless did make clear that the immigrant worker, now authorized to work, would be entitled to front pay and reinstatement if he prevailed on his claims under Title VII); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1277-78, 1280, 1286-88 (N.D. Okla. 2006), (where the EEOC did not pursue back pay, the court stated that Hoffman Plastic “may preclude an award of back pay” for work that was not actually performed); *Lopez v. Superflex, Ltd.*, No. 01-CIV-10010, 2002 WL 1941484, at *1 (S.D.N.Y. Aug. 21, 2002), (where Plaintiff, in response to the ruling in *Hoffman Plastic*, withdrew a claim for back pay).
Singh v. Jutla, a worker, whose employer turned him in to the then-INS shortly after settling a claim for unpaid wages, was found eligible for compensatory and punitive damages. Singh v. Jutla & C.D. & R's Oil, Inc., 214 F.Supp.2d 1056 (N.D. Cal. 2002). In Renteria v. Italia Foods, 2003 WL 21995190, the court held that compensatory damages would still be available to unauthorized workers post-Hoffman.54 Prior to Hoffman, the Second and Seventh Circuits had held that punitive damages are recoverable under Title VII even in the absence of any other damage award. See, Cush-Crawford v. Adchem Corp., 271 F.3d 352, 354 (2d Cir. 2001); Timm v. Progressive Steel Plating, Inc., 137 F.3d 1008, 1009 (7th Cir. 1998).

E. Post-Hoffman Plastic Law on Employment Claims under State Common Law and under Workers’ Compensation Laws

The Hoffman Plastic ruling so far has not been read to place any limitations on Texas state law employment claims by undocumented immigrant workers. The Court in a prior decision in DeCanas v. Bica, 424 U.S. 351, 356 (1976) recognized that states have “broad authority under their police powers to regulate the employment relationship to protect workers within the State.” As noted above, Texas tort law, contract law, and workers’ compensation laws have been held to be generally enforceable by plaintiffs regardless of their immigration status.55 That has generally been true in other states as well, but not without some contrary rulings and disparate interpretations.56

However, a different question arises with respect to the claim that the IRCA and/or Hoffman Plastic limit the state law remedies that an undocumented immigrant may seek –

54 But, see, a state court decision finding that an unauthorized worker was not entitled to claim either economic or non-economic damages in a state discrimination claim, Crespo v. Evergo Corp., 2004 WL 229336 (N.J. Super.A.D. Feb. 9, 2004).
55 See Section II.D. above.
specifically the undocumented immigrant’s right to recover for lost future earnings.\(^{57}\) This argument can take two forms: (1) an argument that the undocumented worker cannot claim any recovery for lost earning capacity, because the worker was not authorized to work in the U.S. and therefore could not legally have earned compensation; or (2) an argument that the undocumented worker’s lost earnings should be measured according to what the worker could potentially have earned in her own home country, rather than what she would have earned in the U.S. The Texas courts and the Texas Workers Compensation Commission have consistently held that “Texas law clearly allows for the recovery of damages for lost earning capacity, regardless of the claimant’s citizenship or immigration status.” \(^{58}\) Tyson Foods, Inc v. Guzman, 116 S.W.3d 233, 244 (Tex. App. – Tyler 2003). While no Texas court has squarely addressed the argument that lost earning capacity should be measured by reference to an undocumented worker’s home country, most existing authorities seem to presume that earning capacity should ordinarily be measured in the conventional manner according to the workers’ future earning capacity in Texas,\(^{59}\) with the possible exception of a case with facts showing the employee’s imminent deportation.\(^{60}\)

The Fifth Circuit recently ruled that Hoffman Plastic does not limit either the coverage or the remedies available to undocumented workers under the federal Longshore and Harbor Workers’ Compensation Act, including its monetary remedies. \(^{58}\) Bollinger Shipyards Inc. v. Director, Office of Worker’s Compensation Programs, 604 F.3d 864 (5th Cir., 2010). In distinguishing Hoffman Plastic, the Bollinger court observed that “unlike the NLRA, but like most workers' compensation statutes, the LHWCA's remedial scheme is a substitute for the tort claims that an injured employee could otherwise bring against his employer.” 604 F.3d at 878.

An interesting discussion of some of the complexities lurking within the issue of assessing future earnings by an undocumented employee can be found in Republic Waste Services, Ltd. v. Martinez, 335 S.W.3d 401 (Tex. App. – Houston [1 Dist.], 2011). That decision, an appeal in a wrongful death case, notes how an assessment of an undocumented employee’s lost future earnings could perhaps take into account the intention and the incentives for an undocumented employee to remain in the U.S., the likelihood that he might subsequently return to or be deported back to his low-paying home country, and even the likelihood that he would in that latter event come back to the U.S. after being deported. In the end, however, the Court of Appeals held that such contingencies are so highly speculative, especially when weighed against the near-certain prejudicial impact of evidence regarding the deceased employee’s immigration status, that the trial court was justified in exercising its discretion to exclude any evidence about the deceased employee’s immigration status and in allowing the jury to assess lost future


\(^{59}\)  See e.g., Hernandez v. M/V Rajaan, 848 F.2d 582 (5th Cir.1988) (per curiam) (on rehearing), amending 841 F.2d 582 (5th Cir.1988) ; Librado v. M.S. Carriers, Inc. 2004 WL 583602 (N.D.Tex., 2004); Contreras, Id.; Guzman, Id.; Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 770 n.1 (Tex. App. – El Paso 1993, writ denied); Funk Farms, Inc. v. Montoya, 736 S.W.2d 803, 805 (Tex. App. – Corpus Christi 1987).

\(^{60}\)  Hernandez v. M/V Rajaan, Id.; Librado v. M.S. Carriers, Inc. Id.
earnings according to what the undocumented employee would have earned working in the U.S. for the next 35 to 40 years.\footnote{The court did not even consider the further possibility that the sometime during those 35 to 40 years remaining in the deceased employee’s work life, Congress might have enacted comprehensive immigration reform, enabling the employee to legalize his status, come out of the shadows, and command a higher wage rate.}

\section*{V. Discoverability of Immigration Status}

The post-\textit{Hoffman Plastic} legal issue that has perhaps generated more case law than any other is the question of the discoverability of a plaintiff/employee’s immigration status. Often employers in litigation seek such information, ostensibly for its relevance to a legal issue in the case, but perhaps in many cases as much for its potential chilling effect on the plaintiff or its potential to prejudice the judge or jury.

\subsection*{A. Balancing relevance against prejudice and chilling effect}

Courts have broad discretionary authority under federal and state rules of civil procedure to protect a party from discovery, whenever the prejudice to that party outweighs the probative value of the information sought.\footnote{Fed. R. Civ. P. 26(c) and 30(d)(4); Fed. R. Evid. 403; and Tex. R. Civ. P. 192.6(b).}

A growing body of case law in the employment context holds that a court may prohibit discovery of a plaintiff-employee’s immigration status where such discovery is either not relevant at all to the essential elements of the underlying claim, or where the relevance is so slight or tangential that it is outweighed by the potential prejudice and chilling effect of allowing the discovery.\footnote{E.g. \textit{Rivera v. NIBCO, Inc.}, 364 F.3d 1057, 1064 (9th Cir. 2004); \textit{In Re Reyes}, 814 F.2d 168, 170 (5th Cir. 1987), cert. denied sub nom. Griffin & Brand of McAllen v. Reyes, 487 U.S. 1235 (1988) (issuing writ of mandamus to overturn a federal district court decision allowing discovery into FLSA plaintiffs’ immigration status because it “could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry into their private lives which was not justified, and also because it opened for litigation issues which were not present in the case"}); \textit{Reyes v. Snowcap Creamery, Inc.}, 898 F. Supp. 2d 1233, 1235–36 (D. Colo. 2012); \textit{E.E.O.C. v. DiMare Ruskin, Inc.}, No. 2:11–CV–158–FTM–99, 2012 WL 12067868, at *4–5 (M.D. Fla. Feb. 15, 2012); \textit{Demaj v. Sakah}, No. 3:09 CV 255 JGM, 2012 WL 476168, at *3–6 (D. Conn. Feb. 14, 2012); \textit{Castillo v. Hernandez}, No. EP–10–CV–247–KC, 2011 WL 1528762, at *8 (W.D. Tex. Apr. 20, 2011); \textit{E.E.O.C. v. Willamette Tree Wholesale, Inc.}, No. CV 09–690–PK, 2010 U.S. Dist LEXIS 97380 at *13 (D. Or. July 8, 2010); \textit{David v. Signal Intern., LLC}, 257 F.R.D. 114, 122 (E.D. La. 2009); \textit{Avila–Blum v. Casa de Cambio Delgado, Inc.}, 236 F.R.D. 190, 192 (S.D.N.Y. 2006); \textit{E.E.O.C. v. Rest. Co.}, 448 F. Supp. 2d 1085, 1087 (D. Minn. 2006); \textit{E.E.O.C. v. First Wireless Grp., Inc.}, 225 F.R.D. 404, 405 (E.D.N.Y. 2004); \textit{Topo v. Dhir}, 210 F.R.D. 76, 78 (S.D.N.Y. 2002); \textit{Zeng Liu v. Donna Karan Int’l, Inc.}, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); \textit{De La Rosa v. N. Harvest Furniture}, 210 F.R.D. 237, 239 (C.D. Ill. 2002).} This chilling effect – also referred to in the case law as an \textit{in terrorem} effect – can be prejudicial not just to parties who are undocumented immigrants; many employees who themselves are U.S. citizens or documented legal immigrants may nonetheless be discouraged from going to court to assert their employment rights if they know the legal proceedings may draw attention to their immigration status and history or that of their families. \textit{Rivera v. NIBCO, Inc.}, 364 F.3d 1057, 1065 (9th Cir. 2004), cert. denied, 544 U.S. 905 (2005). For example, the employee may be a new citizen or new legal resident fearful of having her immigration history re-examined in a public proceeding. In addition, legal immigrants are acutely aware that inquiries into their own immigration status may lead to adverse immigration
consequences for other family members who are undocumented or whose immigration status is uncertain. See, e.g., Rivera, Id. at 1065.64

A number of decisions have specifically rejected contentions made by employers that discovery of such immigration-related matters should be permitted because they are relevant to the issue of the employee’s credibility, or because the employee’s statements in employment documents might be potential impeachment evidence, or because the employer purports to need such discovery in order to verify the true identity of the plaintiff-employee.65 In a non-employment case, the Texas Supreme Court broadly declared that a witness’s status as an undocumented immigrant “is not admissible to impugn the witness’s character for truthfulness.” TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 242-44 (Tex. 2010). The Court went on to say: “Even assuming the immigration evidence had some relevance, its prejudicial potential substantially outweighed any probative value. Even in instances where immigration status may have limited probative value as to credibility, courts have held that such evidence is properly excluded for undue prejudice under [Tex. R. Evid.] Rule 403.” Id. at 244.

In addition to prohibiting discovery of the plaintiff’s immigration status per se, courts have also recognized that the need for protection extends to those related inquiries—such as the employee’s social security information,66 educational history,67 place of birth,68 and tax

64 “Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.” Rivera, 364 F.3d at 1065.


documents—that could lead to disclosure of immigration status or put a plaintiff in jeopardy on account of his/her immigration status.

1. FLSA Cases

Courts are especially likely in FLSA cases to grant protective orders against discovery related to immigration status and to deny motions to compel such discovery. As Judge Garcia noted in refusing to compel discovery in *Bernal v. A.D. Willis Company, Inc.*, 

In addition, discovery into the plaintiffs’ immigration status poses a serious risk of injury to the plaintiffs outweighing any need for disclosure. As the court in *Liu* noted: “Even if the parties were to enter into a confidentiality agreement restricting the disclosure of such discovery…, there would still remain ‘the danger of intimidation, the danger of destroying the cause of action’ and would inhibit

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2. Discrimination Cases

Other courts have invoked the very same concerns in protecting plaintiffs from similar discovery in cases involving Title VII claims.72 It should be noted, however, that in Title VII and other employment discrimination claims there may be a closer balance between the prejudicial/chilling effect on the one hand and the degree of relevance on the other hand, since employment discrimination cases, unlike FLSA cases, may well involve claims for unearned back pay or front pay as well as reinstatement. As a result, the employer may have a stronger argument that Hoffman Plastic makes the employee’s immigration status relevant to the question whether the back pay, front pay, or reinstatement remedies are permissible. Plaintiffs, for this reason, sometimes decide to forego these specific remedies. Similarly, courts sometimes prohibit immigration-related discovery during the liability phase of the litigation, without necessarily reaching the question of its potential relevance in a remedy phase.73


Cazorla v. Koch Foods of Miss., L.L.C., a recent Fifth Circuit case, set forth general guidelines for courts determining whether to allow discovery of immigration status. 838 F.3d 540 (5th Cir. 2016). Koch Foods is an ongoing Title VII action brought by employees and the EEOC. During discovery, the employer sought to discover the employees’ U visa applications on the theory that some plaintiffs had fabricated their allegations in order to obtain U visas. Id. at 546-47. The Fifth Circuit held that 8 U.S.C. § 1367 prohibits the EEOC from producing U visa applications in discovery. Id. at 550-54. That statute applies to officials and employees of the Department of Justice, the Department of Homeland Security, and the Department of State, and it prohibits “use by or disclosure to anyone…of any information which relates to an alien who is the beneficiary of an application for relief under paragraph (15)(T), (15)(U), or (51) of section 101(a) of the Immigration and Nationality Act.” 8 U.S.C. § 1367. Because U visas arise from paragraph (15)(U), EEOC officials are not permitted to disclose U visa applications, including in

71 No. SA-03-CA-196-OG (W.D. Tex., San Antonio Div., April 1, 2004 unpublished order denying motion to compel).
the course of discovery. *Koch Foods*, 838 F.3d at 550-54. The Court found, however, that 8 U.S.C. § 1367’s prohibition on disclosure applied only to the EEOC, not to individual employees. *Id.* at 550-54.

*Koch Foods* also analyzed plaintiffs’ discovery obligations under Federal Rule of Civil Procedure 26(c). The Court highlighted three factors that must be balanced: (1) the probative value of the information to the party seeking discovery; (2) the hardship to the party against whom discovery is sought; and (3) the relevant public interests. *Id.* at 555. With regard to the first factor, the Court found that evidence regarding immigration status may have significant probative value where immigration benefits are alleged to have motivated or shaped the claims at issue. *Id.* at 555-59. With regard to the second factor, the Court found that employees had a serious fear of being fired, as well as a reasonable fear of being reported to immigration enforcement authorities, if the discovery was allowed. *Id.* at 559-61. Finally, the Court held that the district court erred by failing to consider the third factor, specifically, the interests of potential claimants in other cases and the interests of agencies that fight workplace abuse. *Id.* at 562-64. The Court noted that allowing discovery of immigration status may deter immigrant victims of abuse from stepping forward, frustrating the purpose of government agencies such as the EEOC, the NLRB, and federal and state departments of labor. *Id.*

The Court did not issue its own discovery order, instead remanding to the district court to devise an approach in line with the “broad contours” outlined by the Fifth Circuit. However, the guidelines laid out here suggest some possible arguments for barring discovery of immigration status, as well as some limitations.

C. Practical Considerations for Managing Discovery Issues

Where the plaintiff’s counsel is representing an employee who might be prejudiced by (otherwise irrelevant) questions related to immigration status, plaintiff’s counsel may want to consider first attempting to informally confer with counsel for the employer to try to establish an understanding that neither side will attempt to conduct immigration-related discovery on matters which are collateral to the principal issues in the dispute. If the employer-counsel still perseveres in seeking prejudicial immigration-related discovery, then the employee-counsel should consider objecting to written discovery and instructing the employee not to answer prejudicial questions in a deposition. An instruction not to answer is an extraordinary measure permitted only as an exception to normal procedure under which the deponent answers and objections are preserved for later ruling by the court. However, an instruction not to answer is the appropriate action where the prejudice, oppression, and chilling effect stem from the fact of being asked the questions and being required to answer in the first instance. If the employee’s

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74 The Court held that, even if a protective order prohibits the employer from disclosing the discovery evidence to immigration enforcement authorities, unlawful retaliation of this nature is common enough that employees may reasonably fear it. *Id.* at 560-61.

75 Plaintiffs urged the Court to hold that U visa applications are presumptively sensitive, on the order of tax returns. *Id.* at 549-50. The Court declined to consider this argument, however, holding that the plaintiffs waived this argument by failing to present it to the district court. *Id.*

76 Often the employer will have a comparable interest in avoiding inquiry into the employer’s hiring practices, including whether the employer has properly verified the work authorization of all its employees, and whether the employer has actual or constructive knowledge that some of its employees are undocumented.
counsel instructs the witness not to answer, counsel must be prepared to seek an immediate protective order in accord with Fed.R.Civ.P. 30(d)(3) or Tex.R.Civ.P. 192.6 – either adjourning the deposition before going any further or, more commonly, by entering an agreement among counsel to complete the deposition on all undisputed inquiries and then proceed after the deposition with a motion for protective order and/or motion to compel on the disputed immigration-related questions.

The party seeking a protective order has the burden of showing good cause. F.R.Civ.P. 26(c)(1). The employee’s counsel will need to carefully consider where to draw the line on questions that indirectly touch on immigration-related issues in order to determine which of those questions are sufficiently-related to, or likely lead to prejudicial disclosures regarding immigration status. The employee’s counsel will also need to consider which discovery actually is directly relevant to the specific elements of the employee’s principal case, and which discovery is merely collateral and thus objectionable. For example, where an employee has worked for an employer under an alias or a false Social Security number, the employer would normally be entitled to obtain narrowly-tailored information as to the employee’s real name and as to the alias and Social Security number the employee worked under. On the other hand, questions about why or how the employee used an alias or used that social security number are normally objectionable because they are collateral to the specific claims and defenses in the case, while having high potential for prejudice to the employee. Where appropriate, the employee’s counsel should consider stipulating at the outset to the employee’s correct name and to the name and social security number the employee worked under, precisely in order to preempt defense arguments about needing further discovery along these lines for the purpose of verifying the “true” identity of the employee, or the purpose of locating the employee’s work records.

A compromise solution sometimes proposed, is a confidentiality agreement among the parties limiting disclosure of potentially prejudicial immigration-related information to the current case and prohibiting disclosure to third parties. However, several courts have cautioned that such an approach does little to abate the serious chilling effect which inhibits employees from enforcing their rights.

In addition to causing potential prejudice, oppression, and chilling effects, a requirement that a plaintiff make disclosures in response to an employer’s immigration-related inquiries can potentially raise issues of self-incrimination and hence 5th Amendment privilege. If a plaintiff were undocumented, interrogation on matters that are otherwise peripheral to the litigation – e.g. use of social security documents, tax documents, and immigration work authorization documents - could nonetheless lead to that plaintiff suffering or reasonably fearing serious consequences such as detention, deportation, and/or criminal prosecution. As the Ninth Circuit noted in its *Rivera* decision, “by revealing their immigration status, any plaintiffs found to be undocumented

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77 *See, e.g. Avila-Blum, Id. at 192; E.E.O.C. v. Bice of Chicago, Id. at 583; Sandoval v. Am. Bldg. Maint. Indus., Inc., 267 F.R.D. 257, 277 (D. Minn. 2007).*

78 *It is clear that parties to a lawsuit are required to provide the correct name, address, and telephone number of the parties. E.g., Tex. R. Civ. P. 194.2(a)-(b).*


80 *E.g., Rivera v. NIBCO, 364 F.3d at 1064; David v. Signal Intern., LLC, 257 F.R.D. at 126; Rengifo, 2007 WL 894376 at *3; Zeng Liu, 207 F. Supp. 2d at 193.*

VI. RETALIATION AGAINST UNDOCUMENTED CLAIMANTS

A. Adverse Employment Actions in Retaliation Against a Title VII Claimant

The perceived risk to undocumented claimants seeking to enforce their employment rights is clear and pervasive – even if the actual risk is difficult to assess. Undocumented complainants making discrimination claims have a heightened vulnerability, which formed the basis for the Rivera v. NIBCO, Inc., court’s decision to disallow claimants’ inquiry regarding immigration status in the discovery phase of trial. 364 F.3d 1057, 1064-64 (9th Cir. 2004). This context of heightened vulnerability, on the one hand, makes undocumented workers especially susceptible to subtle retaliation while, on the other hand, it often makes the employer’s retaliatory motive particularly difficult to determine or prove. Yet the employee does have the burden to demonstrate that an employer’s actions and motives were retaliatory and in order to show retaliation, the employee must prove that the employer’s action would “dissuade a reasonable worker from making or supporting a charge of discrimination.” Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68 (2006).

Moreover, it is often uncertain what constitutes retaliation in an employment context where the employer is not legally permitted to employ the worker and the worker is not legally permitted to work. An employer who terminates an undocumented employee who has lodged a discrimination complaint can readily claim that the employer was merely trying to comply with the IRCA prohibition against employing an unauthorized worker. An instructive example is provided by two rulings in E.E.O.C. v. The Restaurant Co., 448 F.Supp.2d 1085 (D. Minn. 2006)(denying discovery of immigration status) and 490 F.Supp.2d 1039, 1051 (D. Minn. 2007)(denying employer’s motion for summary judgement). In that case the defendant employer suspended an employee who had previously complained of sexual harassment by a manager, until the employee could prove her work-authorized immigration status. In the first ruling, the court determined that the employer’s claim that it acted out of a good faith desire to comply with the immigration laws could indeed satisfy the employer’s burden of offering a legitimate non-discriminatory reason for its action (thereby shifting the burden back to the employee to show the proffered reason was pretextual). 448 F.Supp. at 1087-88. In the court’s second ruling it denied the employer’s motion for summary judgment ruling that there was a genuine fact dispute about whether the employer knew about the plaintiff’s unauthorized immigration status before she made her complaint.

81 Interestingly, the case was only before the court at that point on a dispute about whether the employer could conduct discovery into the plaintiff’s immigration status. The court prohibited that discovery reasoning the at that stage in the litigation all that was in issue in the retaliation claim was whether the employer had a good faith belief that the plaintiff was undocumented – not whether the plaintiff actually was undocumented. 448 F.Supp. at 1088.
Certainly, plaintiffs do not disagree that defendant has an obligation to verify that its employees have proper work authorization documents. However, plaintiffs argue that an employer cannot turn a blind eye to its employee's work authorization status, and then later use it as a pretext to terminate an employee when she complains about sexual harassment. If a jury finds that defendant knew about Torres's immigration status prior to the harassment investigation, it could reasonably infer that defendant's proffered reason for the adverse employment actions was pretextual.82

B. Adverse Employment Actions in Retaliation Against an FLSA Claimant

While the law has become quite clear that the Hoffman Plastic rationale does not in any way limit the rights of undocumented FLSA claimants to seek unpaid overtime and minimum wages (see Sec. IV.C. above), Hoffman may limit their remedies for employer retaliation prohibited under 29 U.S.C. §215(a)(3) of the FLSA. Some courts, citing Hoffman, have held that undocumented workers may not obtain reinstatement and back pay as remedy for unlawful FLSA retaliation, though they may still seek compensatory and punitive damages. E.g., Renteria v. Italia Foods, Inc., 02 C 485, 2003 WL 21995190, *6 (N.D. Ill. Aug. 21, 2003); Singh v. Jutla & C.D. & R's Oil, Inc., 214 F.Supp.2d 1056, 1061–61 (N.D.Cal.2002). In declining to allow front pay or back pay as remedies for an FLSA retaliatory discharge claim brought by undocumented claimants, the Renteria court stated that it was following Hoffman Plastic and that “awarding back pay [and front pay] to undocumented aliens contravenes the policies embodied” in the Hoffman Plastic decision even outside of the context of an NLRA claim. The Renteria court distinguished between these remedies and other remedies that it did allow – namely compensatory damages which the court said did “not assume the undocumented worker’s continued (and illegal) employment by the employer.”83

C. Retaliatory Threats or Reporting to Immigration Authorities


82 490 F.Supp. at 1051.
84 There is currently a circuit split over whether punitive damages are available at all in FLSA retaliation cases. Compare Travis v. Gary Community Mental Health Ctr., Inc., 921 F.2d 108, 112 (7th Cir.1990) (punitive damages
attention of an employer or defense counsel when this form of retaliation is anticipated may be helpful in deterring potential retaliation before it occurs.

In addition, an employer who may be engaged in or considering this form of retaliation against a worker, should be encouraged to understand that the employer may in essence be reporting itself or subjecting itself to investigation, since it is the employer that is ordinarily in violation of the IRCA when an unauthorized immigrant is hired with actual or constructive knowledge.

If an employer works with local law enforcement to arrest or detain undocumented employees trying to assert their rights, both the employer and the law enforcement agency may face civil liability. In Montano-Perez v. Durrett Cheese Sales, Inc., 666 F. Supp. 2d 894 (M.D. Tenn. 2009), plaintiff-employees were fired after they assembled at their workplace to request overdue pay. When the plaintiffs refused to leave the premises without their unpaid wages, the employer called the county sheriff’s department. Durrett Cheese Sales, 666 F. Supp. 2d at 898. Plaintiffs alleged that the employer and the sheriff’s department “work[ed] together to defeat the plaintiffs’ wage complaints.” Id. The plaintiffs were arrested and detained overnight, then transported to an immigration detention facility after sheriff’s department personnel reported plaintiffs to immigration authorities. Id. at 898-99. Plaintiffs brought suit against the employer, as well as the sheriff’s department and several individuals in the department. Id. The Middle District of Tennessee upheld claims that the sheriff’s department defendants violated the FLSA’s retaliation provisions, 85 42 U.S.C. § 1981 (race discrimination in the making and enforcement of contracts), 42 U.S.C. § 1985(3) (conspiracy to violate civil rights), and 42 U.S.C. § 1983 (violations of the NLRA, § 1981, and the Fourth Amendment). 86 Id. at 901-07. In so holding, the Court repeatedly cited the plaintiffs’ allegation that the sheriff’s department defendants worked with the employer to violate plaintiffs’ employment rights, as well as the allegations that sheriff’s department personnel “laughed at Plaintiffs, referenced Plaintiffs’ race and national origin, and made statements regarding their intent to send Plaintiffs ‘back to Mexico.’” Id.

D. Social Security No-Match Letters

The so-called Social Security “no-match” letter is a letter sent by the Social Security Administration (SSA) to employers and employees when the names or social security numbers listed on the employer’s W-2 forms do not match the SSA records. The purpose of the no-match letter is to alert the employee that the earnings reported on her W-2 are not being properly available), with Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 933-35 (11th Cir.2000) (punitive damages not available). Additionally, the majority of district courts in the Fifth Circuit until recently held that compensatory damages for emotional distress were not available either in FLSA retaliation cases, but the Fifth Circuit recently joined the uniform view of the rest of the federal circuits in clarifying that compensatory damages are available. Pineda v. JTCH Apartments, L.L.C., 843 F.3d 1062, 1065 (5th Cir. 2016).

85 The Court noted that the issue of non-employer civil liability for FLSA violations was one of first impression in the Sixth Circuit. Durrett Cheese Sales, 666 F. Supp. 2d at 902 n. 4. The Court did not take a position on the issue, and instead invited additional briefing. Id. The plaintiffs ultimately settled their claims against the sheriff’s department defendants. Montano-Perez v. Durrett Cheese Sales, Inc., No. 3:08-1015, 2011 WL 128793, at *1 (M.D. Tenn. Jan. 14, 2011).

86 The Court rejected the plaintiffs’ claim for § 1983 relief for violations of the FLSA. Durrett Cheese Sales, 666 F. Supp. 2d at 905-06.
credited to the employee’s Social Security earnings record and to provide the employee an opportunity to correct errors or discrepancies so that the employee’s record can be properly credited. A no-match letter may be sent by SSA (a) to the individual employee, (b) to the employer about an individual employee, and/or (c) to the employer about a group of employees.

The no-match letter is sent out by the SSA – not by Department of Homeland Security immigration authorities – and the letter has nothing to do with immigration status or enforcement. 87 Indeed there are many different reasons, unrelated to immigration status, why the information on an employee’s W-2 may not match the SSA records – though one reason might be that the employee has provided the employer with a false name or social security number. 88 Indeed more than two thirds of no-match letters sent out by SSA pertain to native-born U.S. citizens. Neither the SSA nor the IRS undertake any enforcement against the employer or impose any sanction based on a no-match letter. 89

Many employers incorrectly presume that the no-match letter is an indication that the named employee is undocumented and some employers over-react by terminating the employee or threatening to terminate the employee if the no-match is not corrected. This happens in spite of the fact that for years the text of the SSA no-match letter itself has stated that the letter “does not make any statement about [the employee’s] immigration status” and “is not a basis, in and of itself, to take any adverse action against the employee.” 90 In fact, the text of the no-match letter clearly states that employers should not “take any adverse action against an employee, such as laying off, suspending, firing, or discriminating against that individual, just because his or her Social Security number appears on the list” and that “[d]oing so could, in fact, violate State or federal law and subject you to legal consequences” (emphasis added). In addition to employers who have merely over-reacted to a SSA no-match letter by terminating workers out of misplaced anxiety, there are numerous reported cases of unscrupulous employers who have affirmatively used the receipt of no-match letters as a pretext to unlawfully retaliate against workers who have complained about working conditions, have been injured, or have participated in organizing campaigns.

The U.S. Ninth Circuit Court of Appeals has specifically ruled that an employer’s mere receipt of a SSA no-match letter does not give an employer “constructive knowledge” of a named-employee’s immigration status and does not provide justification for terminating such an employee. 91

Guidance is available for employers who seek to respond appropriately to a no-match letter and to avoid discriminating against lawful employees. 92

87 The Social Security Administration’s purpose in sending out the no-match letter is to make sure all of an employee’s earnings are properly credited to his or her Social Security account. See Aramark Facility Services v. SEIU Local 1877, 530 F.3d 817, 826 (9th Cir 2008).
88 For example, other reasons for the no-match might include: typographical errors; name changes due to marriage or divorce; transposed first and middle names; incomplete information on the W-4 or W-2.
89 See Aramark, id. at 826-27.
90 See Aramark, id. at 826.
91 See Aramark, id.
employer who receives a no-match letter may adequately fulfill its legal obligation by notifying
the employee(s) in question, documenting that the employer provided that notice, and then
leaving it up to the employee(s) to take whatever action may be warranted.

Guidance is also available for employees and labor organizations confronting no-match
letters.  

Additional confusion about Social Security no-match letters was created in 2007 when
the Bush Administration’s Department of Homeland Security (DHS) published a final rule
entitled “Safe Harbor Procedures for Employers Who Receive a No-Match Letter” (August 15,
2007). The new rule never went into effect, having first been blocked by an injunction and
having subsequently been withdrawn by the DHS under the Obama Administration. However, in
the interim the pending rule received a great deal of public attention, which heightened
uncertainty and concern among many employers and employees.

The aborted rule, which was issued not by the Social Security Administration but by the
DHS, would for the first time have allowed DHS to use the SSA no-match letter as an
immigration enforcement tool, creating a presumption of undocumented status as to an employee
who is named in a no-match letter and who does not correct the no-match issue within a
specified time period. If the rule had been implemented, an employer who did not follow the new
rule would have faced increased penalties for hiring unauthorized workers.

On October 10, 2007, the U.S. District Court for the Northern District of California
preliminarily enjoined the implementation of the August 2007 rule in response to a lawsuit
brought by the AFL-CIO, the American Civil Liberties Union, the National Immigration Law
Center, and other labor groups. On October 28, 2008 the DHS published a supplemental final
rule that purported to correct defects previously found by District Court. The DHS sought
unsuccessfully to persuade the District Court to issue an expedited order lifting its preliminary
injunction and allowing the Bush Administration DHS to implement the new no-match rule. On
October 7, 2009, the Obama Administration DHS rescinded the August 2007 and October 2008
no-match rules which the prior administration had tried unsuccessfully to implement.

In rescinding the Bush DHS no-match rules, the Obama Administration DHS reaffirmed
several long-standing principles that had applied to no-match letters even before issuance of the
abortive rules in 2007 and 2008. For example the commentary in the Federal Register which


For a summary of the DHS rule, see Summary of U.S. Dept. of Homeland Security 2008 Supplemental Final
Flexibility Analysis” (NILC, Nov. 2008), www.nilc.org/immsemplymnt/SSA_Related_Info/no-match-DHSfinalrule-

For more information about the preliminary injunction, see How Does the 2008 Supplemental Final DHS Rule
about Social Security “No-Match” Letters Affect the Federal Lawsuit and Injunction? (NILC, Oct. 23, 2008),
accompanied the rescission\textsuperscript{96} states that the no-match letter may be caused by many things unrelated to immigration status and that the no-match letter itself does not make any statement about an employee’s immigration status.\textsuperscript{97} In addition, the commentary clarifies that an employer’s mere receipt of a no-match letter does not give an employer “constructive knowledge” of a named employee’s undocumented status. The commentary suggests that an employer who receives a no-match letter would be responding reasonably and prudently if the employer checks its own records for errors, informs the employee and asks the employee to review the information, gives the employee reasonable time to do so, and allows the employee to resolve the no-match with SSA.\textsuperscript{98}

After the Obama Administration’s DHS rescinded the Bush DHS no-match rule in October 2009, the SSA did not send no-match letters to employers for the next year and a half (having already suspended no-match letter mailings in 2007-08 during the pendency of the litigation). However, in April 2011, the SSA announced that it was resuming sending no-match letters to employers,\textsuperscript{99} but only starting with tax year 2010. It is important to note that these resumed SSA no-match letters are like those sent prior to 2007: they are sent by the Social Security Administration, not by the Department of Homeland Security; they explicitly state on their face that they do not constitute any statement about the employee’s immigration status; and they have no immigration law implications for the employer. Nevertheless, there is fear that many employers will misperceive the resumed no-match letter as an immigration-related warning, especially after the Bush Administration’s aborted effort to make it serve that function. Guidance is available showing employers who receive no-match letters how they can respond appropriately, protecting themselves and their workforce.\textsuperscript{100}

E. Ethical Considerations for Employment Lawyers

Most of the issues specific to employment litigation brought by undocumented immigrant employees have developed relatively recently, partly because it is only in recent years that employment enforcement actions by undocumented immigrants has become so common and partly because so many of these issues were precipitated by the Supreme Court’s 2001 decision in \textit{Hoffman Plastic}. These issues have so far mainly arisen and been resolved in the context of substantive litigation or administrative agency action and there have as yet been few ethics rulings or professional responsibility rules issued to guide lawyers handling these disputes for the employee or for the employer. Nevertheless it seems clear enough how some of the existing general professional responsibility rules might apply to the handling of cases involving employment of undocumented immigrants and these at least warrant the careful attention of attorneys on both the employee and employer side.

For example, Texas Disciplinary Rules of Professional Responsibility require an attorney to accept employment only in a case which the attorney has the legal knowledge, skill, and training reasonably necessary for the representation, taking into account the relative complexity and specialized nature of the matter, as well as the study and preparation the attorney is prepared

\textsuperscript{96} See Federal Register, Vol. 74, No. 193, p. 5147 (October 7, 2009).
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.} at 51449
\textsuperscript{99} Announcement at \url{https://secure.ssa.gov/apps10/public/reference.nsf/links/04052011011437PM}.
\textsuperscript{100} See fn 73 and 80, \textit{supra}. 
to undertake. Tex. Disciplinary R. of Prof’l Conduct 1.01. This same Rule requires the attorney to act with diligence and dedication to the interest of the client. At a minimum this Rule would require, first, that attorneys representing either employees or employers in cases where employment of immigrants is or may be involved, should take steps to fully understand the sometimes-complex nuances of the parties’ immigration status and immigration-related practices and the effect that may have on the availability of certain claims, remedies, and defenses. Moreover, diligent representation of the client’s best interest will often require the employee’s attorney to ascertain his client’s immigration status and, if the client is undocumented, how the client came to be hired in violation of the immigration laws. Without that information, the lawyer may well frame the undocumented employee’s claim improperly and may well expose that undocumented employee to prejudicial disclosure of his immigration status, including embarrassment, loss of a current job, deportation, or even potential criminal prosecution. Conversely, the employer’s attorney should normally become familiar with the employer’s practices and knowledge with regard to hiring and required verification of immigration status in order to diligently advise and protect the employer from adverse disclosures about the employer’s ongoing compliance with immigration laws, tax laws, or recordkeeping requirements.

Even more likely to be significant as a professional responsibility concern in employment cases involving undocumented immigrants is the attorney’s obligation to preserve confidential information disclosed by or discovered about the client. Tex. Disciplinary R. of Prof’l Conduct 1.05. Information about the employee’s undocumented status would nearly always fall into the category of confidential information that an attorney has a duty not to reveal, in view of the high potential that disclosure could compromise and prejudice the employee’s position or even expose her to prosecution. On the employer side, information about the employer’s practices with regard to hiring, verification of employee’s immigration status, recordkeeping, and payroll taxes may well turn out to be information that could expose the employer to adverse consequences, including civil fines or prosecution – especially where those practices relate not just to the complaining employee, but to the employer’s ongoing employment practices or to the other employees in the employer’s workforce. As noted above, competent and diligent representation under Rule 1.01 would likely require the employer’s attorney to ascertain this kind of information, even as Rule 1.05 makes it incumbent on the attorney to also take care to properly preserve the confidentiality of that information.

There is a further ethical ramification of Texas Disciplinary Rules of Professional Conduct 1.01 and 1.05, taken together with 1.03 (i.e. the duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation): Where employment and hiring of undocumented immigrants is in the picture, the attorneys for both the employee and the employer have a duty to explain to their clients what impact their status and practices likely will and won’t have in the context of the current employment dispute, what steps the client can properly take to avoid any compromising disclosure of information that should remain confidential, and what steps the attorney can properly take to preserve the confidences.

For the lawyer representing an undocumented worker, this may often entail providing legal counsel that helps the client understand that she can safely pursue her employment claim as
well as to understand what actions the client and the attorney can take to protect the client and to keep prejudicial information related to the client’s immigration status out of the proceedings. Indeed this may be the legal question that is uppermost in the employee-client’s mind at the outset of the representation as she determines whether to engage the attorney and whether to pursue her claim at all. The attorney’s obligation to provide complete and accurate information is all the more essential because the actual ability of such an employee to safely enforce her employment rights often seems counter-intuitive to the uninformed layperson. The attorney may need to carefully assist the client in appropriately prosecuting and resolving the specific employment claim in issue without committing any further violation of the law, and while minimizing the likelihood of adverse consequences collateral to employment dispute.

The attorney for the employer of an immigrant workforce may need to carefully counsel the client about how to resolve an employment claim without calling unwanted attention to the employer’s hiring practices (known or unknown to the employer) or to the actual immigration status (known or unknown) of others in the employer’s workforce. This is especially true for employers in those industries that, as a matter of economic reality, have become highly dependent on undocumented labor. The lawyer’s role may require a thoughtful review of the employer’s hiring and verification procedures to ensure that the employer is in compliance with the letter of the verification requirements, payroll recordkeeping requirements, and payroll tax reporting requirements and does not have actual or constructive knowledge of any hiring of unauthorized employees. For the employer who is already out of compliance, the lawyer’s role may be to help the employer resolve the employment dispute currently in issue without committing any further immigration or tax violations and while minimizing the employer’s potential collateral liability.

A less subtle professional obligation is presented by Texas Disciplinary Rule of Professional Conduct 4.04, which forbids an attorney to threaten to present or participate in presenting criminal charges solely to gain advantage in a civil proceeding. It would seem to be a clear violation of this Rule for an attorney to become party to a retaliatory effort to report an employee either to ICE or some other law enforcement agency after that employee had asserted a civil employment law claim. While it is not hard to imagine the many ways in which the attorney for an employer might game his way around a literal violation of this ethical rule, it would seem far more professional and helpful to the client to steer clear of such action and, further, to counsel the employer about the likely futility of such an action; and about the employer’s potential to become liable for a claim of retaliation; and about the potential for the employer to become hoist with his own petard if ICE should take a broader interest in the employer’s overall hiring practices and workforce authorization.

VII. IMMIGRATION ENFORCEMENT POLICIES AND PRACTICES RELATED TO LABOR DISPUTES

The Bureau of Immigration and Customs Enforcement (ICE)—which is the enforcement arm of the immigration service—has a long-established policy of avoiding interfering in labor

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101 Though an undocumented worker’s mere presence in the U.S. is a civil, not criminal, violation, there are a host of criminal consequences that could ensue from the reporting of an undocumented immigrant to the ICE, which is a criminal law enforcement agency.
disputes. Several ICE policy documents reflect the understanding that immigration enforcement during a labor dispute undermines enforcement of both labor and immigration law by rewarding employers who intentionally hire and exploit undocumented workers and encouraging them to use ICE to dispose of the workers when they complain. However, recent changes to these policies during both the Obama and Trump Administrations have diluted that principle and injected unpredictability into ICE enforcement practices.

A. ICE Guidance on Non-Interference in Labor Disputes

A 2016 ICE Memorandum declares that ICE “respects the labor rights of workers, regardless of immigration status,” and provides the following general guidance to ICE agents:

When information is received concerning the unauthorized employment of aliens, consideration should be given to whether the information is being provided for the purpose of interfering with a genuine labor organizing campaign or employment dispute between workers and the management or ownership of the business or organization . . . .

The guidance memo supersedes a more detailed set of instructions titled Questioning Persons During Labor Disputes, commonly known as Operating Instruction 287.3a. Former OI 287.3a provided a list of questions that ICE agents were instructed to ask that were designed to discover whether there was an ongoing labor dispute and whether the employer was attempting to use ICE to retaliate. If ICE determined that the information may have been provided in order to interfere with employees’ rights or to retaliate against them for the exercise of those rights, OI 287.3a stated that “no action should be taken on this information without the review of District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol.”

By contrast, the 2016 memo merely instructs agents who discover an ongoing labor dispute to follow the deconfliction processes under the Memorandum of Understanding between the Department of Homeland Security (DHS) and federal labor agencies (DOL, NLRB, and EEOC), discussed below. Guidance Memo, p. 1. If none of the federal labor agencies has an open and active investigation, “there is no prohibition for enforcing immigration law even when a labor dispute is in progress.” Id. at 2. On the other hand, the memo “encourages” agents “to


103 The instructions were originally located in then-Immigration and Naturalization Service (INS, now ICE) Operating Instruction 287.3a and were redesignated to Section 33.14(h) of the INS Special Agent’s Field Manual. Available at: https://www.uscis.gov/リンク/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690/0-0-0-61072/0-0-0-61097.html.

104 Those questions included the names of the informants; whether there was a labor dispute in progress; whether they were employed at the site or by a union representing workers at the site; whether they were employed as managers or supervisors at the site or are related to anyone who was; whether there were pending grievances, charges or complaints at the worksite; and how the informant obtained information regarding the aliens’ alleged unlawful status. Id.
establish communications with other federal, state and local agencies within their area of responsibility that have jurisdiction to investigate the violation of employment related rights” and reminds agents “to refer to all relevant existing policies, including policies related to treatment of victims and witnesses as well as DHS's civil immigration enforcement priorities.” Id. at 2-3.

In summary, the new memo provides less guidance to ICE agents and less predictability to the public than previous internal policies. The memo only became publicly available after the AFL-CIO obtained it through a FOIA request and disseminated it. As part of the FOIA process, ICE redacted several portions of the memo, making the guidance even less predictable. What we do know is that it removes detailed instructions and, in the absence of an active federal labor agency investigation, neither prohibits nor requires enforcement, but merely advises consideration of labor disputes, even while meaningful guidance on enforcement priorities in general is withdrawn.

Accordingly, workers’ advocates must take an ad hoc approach to relying on ICE policies and communicating with ICE. In appropriate circumstances—ideally when a labor agency is actively investigating a labor dispute, thereby invoking heightened deference from ICE—advocates might consider notifying ICE in order to alert them that any “tips” they receive related to that worksite may be motivated by retaliation. Advocates considering this course should work closely with the labor agency, which might have greater insight into local ICE practices, and should refer ICE to the guidance memo, since ICE officials may be unfamiliar with or lack easy access to it.

B. Memorandum of Understanding Between DHS and Labor Agencies

In March 2011, the U.S. Department of Labor (USDOL) and the Department of Homeland Security (DHS) announced a revised Memorandum of Understanding (MOU), updating a vaguer 1998 MOU, that is designed to encourage more effective enforcement of the employment rights of undocumented workers by reducing the conflict between USDOL enforcement and the worksite immigration enforcement actions by DHS’s Immigration and Customs Enforcement agency. In a 2016 addendum, the EEOC and NLRB also joined the agreement. The 2011 MOU contains the following key provisions:

- ICE will refrain from undertaking civil immigration enforcement activities at a worksite during the pendency of a USDOL investigation of a labor dispute.
  - “Labor dispute” is defined to include a dispute between employees and management concerning: wages; family and medical leave; workplace safety; discrimination; or retaliation.

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DOL divisions covered by the MOU are: the Wage & Hour Division; the Occupational Safety and Health Administration, and the Office of Federal Contract Compliance Programs.

- ICE will “be alert to and thwart attempts” by employers and other parties to “manipulate ICE enforcement activities for illicit or improper purposes.” This includes assessing whether tips and leads ICE receives “are motivated by an improper desire to manipulate a pending labor dispute [or] retaliate against employees for exercising labor rights.”

- USDOL will provide ICE with information about labor disputes it is investigating and about parties who may be seeking to manipulate a pending labor dispute or retaliate against employees for exercising labor rights.

- ICE will consider USDOL requests to grant temporary parole status allowing some undocumented immigrants to remain in the U.S. to serve as witnesses in labor investigations and enforcement actions.

One important suggestion implicit in the MOU is the specific acknowledgement by DHS that it is – and has been in the past – the policy of DHS that the immigration-related enforcement process should “be insulated from inappropriate manipulation by other parties,” such as employers who might threaten or try to sabotage an undocumented employee’s labor complaint by reporting the employee to ICE. One of the greatest deterrents to undocumented workers’ enforcement of their employment rights is the iconic fear and perception that a labor complaint could trigger immigration enforcement action against the worker at the behest of the employer. Lawyers for immigrant employees have long observed anecdotally that the apparent actual practice by ICE is to de-prioritize and even eschew self-serving enforcement tips from employers or those acting on behalf of an employer. The 2011 MOU goes further than any previous written policy statement in declaring that to be official DHS-ICE policy.  

C. ICE Enforcement Priorities

As a practical matter, ICE lacks the resources to detect and remove more than a small fraction of the 11 million undocumented immigrants residing in the U.S. Under previous administrations, ICE reconciled this reality with its mission through strategic enforcement priorities. For example, a DHS memo from the Obama Administration established three tiers of enforcement priorities: 1) threats to national security, border security, and public safety; 2) misdemeanants and new immigration violators; and 3) other immigration violations.  

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107 “ICE will continue its existing practice of assessing whether tips and leads it receives concerning worksite enforcement are motivated by an improper desire to manipulate a pending labor dispute, retaliate against employees for exercising labor rights, or otherwise frustrate the enforcement of labor laws.” Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (March 31, 2011) http://www.nelp.org/page-/Justice/2011/DHS-ICE-DOL_MOU_Final_3-31-2011.pdf?nocdn=1 at ¶ IV.B.

By contrast, the Trump Executive Order on “Enhancing Public Safety in the Interior of the United States” identifies “priority” categories so broadly and vaguely that they fail to meaningfully limit the scope of the agency’s focus. The categories include aliens who:

(a) Have been convicted of any criminal offense;
(b) Have been charged with any criminal offense, where such charge has not been resolved;
(c) Have committed acts that constitute a chargeable criminal offense;
(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
(e) Have abused any program related to receipt of public benefits;
(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Id. The Executive Order purports to accomplish mass deportations in part by hiring 10,000 new immigration officers “subject to the availability of appropriations.” Id. Until such appropriations are made, ICE still lacks the resources for Trump’s proposed scale of operations. If the broader, vaguer new enforcement priorities portend any change in ICE’s actual practices, they probably serve to make enforcement decisions less predictable, less coherent, and more prone to the whims of individual agents.

D. Prosecutorial Discretion

ICE can exercise its prosecutorial discretion in a number of ways, such as:

- deciding to cancel a notice of detainer or Notice to Appear (NTA);
- focusing enforcement resources on particular violations or conduct;
- deciding whom to stop, question, arrest, or release and on what conditions;
- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal; and
- joining in a motion to grant relief or a benefit.110

Prior to the Trump Administration, ICE had established a number of factors to consider when exercising prosecutorial discretion, one of which was “whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.” Id.111

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111 For a more detailed discussion of pre-Trump prosecutorial discretion in situations involving employment claims, see Prosecutorial Discretion by U.S. Immigration and Customs Enforcement (ICE) in Cases Involving Immigrant
However, the DHS memo implementing Trump’s Executive Order states that the exercise of prosecutorial discretion “shall be made on a case-by-case basis” and “shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement.”\(^{112}\) The memo further stated that “all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby immediately rescinded—to the extent of the conflict.” \(\textit{Id.}\) While the extent of any conflict with the 2011 memo on prosecutorial discretion is unclear, the 2017 memo seems to give ICE more leeway to disregard the factors that previously provided relative regularity and predictability.

E. U and T Visas

Advocates should also consider potential immigration relief in the form of T Visas, available for victims of human trafficking, and U visas, available for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity. 8 U.S.C. §§ 1101(a)(15)(T), (U). A detailed discussion of the criteria and certification and application processes for U and T Visas is beyond the scope of this paper.\(^{113}\) However, a couple of considerations in response to recent developments are worth noting.

First, as discussed in \textit{Cazorla v. Koch Foods},\(^{114}\) in civil litigation where immigration status is otherwise irrelevant, courts might allow some immigration-related discovery under the theory that the applicant fabricated an employment claim in order to support the U Visa application.

Second, there are some vague exceptions to the statutory provision prohibiting DOJ, DHS, and the Department of State from permitting the use or disclosure of information related to an alien who is the beneficiary of a U or T Visa or Violence Against Women Act (VAWA) application. 8 U.S.C. § 1367. These exceptions include disclosure to “a sworn officer or employee of the Department, or bureau or agency thereof, for legitimate Department, bureau, or agency purposes” and “to law enforcement officials to be used solely for a legitimate law enforcement purpose in a manner that protects the confidentiality of such information.” \(\textit{Id.}\)

USCIS—the arm DHS that handles applications for immigration relief—traditionally has maintained a firewall between itself and ICE in order to avoid undermining public trust and USCIS’s ability to effectively collect the information it needs to determine when immigration relief is merited. However, ICE has demonstrated a relative disregard for balance between its

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\(^{114}\) \textit{See} Section V(B).
immigration enforcement mission and other public interests so far in the Trump Administration compared to previous administrations. For example, the DHS memo implementing Trump’s Executive Order on interior enforcement declared that “[t]he Department will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents” and that DHS “will develop new guidance specifying the appropriate treatment of personal information DHS maintains in its record systems.” Advocates are monitoring how these policy declarations will be carried out in practice, including whether USCIS might share information with ICE in circumstances where it previously would not.

115 Kelly, Interior Enforcement Implementation Memo, 5-6.