Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a *perverse incentive* to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.

*Rivera v. Nibco*, 364 F.3d 1057 at 1072 (9th Cir. 2004) (emphasis added)

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This paper builds on a paper prepared for the NELA 2008 Convention by William. R. Tamayo, Kim Thompson formerly of Thompson,, Rollins and Schwartz, and Kristi Graunke of the Southern Poverty Law Center which built on a paper prepared for the NELA 2004 Convention by William R. Tamayo, Marielena Hincapie of the National Immigration Law Center, hincapie@nilc.org, and Amy Sugimori, formerly of the National Employment Law Project, now Executive Director of La Fuente in New York, asugimori@lafuenteinc.org.
There are an estimated 12 million undocumented immigrants living in the United States, of which an estimated 6-7 million are workers. The manufacturing sector employs nearly 1.2 million undocumented workers, the services sector employs 1.3 million, and 1.5 million undocumented workers are employed in agriculture. Six hundred thousand more work in construction and seven hundred thousand work in restaurants. Many of these same industries are infamously known for paying low or substandard wages, having dangerous working conditions, and being replete with labor and employment law violations.

The changing demographics throughout the country also speak to the contributions immigrants are making to the economy. Throughout the 1990s, one out of every two workers who joined the labor force was a new immigrant who entered the U.S. after 1990. Moreover, because of the imminent retirement of many baby boomers, immigrants may account for half of the working-age population growth between 2006 and 2015 and for all of the growth between 2016 and 2035. Despite suffering high levels of exploitation and workplace discrimination, immigrants have a high level of workforce participation in comparison to their native counterparts. Employment and labor law attorneys can no longer afford to practice in this area without at least a basic understanding of immigrants and the immigration laws and policies affecting their workplace rights. Likewise, plaintiffs’ attorneys must be prepared to counter defense tactics to intimidate litigants who happen to be immigrants, as this can have an impact on other plaintiffs such as in class actions.

There are negative policy implications for everyone when undocumented workers are denied legal protections and attendant remedies. Specifically, the failure to provide certain remedies to undocumented workers will (1) unfairly reward employers who violate the law; (2) undermine enforcement of critical workplace protections for all workers; and (3) create perverse incentives for employers to prefer hiring less-protected undocumented workers instead of U.S. citizen workers or work-authorized immigrant workers, thereby thwarting the intent of the IRCA. See, e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (U.S. 1984) (“Application of the NLRA [to undocumented workers] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened.”)

This paper highlights some of the issues and pitfalls that may arise when representing a plaintiff who is an immigrant worker.

1. THE IMPACT OF HOFFMAN PLASTICS ON FEDERAL LITIGATION

Hoffman Plastics Compound, Inc. v. NLRB, 122 S.Ct. 1275 (2002) focused a spotlight on the remedies available for undocumented workers who suffer some form of
employment or labor law violation. Jose Castro, who worked in a factory in California, was fired along with other co-workers, for his union organizing activities. The National Labor Relations Board (NLRB) ordered the employer to cease and desist, to post a notice that it had violated the law, to reinstate Mr. Castro, and to provide him with back pay for his lost earnings during the period he was not working because he had been illegally fired.

During a compliance hearing before an Administrative Law Judge to determine the amount of back pay due, Mr. Castro, in response to the employer’s question regarding whether he was authorized to work, admitted he had used false documents to establish work authorization and that he was an undocumented worker. The NLRB held that undocumented workers were entitled to backpay. A panel of the Court of Appeals denied the petition for review. Hoffman Plastics Compound, Inc. v. NLRB, 208 F.3d 229 (C.A.D.C.2000). After rehearing the case en banc, the court again denied the petition for review and enforced the Board's order. 237 F.3d 639 (2001). The Solicitor General argued in favor of the NLRB’s order. The U.S. Supreme Court reversed the lower court and held that the NLRB could not award back pay as a remedy under the National Labor Relations Act (NLRA) to undocumented workers because the “legal landscape [had] now significantly changed” since Congress had enacted the Immigration Reform and Control Act of 1986 (IRCA). Under the NLRA, back pay is the traditional remedy awarded to a victim of an illegal anti-union firing in order to compensate her for wages she would have earned had she not been wrongfully fired. The Court also reinforced that undocumented workers are not entitled to reinstatement, which is the other traditional remedy for such violations. According to the Supreme Court, IRCA’s prohibition on the hiring of undocumented workers, and on workers’ acceptance of employment without work authorization requires the NLRB to deny back pay to these workers, because back pay would compensate these workers for work they could not have lawfully performed. The court noted that the NLRB did not have the authority to interpret immigration policy and fashion an award that contradicted IRCA’s prohibitions on the hiring of the undocumented.

Though Hoffman was limited to the NLRA, defense counsel have sought to extend its holding to argue that immigration status is now always relevant no matter what the violation or the remedy sought. Finally, they have argued that undocumented workers are not entitled to any protection or remedies under a broad range employment laws.

A. Coverage

National Labor Relations Act

Prior to Hoffman, it was well-established that undocumented workers are "employees" within the meaning of the NLRA. Sure-Tan v. NLRB, 467 U.S. 883 (1984); See also, Local 512 ILGWU (Felbro) v. NLRB, 795 F.2d 705 (9th Cir).

2The NLRB attorney did not object to the question.
1986). Although these cases involved violations that occurred prior to IRCA's enactment, courts continued to hold that the adoption of employer sanctions in 1986 did not change the Act's definition of "employee." *NLRB v. Kolkka*, 170 F.3d 937, 940 (9th Cir. 1999); *Agri Processor Co. v. NLRB*, 514 F.3d 1, 4 (D.C. Cir. 2008).

Moreover, employer use of workers' immigration status to threaten, intimidate or remove workers in retaliation for their union activities constitutes an unfair labor practice in violation of §8(a)(3) of the NLRA. *Sure-Tan v. NLRB*, 467 U.S. 883 (1984); *Del Rey Tortilleria, Inc.* 272 NLRB 1106 (1984), *enf'd.*, 787 F.2d 1118 (7th Cir. 1986) (employer's demand that employees present social security cards and green cards two days after union filed representation petition constituted unfair labor practice).

The *Hoffman* decision only affected the remedies available under the NLRA and held implicitly that undocumented persons are still covered “employees”. In July 2002, the General Counsel (GC) of the NLRB issued a guidance interpreting how *Hoffman* affects the agency’s practice and procedures. The GC 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. However, in 2009 the Board issued a decision clarifying that it construed the *Hoffman* decision to apply both to circumstances where the employee in the case violated IRCA by proffering fraudulent work-authorization documents and to situations where there was no such showing. *Mezonos Maven Bakery, Inc.*, 357 NLRB No. 47, WL 3488558 (N.L.R.B. Aug. 9, 2011)

Immigration status may be a part of an employer’s affirmative defense to a request for backpay and the proper subject of examination at hearing. *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011) (remanding decision to NLRB based on failure to allow reasonable inquiry into immigration status for the period during which claimants were seeking back pay).

**Title VII of the Civil Rights Act of 1964**

Undocumented workers are protected by Title VII. *EEOC v. Tortilleria “La Mejor”,* 758 F. Supp. 585, 591 (E.D. Cal. 1991) ("Congress did not intend [for IRCA to] amend or repeal any of the previously legislated protections of the federal labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII." id. at 593-4); *EEOC v. Switching Systems Div. Of Rockwell Int’l Corp*, 783 F.Supp. 369, 374 (N.D. Ill. 1992); see also, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 n.4 (9th Cir. 2004); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (assuming but not deciding that Title VII applies to undocumented workers); *Murillo v. Rite Stuff Foods, Inc.*, (1998) 65 C.A. 4th 833, 77 FEP 605, (the employment discrimination
statutes apply to undocumented alien employees notwithstanding the illegality of employing them); but see, Egbuna v. Time Life Libraries, Inc., 153 F.3d 184 (4th Cir. 1998), cert. denied, 119 S. Ct. 1034 (1999) (because IRCA renders undocumented workers unqualified to work, an undocumented applicant has no cause of action under Title VII for an allegedly discriminatory refusal to hire).

The EEOC stated that “Hoffman Plastics...does not affect the government’s ability to root out discrimination against undocumented workers” and “...directed its field offices that claims for all forms of relief, other than reinstatement and back pay for periods after discharge or failure to hire, should be processed in accord with existing standards, without regard to an individual’s immigration status.” EEOC Press Release, “EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination”. June 28, 2002.3

**Fair Labor Standards Act (FLSA)**


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NLRB was discretionary while awards for back pay under the FLSA are “a matter of statutory entitlement, and immigration status does not affect right to recovery or suitability as a class representative); *David v. Signal Int’l, LLC*, 257 F.R.D. 114 (E.D. La. 2009)(protective order granted, immigration status no relevant at class certification stage).

Courts have separately addressed the right to recover liquidated damages under the FLSA and concluded that immigration status is not a basis for denying those damages. *Ulin v. Lovell’s Antique Gallery*, 2010 U.S. Dist. LEXIS 99153 (N.D. Cal. Sept. 22, 2010); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1280 (N.D. Okla. 2006)

**B. Remedies**

Undocumented workers who are victims of violations of employment laws generally are entitled to the same remedies as other workers. A possible, but yet undecided exception to this is of reinstatement and back pay (for work not performed) when the worker is unable to obtain proper documentation to work. But see, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004).

1. **Injunctive relief to prevent future violations:** *Hoffman* should not affect this remedy. Counsel should seek all traditional injunctive relief such as training for personnel, purging records of negative references, standard reference letters for future employment, etc. In representing immigrant plaintiffs, counsel should also seek to prevent all forms of retaliation.

2. **Reinstatement:** In its memorandum clarifying policy following *Hoffman*, the NLRB General Counsel stated that “[c]onditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented discriminatees whom an employer knowingly hires,” referring to *A.P.R.A. Fuel Oil Buyers Groups*, 151 L.R.R.M. 1209 at 1216, *aff’d* NLRB v. *A.P.R.A. Fuel Oil Group*, 134 F.3d 50 at 56 (2d Cir. 1997).” A worker who benefits from such an order will be given a “reasonable period of time” to establish work eligibility and to comply with I-9 requirements, but they would not be entitled to back pay during that period of time.

Under the immigration regulations, a worker is considered to be a “continuing employee” and not subject to reverification of their employment authorization under a number of scenarios, including when a person is “reinstated after disciplinary suspension or wrongful termination, found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement.” This is important because it means that an employer does not have to --and should not-- seek reverification of an employee’s status simply because the employer is
ordered to reinstate that employee.

Keep in mind that a worker’s immigration status may be fluid. If a worker was undocumented at the time she was wrongfully terminated, but later becomes authorized to work, *Hoffman* should not be read as barring her reinstatement. See, e.g., *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (denying defendant’s motion for summary judgment against defendant on his claims for front pay and reinstatement under Title VII where defendant was not work-authorized at the time of his termination but later became work-authorized).

3. **Damages:** there are no limitations on damages (compensatory and punitive) for undocumented workers, beyond those which would apply in any other case. Two federal courts, in California and Illinois, have held, post-*Hoffman*, that compensatory and punitive damages are available to undocumented immigrants for retaliation under the Fair Labor Standards Act. In *Singh v. Jutla & C.D. & R’s Oil, Inc.*, a worker whose employer turned him in to then-INS shortly after settling a claim for unpaid wages was found eligible for compensatory and punitive damages for the unlawful retaliation. In *Renteria v. Italia Foods, Inc.*, 2003 U.S. Dist. LEXIS 14698 (N.D. Ill. Aug. 21, 2003), the court held that compensatory damages would still be available to undocumented workers for retaliatory discharge under FLSA post-*Hoffman*. 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). See also *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247 (N.D. Okla. 2006) lost wages for period actually worked, plus compensatory and punitive damages available in Title VII/1981 action.

4. **Back pay:**

**National Labor Relations Act**

Under the NLRA, an employer is not liable for back pay accruing during any period during which the worker is unavailable for work because s/he is not authorized to work. In its post-*Hoffman* memorandum, the NLRB General Counsel instructed regions not to seek backpay once the evidence establishes that a worker was undocumented during the backpay period. In doing so, the General Counsel does not distinguish between cases where the employer did not know that it had hired an undocumented worker, as in *Hoffman*, and cases where the employer “knowingly employed” undocumented workers, as in *A.P.R.A.*, even though the Supreme Court only addressed the situation where the employer did not know it had hired
an undocumented worker. The General Counsel determined that the Hoffman decision precludes back pay for “work not performed” as a remedy for undocumented workers. See also, NLRB v. Mezonos Maven Bakery, Inc., 357 NLRB NO. 47, WL 3488558 (2011) (Hoffman is a categorical denial of back pay and reinstatement, even where employer never followed the I-9 process, and workers never violated immigration law) (petition for review pending). However, back pay is permitted “for work previously performed under unlawfully imposed terms and conditions.” (such as a unilateral change of pay or benefits). The General Counsel left open the question of whether back pay is available to undocumented workers who have been demoted.

In Flaum Appetizing, 357 NLRB No. 162 (Dec. 30, 2011), the Board held that before an employer can pursue an affirmative defense to backpay based on Hoffman Plastic at a compliance proceeding, the employer must come forth with “some articulable reason to believe” that the discriminatees were not authorized to work during the backpay period. Slip op. at 6. See also Case Handling Instructions for Compliance Cases after Flaum Appetizing Corp., OM 12-55 (May 4, 2012), available at http://www.nlrb.gov/publications/operations-management-memos

Title VII

Some courts have applied Hoffman to bar collection of back pay by undocumented workers in Title VII cases. See, e.g., Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003). In Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004), the Ninth Circuit questioned whether the Supreme Court’s decision limiting back pay under the NLRA extended to Title VII as well. The Court states, “[w]e seriously doubt that Hoffman is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases. The NLRA and Title VII are different statutes in numerous respects. Congress gave them distinct remedial schemes and vested their enforcement agencies with different powers.” The Rivera court did not decide this issue though given that the main issue on appeal was a discovery one. See also Avila-Blum v. Casa De Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (upholding magistrate-issued protective order citing Rivera for the proposition that Hoffman may not bar an undocumented worker’s collection of back pay for Title VII violations); Garcia v. Monument Mgmt. Group, L.L.C., 2006 U.S. Dist. LEXIS 48532 (D. Neb. July 17, 2006) (where allegedly undocumented plaintiff’s ineligibility for back pay under Title VII was “by no means a slam dunk,” the court denied the defendant leave to amend its answer in order to raise plaintiff’s immigration status); 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 of plaintiff’s current work authorization was denied as irrelevant to the question of post-termination backpay, which was claimed for a limited period).

In De La Rosa v. Northern Harvest Furniture the district court reasoned: “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). See also Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 247 (2d Cir. N.Y. 2006) (in worker injury case, a worker’s recovery of compensatory damages, including lost earnings, was not barred by Hoffman where the employer had knowingly violated immigration laws in hiring the worker).

FLSA Retaliation

Although there is not extensive case law on FLSA retaliation remedies post-Hoffman, at least two courts have suggested that undocumented workers who were retaliated against for asserting their rights under the FLSA may not seek back pay for the period during which they were discharged and unauthorized to work. See, e.g., Colindres v. Quietflex Mfg., 2004 U.S. Dist. LEXIS 27982, 9-10 (S.D. Tex. Apr. 19, 2004); Renteria v. Italia Foods, Inc., 2003 U.S. Dist. LEXIS 14698 (N.D. Ill. Aug. 21, 2003), But see, Polycarpe v. E & S Landscaping Serv., 2011 U.S. Dist. LEXIS 127479 *5 (S.D. Fla. Nov. 3, 2011) denying motions for summary judgment based on immigration status as to FLSA wage and retaliation claims.

Other Federal Labor Protection Statutes


C. Mixed-Motive Title VII Cases

A "mixed motive" case exists if a termination was based on an unlawfully discriminatory basis under Title VII and on a lawful basis, e.g. person not
unauthorized to work. 42 U.S.C. §2000e-2(m) (Supp. IV 1992). If the employer establishes that termination would have occurred even without the unlawful motive, back pay and reinstatement are not available and the only remedy is declaratory and other injunctive relief and attorney's fees, 42 U.S.C. §2000e-5(g)(2)(B)(i) (Supp. IV 1992). Damages, reinstatement, hire, and promotion are prohibited (ii).

D. After-Acquired Evidence

The "after-acquired evidence" doctrine limits the remedies an employee can receive for wrongful discharge if the employer later "discovers" evidence of wrongdoing (such as the use of false documents to obtain employment or misrepresenting immigration status) by the employee that would justify termination had the employer known of the misconduct beforehand. However, the doctrine does not require that an employee's claims be dismissed or precluded altogether. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S. Ct. 879 (1995). If the employer establishes that it would have fired the employee for the past misconduct, it does not have to reinstate or give front pay to such an employee. In *McKennon*, the Court determined that back pay should be awarded only from the date of the unlawful discharge to the date the information is discovered. When appropriate, the employee may still be able to recover compensatory and punitive damages under the Civil Rights Act of 1991.

In *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), the defendant claimed that the lower court was required to facilitate its discovery by granting its requests to question the plaintiffs regarding their immigration status. The Ninth Circuit held that

*McKennon* does not direct courts to authorize the type of discovery NIBCO seeks to conduct here. Although *McKennon* involved illegal conduct that was "after-acquired" during a deposition, the *McKennon* Court did not hold that depositions could be conducted for the purpose of uncovering illegal actions. Even if *McKennon* authorizes district courts to approve such discovery, that would be a far cry from holding that *McKennon* requires a district court to order plaintiffs to submit to intrusive and injurious investigations in order to pursue a civil rights action. Moreover, the *McKennon Court* insisted that the district courts would play a critical role in preventing defendants from using the after-acquired evidence doctrine as a sword rather than as a shield against inappropriate damage awards. The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under
the Act is not an insubstantial one, but we think the authority of the courts to . . . invoke the appropriate provisions of the Federal Rules of Civil Procedure will deter most abuses. (omitting internal citations).

Rivera, 364 F.3d at 1071-1072.

E. Retaliation

Title VII prohibits retaliation. 42 U.S.C. §2000e-3. Actions which serve to deter the employee from pursuing his or her civil rights or otherwise engaging in protected activity constitute retaliation. Burlington Northern Santa Fe Railway Co. v. White 126 S. Ct. 2405 (2006). Fear of retaliation is perhaps the main barrier to immigrant workers’ access to the legal system as a forum to vindicate their workplace rights. Attorneys should be aware that there is a grave risk of employer retaliation (e.g., threats of reporting or actually reporting workers to the immigration authorities), and that there is an ethical duty to inform clients at the outset of the risks and protections available. If such a threat or report is made because a worker opposed unlawful discrimination or participated in a proceeding under anti-discrimination laws or other labor and employment laws, it constitutes unlawful retaliation. See, e.g., Centeno-Bermuy v. Perry, 302 F. Supp. 2d 128, 136 (W.D.N.Y. 2003) (“reporting plaintiffs to the INS and making baseless allegations to the government that plaintiffs are terrorists, constitute an adverse employment action” actionable under the anti-retaliation provisions of the FLSA); Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (employer reported employee to immigration authorities after employee filed claim for non-payment of wages); Contreras v. Corinthian Vigor Ins. Brokerage, 103 F. Supp. 2d 1180, 1186 (N.D. Cal. 2000) (same). All remedies under the anti-retaliation provisions of the applicable laws should be available. But see Egbuna v. Time Life Libraries, Inc. 153 F.3d 184 (4th Cir. 1998), cert. denied, 119 S. Ct. 1034 (1999) (because IRCA renders undocumented workers unqualified to work, an undocumented applicant has no cause of action under Title VII for an allegedly discriminatory refusal to hire).

Practice TIP: EEOC Can Obtain TRO’s to Stop Retaliation

If, during the course of an EEOC investigation, a charging party is being threatened with termination, further harassment, or other adverse actions that may consequently impede the investigation, EEOC can go to federal court immediately to obtain a temporary restraining order or preliminary injunction to stop the adverse action. 42 U.S.C. Sec. 2000e-5(f)(2). Plaintiff

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7 See EEOC v. Evans Fruit Company, 2010 WL 2594960 (E.D. WA, June 24, 2010)TRO issued where claimants and witnesses had been offered money for testimony, were intimidated by alleged harasser and his agents, etc. in sexual harassment case. Preliminary injunction issued after 4-day hearing. EEOC v. Evans Fruit Company, No. 2:10-cv-03033-LRS (E.D. WA) ECF No. 215, amended order, November 30, 2010.
counsel should contact the EEOC Regional Attorney in your area so that an TRO can be pursued. See www.eeoc.gov.

If the employer appears to have acquired information about a workers’ immigration status after s/he complained of discrimination, counsel should determine whether the information is acquired through a retaliatory investigation and consider adding a claim of retaliation.8

II. STATE ENFORCEMENT OF WORKERS’ RIGHTS POST-HOFFMAN

While most of the litigation undertaken since Hoffman has been at the federal court level, state courts may continue to limit its impact on remedies available to undocumented workers under state employment and labor laws. Like the federal laws, most state labor and employment laws contain no provision that distinguishes between documented and undocumented workers. Prior to Hoffman, courts had usually held that labor protective laws such as state minimum wage, workers’ compensation, wage claims and others apply equally to undocumented workers as to workers who are working legally in the country.

The Hoffman decision has renewed employers’ interest in arguing that undocumented workers are unprotected by state labor and employment laws. A survey of state cases shows that thus far, state coverage under wage and employment laws is largely unaffected. On the other hand, some state decisions have relied on Hoffman in limiting the rights of undocumented workers to back pay and certain forms of compensation under state workers’ compensation laws.

A. Back Pay under State Discrimination Laws post-Hoffman

Regardless of the outcome of issues regarding back pay and other forms of damages in the federal courts, there is a strong argument that states are free to make their own policy choices under their own state laws regarding what remedies are available to undocumented workers. States have taken different approaches to whether their state law should be interpreted differently from the federal NLRA.

The EEOC has also sued Evans Fruit separately for the alleged retaliation involved in the preliminary injunction. EEOC v. Evans Fruit Company, No. CV 2:11-cv-03093-LRS (E.D. WA).

8 See for example, EEOC v. Queen’s Medical Center, 01-CV-00389 (D. Haw. filed 2000) (suit filed alleging that defendant retaliated against doctor of Sri Lankan origin after he complained about national origin discrimination. Retaliation included the defendant’s in-house counsel writing to INS (four years after charging party had been conducting research at defendant’s site) stating that it immigration sponsorship of plaintiff was erroneous (despite not writing to INS about two other employers who had not complained). Settled through consent decree ($150,000; July 18, 2002); EEOC v. Quality Art LLC and Palestra Capital (D. Az.); suit filed alleging in part that employer retaliated against employees who complained about sexual harassment and national origin discrimination by firing them or forcing them to resign, as well as by reporting several undocumented workers to the INS in an effort to have them arrested and deported. Consent Judgment $3 million. (2002)
1. State Agency Statements

Shortly after the *Hoffman* decision, the California Department of Industrial Relations clarified that it will continue to seek back pay for undocumented workers. That statement was followed by enactment of a state law that reaffirms that “[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment who are or who have been employed, in this state.” It also reaffirms that:

For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person’s immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person’s immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.

Washington State’s Human Rights Commission issued a statement that it will continue to seek back pay as a remedy for violation of Washington State’s Law Against Discrimination.

2. Claims for Damages Under State Discrimination Laws

A New Jersey court held that a worker claiming discriminatory termination under New Jersey’s Law Against Discrimination (LAD) was not entitled to claim economic or non-economic damages because she could not be lawfully employed. In that case, the plaintiff had left work on maternity leave and her employer refused to reinstate her after the leave. In reaching its conclusion, the New Jersey Superior court observed that the plaintiff did not allege any harassment or discriminatory misconduct other than her termination and recognized that there might be cases where “the need to vindicate the policies of the LAD … and to compensate an aggrieved party for tangible physical or emotional harm” might lead to concluding that an individual should be able to seek compensation for that harm. *Crespo v. Evergo Corp.*, No. A-3687-02T5, 2004 N.J. Super. LEXIS 61 at *15 (Feb 9, 2004).
B. Claims for Wage Loss Under State Law for Undocumented Workers


However, one court, sitting as a small claims court in New York, has placed limitations on workers’ ability to recover unpaid wages after *Hoffman*. In *Ulloa v. Al’s All Tree Service, Inc.*, 2003 WL 22762710 (N.Y. Dist. Ct. Sep. 22, 2003), the court limited a landscape worker to recovery of minimum wage only, not the contract wage the worker claimed was promised. This ruling conflicts with the stated policy of the New York Attorney General to continue recovering wages on behalf of undocumented workers after *Hoffman*.

- In *Ulin v. Lovell’s Antique Gallery*, No. C-09-03160 EDL, 2010 WL 3768012 (N.D. Cal. Sept. 22, 2010), the court rejected an employer’s argument since it compensated an employee for something other than wages already earned, FLSA liquidated damages were unavailable to employee who presented false documentation regarding authorization to work. The court found that “numerous courts have found that [liquidated damages] are intended as compensation for unpaid wages already earned but too difficult to calculate.” 2010 WL 3768012, at*9

C. State Statutes Extending Labor Protections to Workers Irrespective of Immigration Status.

On the heels of *Hoffman Plastics* California passed SB 1818 which added provisions to California’s Labor Code, Government Code, Civil Code and Health and Safety Code providing that “(a) All protections, rights, and remedies available under state
law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.” Cal Labor Code § 1171.5; Cal. Civil Code § 3339; Cal. Govt. Code § 7285, Cal. Health & Safety Code § 24000.

These statutes further provide that “(b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.” State and federal courts have construed these sections and concluded that they both extend protections of state law, and impose limits on the discovery of immigration status. *Farmer Brothers Coffee v Workers’ Comp. Appeals Bd.* (2005, 2nd Dist) 133 Cal App 4th 533; *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 618 (Cal. App. 2d Dist. 2007). *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. Cal. 2007) (extending state wrongful discharge protections does not create a conflict with IRCA); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. Cal. 2004) no conflict with extending protections and could proceed for purposes of determining liability; *Ulin v. Lovell's Antique Gallery*, 2010 U.S. Dist. LEXIS 99153 (N.D. Cal. Sept. 22, 2010). But see, *Salas v. Sierra Chemical Co.*, 198 Cal. App. 4th 29, (Cal. App. 3d Dist. 2011), pending review by Cal. Sup.Ct. 1171.5 does not preclude application of unclean hands doctrine and after-acquired evidence rule to preclude recovery by an undocumented worker.

**D. Workers’ Compensation Benefits**

1. **Pre-Hoffman: Undocumented workers covered in nearly all states.**

   Workers’ compensation is a state system that provides remuneration for employees who have been injured while working on the job. In general, it covers the medical costs of an injured employee, and allows a worker to continue to be partially paid during the period s/he is unable to work. Workers’ compensation laws also provide compensation for disabilities and for the family of an employee who dies on the job. Though workers’ compensation is generally an issue of state law, and the state laws vary, generally workers receive medical payments, partial replacement of wages, pensions, death benefits, and sometimes retraining for new jobs.

   The majority of the states’ workers’ compensation laws include “aliens” in the definition of covered employees. Entitlement to lost wages under state workers’ compensation laws turns on state statutes and their definition of “worker” or “employee.” Before Hoffman, state courts in California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Nevada, New Jersey, New York, Pennsylvania, and Texas had specifically held that undocumented workers are covered under their state workers’ compensation
laws. Only one state, Wyoming, explicitly denied workers’ compensation benefits to undocumented immigrants.


In the past six years, courts and agencies in many states have issued opinions about *Hoffman*’s effect on workers’ compensation. While most courts have ruled that injured workers are entitled to workers’ compensation benefits, in many cases workers have needlessly disclosed their immigration status in litigation and exposed themselves to immigration risks. In each of these cases, employers have argued that undocumented workers, especially those who have used false documents in order to get a job in the first place, are either not entitled to workers’ compensation benefits at all, or not entitled to certain types of benefits, such as wage loss.


Other courts have read *Hoffman* to foreclose, at least partially, undocumented workers’ recovery under workers’ compensation laws. A court in Virginia has held that a workers’ compensation claimaint’s legal status “is potentially dispositive as to whether he may recover under the Virginia Workers' Compensation Law.” *Xinic v. Quick*, 69 Va. Cir. 295, 298 (Va. Cir. Ct. 2005). Since *Hoffman*, at least one state court has placed limitations on the availability of time loss recovery for injured workers based on immigration status. The Michigan Court of Appeals has held that wage loss compensation could be
suspended for an undocumented worker from the date that the employer “discovered” (in the context of his workers’ compensation claim) that the worker did not have authorization to be employed, under a specific state law that allows suspension of wage loss benefits if a worker commits a “crime” that prevents him or her from working or obtaining work. See Sanchez v. Eagle Alloy Inc., 254 Mich. App. 651 (Mich. Ct. App. 2003) appeal dismissed, 471 Mich. 851 (Mich. 2004). Although the Pennsylvania Supreme Court held that an injured undocumented worker was entitled to medical benefits, it found that his immigration status might justify terminating benefits for temporary total disability. The Reinforced Earth Company v. Workers’ Compensation Appeal Board, 810 A. 2d 99 (Pa. 2002).

There are other ways in which undocumented workers may be denied worker’s compensation benefits and it is important to be careful depending on the specific facts of your client’s case. In Doe v. Kansas Dep’t of Human Resources, 90 P.3d 940 (Sup. Ct. Kansas 2004) the worker had used a false name and social security number to obtain employment and provided that name and social security number to obtain benefits when injured on the job. The Kansas Supreme Court concluded that the worker’s use of a false name and social security number and lying under oath constituted fraudulent and abusive acts under the worker’s compensation statute even though she was otherwise legally entitled to the benefits she received. But see Silva v. Martin Lumber, No. M2003-00490-WC-R3-CV, 2003 Tenn. LEXIS 1047 (Nov. 4, 2003) (holding that the worker’s presentation of false documents to obtain employment did not provide the employer with an affirmative defense of fraud as there was no causal relationship between the misrepresentation and the injury); Cherokee Industries v. Alvarez, 84 P.3d 798 (Okla. Ct App. 2003) (worker’s compensation benefits awarded to worker who had provided false documents to obtain employment).

See also, Abel Verdon Constr. v. Rivera, 348 S.W.3d 749, 755-56 (S. Ct. KY 20110) – holding that neither Hoffman nor IRCA deprives states of authority to allow undocumented workers to collect WC benefits (“Moreover, we view a decision to exclude unauthorized aliens from the application of Chapter 342 as contravening the purpose of the IRCA by providing a financial incentive for unscrupulous employers to hire unauthorized workers and engage in unsafe practices, leaving the burden of caring for injured *756 workers and their dependents to the residents of the Commonwealth.” Id.); Madeira v. Affordable Housing Found., Inc., 469 F.3d 219 (2d Cir. 2006), Cites policy concerns raised in Design Kitchen approvingly, 469 F.3d at 245 (“For the reasons discussed herein, we conclude that federal immigration law does not clearly preempt New York State law allowing undocumented workers to recover lost United States earnings where, as in this case, (1) the wrong being
compensated, personal injury, is not authorized by IRCA under any circumstance; (2) it was the employer rather than the worker who knowingly violated IRCA in arranging for the employment; and (3) the jury was instructed to consider the worker's removability in deciding what, if any, lost earnings to compensate.” 469 F.3d at 223)

See also, *Asylum Co. v. D.C. Dept. of Emp’t Servs.*, 10 A.3d 619 (D.C. 2010). On issue of first impression, finds that undocumented aliens are eligible to receive benefits under D.C. workers’ compensation statute. 10 A.3d at 622, 628.; *Majlinger v. Cassino Contracting Corp.*, 802 N.Y.S.2d 56 (N.Y. App. Div. 2005) (reversing summary judgment for defendant-employer, holding that undocumented aliens may recover wages lost as a result of workplace injuries; *Economy Packing Co. v. Ill. Workers’ Comp. Comm’n*, 387 Ill. App. 3d 283, 295 (Ill. App. Ct. 2008) (award of WC benefits not pre-empted by IRCA where employee submitted false work authorization documents at time of hire) (“We do not believe that eligibility for workers’ compensation benefits in the event of a work-related accident can realistically be described as an incentive for undocumented aliens to unlawfully enter the United States. Rather, excluding undocumented aliens from receiving certain workers’ compensation benefits would relieve employers from providing benefits to such employees, thereby contravening the purpose of the IRCA by creating a financial incentive for employers to hire undocumented workers.”) Id. at 292.

case in which an award of workers’ compensation benefits was found to be preempted by the IRCA.) See Tarango v. State Industrial Insurance System, 117 Nev. 444, 456–57, 25 P.3d 175, 183 (2001) (upholding an award of permanent partial disability benefits to an undocumented alien, but finding that the IRCA preempted an award of vocational rehabilitation benefits that would facilitate future employment within the United States); Gonzalez v. Performance Painting, Inc., 150 N.M. 306, [pp] (N.M. Ct. App. 2011), (undocumented employee not entitled to modifier WC benefits under N.M. WC law because he cannot lawfully accept an offer to return to work); Curiel v. Envtl. Mgmt. Servs., 376 S.C. 23, 28 (S.C. 2007) (IRCA does not preempt state law entitlement to WC benefits); Bollinger Shipyards, Inc. v. Director, Office of Workers’ Comp. Programs, 604 F.3d 864, 867, 879 (5th Cir. 2010) (Hoffman does not preclude non-resident alien who provided false SSN not precluded from receiving benefits under Longshore and Harbor Workers’ Compensation Act); Arreola v. Admin. Concepts, 17 So. 3d 792 (2009): (Applicant for WC benefits properly denied on basis of fraud where he provided false SSN several times after injury) (“In order to be self-executing, the statute requires everyone to be truthful, responsive and complete.” Id. at 795); Madeira v. Affordable Housing Found., Inc., 469 F.3d 219 (2d Cir. 2006) (“For the reasons discussed herein, we conclude that federal immigration law does not clearly preempt New York State law allowing undocumented workers to recover lost United States earnings where, as in this case, (1) the wrong being compensated, personal injury, is not authorized by IRCA under any circumstance; (2) it was the employer rather than the worker who knowingly violated IRCA in arranging for the employment; and (3) the jury was instructed to consider the worker’s removability in deciding what, if any, lost earnings to compensate.” 469 F.3d at 223)

D. Personal Injury Cases


The New York Court of Appeals has held that Hoffman does not preclude undocumented immigrants from seeking lost wages in tort claims brought against employers who violated workplace safety laws, but also that immigration status
may be relevant to the issue of damages. *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 362-363 (N.Y. 2006). A New York appellate court has held that an undocumented worker can claim lost earnings, but only at the rate he or she would have earned in his or her home country. *Sanango v 200 E. 16th St. Hous. Corp.*, 2004 NY Slip Op 09716 (N.Y. App.Div., 1st Dep’t., Dec. 28, 2004).

In New Hampshire, the Supreme Court took a similar approach, holding that immigration status is not relevant to the issue of liability in personal injury, but it is relevant to the issue of lost earnings. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000, 152 N.H. 6, 13 (2005) (an undocumented worker who can show that his or her employer knew of his or her status and continued to employ him or her can recover lost earnings at U.S. wage rates). As the Court reasoned, “[t]o refuse to allow recovery against a person responsible for an illegal alien’s employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions.”


**III. DISCOVERY ISSUES**

In the post-*Hoffman* era, the majority of issues related to a plaintiff’s immigration status arise in the discovery stage of litigation as defense counsel aggressively attempt to inquire into plaintiffs’ immigration status by arguing that *Hoffman* has made plaintiffs’ status relevant to determination of damages and other remedies. This type of inquiry can intimidate plaintiffs into dropping their claims for back pay or potentially dropping their claims altogether. Counsel should be vigilant and aggressive in responding to discovery requests that are retaliatory, seek to chill workers’ assertion of their rights, and/or could subject an immigrant plaintiff to severe immigration consequences including removal or deportation. Thus, it is critical to prevent a worker’s immigration status and related questions from entering the record and to act aggressively to protect the plaintiff when defendants first raise the issue.

**A. Written Discovery**

While Hoffman holds that immigration status is relevant in determining wages in cases seeking back pay *for work not yet performed* (as opposed to for wages already due)
and reinstatement, the proper inquiry may be whether a person is authorized to work for the relevant period (or will be authorized to work). Given the myriad of undocumented persons who can have work authorization (e.g., having pending applications for permanent residency or hearings, etc.), the actual inquiry into immigration status is a narrower one.

If the plaintiff is not seeking backpay for work not already performed or reinstatement, immigration status is clearly not relevant. See Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005); Flores v. Albertsons, Inc., 2002 WL 1163623, 2002 U.S. Dist. LEXIS 6171, *17 (C.D. Cal. 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) (granting mandamus overturning district court decision which allowed inquiry into documentation of alien petitioners for purposes of determining coverage under the FLSA)). See also De La Rosa v. Northern Harvest Furniture, 210 F.R.D. 237 (C.D. Ill. 2002) (in Title VII matter, defendants Motion to Compel production of documents confirming plaintiff’s legal authorization to work during time employed by defendant and production of documents of plaintiff’s current work authorization was denied as irrelevant to the question of post-termination backpay which was for a limited period); see also backpay remedies discussion supra; see also Reyes v. Snowcap Creamery, Inc. __ F. Supp. __, 2012 WL 4888476 (D. Colo. Oct. 15, 2012) (Motion to Compel denied where employer sought immigration information in FLSA overtime action); Chilling Effect: requiring an employee to reveal immigration status (particularly where it is not relevant) will have an in terrorem effect and will discourage workers from asserting important workplace rights. See, e.g., Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064-1066 (9th Cir. Cal. 2004); De La O v. Arnold-Williams, 2006 U.S. Dist. LEXIS 76816 (E.D. Wash. 2006); EEOC v. Rest. Co., 448 F. Supp. 2d 1085, 1088 (D. Minn. 2006); EEOC v. Bice of Chicago, 229 F.R.D. 581, 583 (N.D. Ill. 2005); Flores v. Albertsons, Inc., 2002 WL 1163623, 2002 U.S. Dist. LEXIS 6171, *17 (C.D. Cal. 2002); Zeng Liu v. Donna Karan International, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002); Topo v. Dhir, 210 F.R.D. 76 (S.D.N.Y. 2002). Practice pointer: In cases where back pay is minimal and the "make whole" relief would come primarily from compensatory and punitive damages, counsel should consider whether it is worth seeking back pay as part of the remedy. This might simplify the litigation and ensure that immigration status does not become an issue.

B. Immigration Related Questions in Depositions

Relevancy: Parties "may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action.... The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence". Fed. R. of Civ. P. 26(b). Immigration status or at least one's "availability to work" (i.e. work authorization) might be at issue when the remedies of backpay, frontpay or reinstatement are at issue. The potential relevance of such information should be weighed, however, against the possibility of an in terrorem effect. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064-
In a unique decision, the Eastern District of Washington reversed its own prior ruling granting a protective order into immigration status inquiries and held that immigration status was relevant to a claim of compensatory damages as a potential “stressor” (in a sexual harassment case where neither backnor nor reinstatement was sought) and allowed discovery for that reason finding that NIBCO did not preclude such an inquiry. EEOC v. Evans Fruit Company, 2011WL 1884477 (E.D. Wash March 2011).

Although it ordered that the trial be bifurcated, the court did not bifurcate discovery. Note, however, that the court held that the evidence could still be excluded at trial.

Privileges

Under Rule 30 of the Federal Rules of Civil Procedure, "A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3)." Fed. R. of Civ. P. 30(d)(1) (emphasis added)

Fifth Amendment Privilege Against Self-Incrimination

A question as to the manner in which one entered the United States (and arguably one's immigration status) could be over broad and violate the privilege against self-incrimination. For example, an inquiry as to how one entered the United States could prompt an answer that admits 1) illegal entry in violation of 8 U.S.C. §1325(a) (a misdemeanor for the first offense and a felony for any subsequent commission), or 2) an illegal entry after a prior deportation, a felony under 8 U.S.C. §1326(a), or 3) illegal acquisition of immigration status through a sham marriage, a felony under 8 U.S.C. §1325(b) or through any other fraudulent means.

Undocumented persons might use false documents to obtain employment in violation of 8 U.S.C. §1324c. If a defendant employer has accepted the documents as valid on their face at the time of hire, the defendant should continue to accept the documents as valid. See, 8 C.F.R. 274a.2 (b) (1)(viii). Raising the issue of documents or their validity for the first time during an employment investigation might be interpreted as retaliation.

The Fifth Amendment provides that “no person shall be compelled in any criminal case to be a witness against himself.” U.S. Const., Amdt. 5. It also applies in civil cases. Baker v. Limber, 647 F.2d 912, 916 (9th Cir. 1981). It also applies in “any other proceedings…formal or informal, where the answers might incriminate [the declarant] in future criminal proceedings.” Minnesota v. Murphy, 465 U.S. 420, 426 (1984).

Note that invoking one’s Fifth Amendment privilege against self-incrimination is not necessarily without consequences in civil cases. The fact that a plaintiff invoked her Fifth Amendment rights may be admitted to adverse effect in a civil case. See Arango
v. United States Dep’t of the Treasury, 115 F.3d 922, 926 (11th Cir. Fla. 1997). At least one court has also suggested that a plaintiff’s invocation of Fifth Amendment rights may affect her fitness as a class representative if the withheld information is indeed relevant to her claims. See, e.g., Luna v. Del Monte Fresh Produce (Southeast), Inc., 2007 U.S. Dist. LEXIS 36893, *20 (N.D. Ga. May 18, 2007); but see DeLeon Granados v. Eller & Sons Trees, Inc, 497 F.3d 1214, 1220-21 (11th Cir. 2007) (suggesting that invocation of Fifth Amendment in response to questions implicating possible undocumented work does not make a proposed class representative per se inadequate; what matters is relevance of the undisclosed information to the issues in the case).

The privilege may be asserted during pre-trial discovery in response to deposition questions, interrogatories, or compelled production of documents. United States v. White, 322 U.S. 694, 699 (1944); Garner v. United States, 424 U.S. 648, 656 (1976). So long as an answer to a question might provide a “link in the chain” to possible criminal liability, the Fifth Amendment privilege is properly asserted. Hoffman v. U.S. 341 U.S. 479, 486 (1951).

If a witness provides information in a civil proceeding and does not claim the Fifth Amendment privilege, it is considered waived for a later criminal prosecution. U.S. V. Wolfson, 294 F. Supp. 267 (D.C. Del. 1968). Once the privilege is waived, it cannot be restored. Rogers v. U.S. 340 U.S. 367 (1951). It could therefore be an ethical violation and breach of duty for an attorney representing persons at risk of possible criminal prosecution not to advise them of their right to invoke the Fifth Amendment when the information requested could be inculpatory. If a deponent is “represented by competent counsel at time of their depositions in civil matter and they had asserted their privilege against self-incrimination in certain instances, deposition testimony to which privilege had not been asserted was admissible” in later criminal prosecution. Bass v. U.S., 409 F.2d 179 (5th Cir. 1969), cert denied, 396 U.S. 863 (1969).


Thus, while a defendant might want to discover immigration status, it cannot obtain such information by making the witness incriminate himself and a judge “may not force a witness to prove incrimination by testimony.” Anton v. Prospect Cafe Milano, Inc., 233 F.R.D. 216, 218 (D.D.C. 2006) (citing Hoffman). Nor must a witness prove that criminal prosecution would be likely; it must only be “possible.” In re Master Key Litig, 507 F. 2d 292, 293 (9th Cir. 1974). That an answer would tend to self-incriminate is open for dispute only when the government has completely immunized the declarant. See, e.g. Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472, 478-479 (1972) (where the potential liability would be exclusively in a foreign country); In re Master Key Litig, 507 F.2d 292, 293 (9th Cir. 1974) (where the
statutes of limitations are expired).

For these reasons, it is typically preferable for advocates to move for protective orders barring questions into immigration status altogether, rather than risk negative inferences or possible disqualification as class representatives.

C. Using Protective Orders

Using Protective Orders to Bar Certain Areas of Inquiry

for plaintiff charging party’s visa, passport, and birth certificate alleged to be used for a “background check”).

**To Stop Private Investigator Inquiry of Immigration Status**

In a recent case, the company hired a private investigator to ask potential class members about their immigration status before class certification was granted. Plaintiffs moved for protective order. *Saucedo v. NW Management and Realty Services*, 2013 WL 163425 (E.D. Wash. Jan 15, 2013) The court found that *Saucedo* that evidence that certain putative class members are undocumented would have no bearing on whether the propose class satisfies the numerosity, commonality, typicality and adequacy of representation criteria set for in Rule 23 (a) and therefore a protective order was warranted.

In granting the order the court noted, “…Farmland’s proposal to question putative class members about their immigration status – particularly at this early stage of the proceedings – is inherently coercive. (citing *Rivera*). Indeed, there can be little doubt that using a private investigator to track down and interview putative class members in their private residences about their immigration status is likely to cause intimidation...” id.

**Other Measures to Narrow Inquiries or Reduce Chances of Disclosure Leading to Retaliation or Immigration Consequences**

While most courts have rejected defendants’ attempts to conduct unfettered discovery into workers’ immigration status, some courts have ordered or allowed that information related to or potentially leading to discovery of status be partially or wholly disclosed because under *Hoffman* such information may be relevant to eligibility for damages or other remedies. See e.g., *Perez-Farias v. Global Horizons, Inc.*, 2007 U.S. Dist. LEXIS 34355 (E.D. Wash. May 10, 2007); *Colindres v. Quietflex Mfg.*, 2004 U.S. Dist. LEXIS 27982 (S.D. Tex. 2004). In such cases, plaintiffs may be faced with a choice between surrendering claims to certain kinds of relief (i.e., back pay, front pay, or reinstatement) or answering questions regarding their immigration status.

The court in *Rodriguez v. ACL Farms, Inc.*, 2010 U.S. Dist. LEXIS 125885 *8* (E.D. Wash. Nov. 12, 2010) determined that given the holding in *Rivera v Nibco*, immigration status was relevant to the issue of actual damages for workers denied employment in violation of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) but bifurcated proceedings so that discovery of that information would be delayed pending a finding on liability. *Id.* at *12.

Given the questionable relevance and highly chilling effects of discovery inquiries related to immigration status, advocates should take aggressive efforts to keep
immigration status from becoming an issue in any aspect of a case. Should these efforts prove partially or wholly unsuccessful, counsel and clients should consider alternatives to reducing potential harms posed by disclosures related to immigration status. Undocumented clients must be counseled about the realistic dangers of such disclosures. Workers and their counsel should weigh several factors, including: (1) the likelihood or possibility that the employer or a third party will use the information to retaliate against the employees; (2) the extent of the disclosures ordered by the court and how clearly such disclosures point to undocumented status; (3) the enforcement climate in the industry or geographic area in which the worker lives and/or works; (4) any criminal wrongdoing or malfeasance the worker may have committed to obtain the job that forms the basis of her claims (e.g., document fraud); (5) any possible criminal wrongdoing or malfeasance by the employer that may be raised as a countervailing consideration (e.g., knowingly recruiting and/or hiring undocumented persons, selling or arranging for false work documents to be used by employees); (6) the availability of immigration relief based on or related to the employer’s violations, such as continued presence or T visas for human trafficking victims or U visas for victims of crimes (further discussed below); and, depending on the audience (7) policy considerations such as the importance of the protections at stake and the severity of the employer’s violations.

If, after weighing the risks, a worker elects to disclose information related to status rather than curtail or surrender her claim, advocates should consider ways to prevent this information from becoming public and/or disclosed to third parties, and should seek to narrowly tailor what is disclosed. Possible measures include: entering into a stipulation or obtaining a court order directing that such information not be disclosed to third parties and that documents and/or relevant deposition transcript excerpts be submitted to the court only under seal; requesting in camera proceedings when a court reviews sensitive evidence; or finding narrowly tailored ways to provide information that pose less risk to the worker (i.e., stipulating to facts that do not directly admit or implicate immigration status but provide information the court has deemed relevant, in lieu of responding to broader inquiries or producing documents). See, e.g., Perez-Farias v. Global Horizons, Inc., 2007 U.S. Dist. LEXIS 34355 (E.D. Wash. 2007) (suggesting use of in camera proceedings); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005) (limited disclosures); Colindres v. Quietflex Mfg., 2004 U.S. Dist. LEXIS 27982 (S.D. Tex. 2004) (limited disclosures, submissions under seal, and protective order).

D. Motions in Limine

Since Hoffman, employers have argued that an immigrant workers’ status is relevant in order to determine if s/he has properly mitigated damages because the Supreme Court in Hoffman said that an undocumented worker could not mitigate damages without
violating the law. In an action brought under the FLSA, the court granted the plaintiffs' pre-trial motion to prohibit the defendants from asserting a defense that would have allowed the introduction of evidence regarding the plaintiffs' immigration status or their inability to mitigate damages. *Rodriguez v. The Texan, Inc.*, 2002 WL 31061237 (N.D. Ill. 2002). The plaintiffs filed a motion in limine seeking to preemptively "head-off any argument that the plaintiffs' status as illegal aliens precludes them from recovering certain damages under the principles articulated in *Hoffman*." The plaintiffs argued that defendants must raise the failure to mitigate damages as an affirmative defense in order to escape liability. The court agreed with the plaintiffs, finding that in the Seventh Circuit, a defendant's failure to raise an affirmative defense results in a waiver of that defense. In this case, the court held, the defendants never formally alleged that the plaintiffs failed to mitigate their damages. The court also noted that "it surely comes with ill grace for an employer to hire alien workers and then, if the employer itself proceeds to violate the Fair Labor Standards Act . . . for it to try to squirm out of its own liability on such grounds."

E. Discovery Logistics and Undocumented Workers

Even if defense counsel does not directly inquire into a worker’s immigration status, undocumented workers may face other challenges in the discovery process. Many immigrant workers migrate frequently in search of work and may face challenges traveling to participate in depositions because they lack travel documents, are indigent, or have returned to their home countries or otherwise live at a significant different from the forum in which their claims were filed. In such cases, courts are increasingly willing to override the normal rule that a plaintiff must appear for a deposition in the forum in which she filed her case. Some courts have granted protective orders requiring that defendants’ counsel travel to the area where the worker is living or to a mutually convenient location, such as a major city in the worker’s country, to depose the worker. See, e.g., *Luna v. Del Monte Fresh Produce (Southeast), Inc.*, 2007 U.S. Dist. LEXIS 36893, *7-8 (N.D. Ga. 2007); see also *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591, 592 (S.D.N.Y. 1994)(ordering defendants to depose plaintiff in London, where plaintiff lived, as opposed to New York, where the action was filed); *De Petro v. Exxon Inc.*, 118 F.R.D. 523, 525 (M.D. Ala. 1988) (requiring defendant to obtain oral discovery from non-resident indigent plaintiff by either telephone or written interrogatories).

F. Trial Logistics and Undocumented workers

In *Lopez v. NTI, LLC*, FLSA plaintiffs residing in Honduras were permitted to testify at trial via videoconference. Good cause was show due to the cost of travel and visa issues required to have the plaintiff testify in the United States. *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471 (D. Md. 2010).
IV. COUNSEL’S DUTIES WHEN IMMIGRATION STATUS IS AT ISSUE

While documented workers face the possibility of retaliatory discharge for an assertion of their labor and civil rights, undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution.

Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064 (9th Cir. 2004).

A. Immigration status is not static.

There are many immigration categories, some of which may eventually lead to lawful permanent resident status and U.S. citizenship. Issues of immigration status and work authorization are governed by the Immigration and Nationality Act (INA) codified in 8 U.S.C. §1101, et seq. and in 8 C.F.R. §1, et seq. The INA is enforced by the Department of Homeland Security (DHS). The DHS was created on March 1, 2003, and encompasses the U.S. Citizenship and Immigration Services (CIS) and U.S. Immigration and Customs Enforcement (ICE) – formerly known as the Immigration and Naturalization Service (INS).

Foreign nationals in the U.S. are divided into two major categories – Immigrants and Nonimmigrants. In general, immigrants are those individuals who come to the U.S. to take up permanent residence (green card). Nonimmigrants are those who enter the U.S. for a specific purpose to be accomplished during a temporary stay (for example, as a student, exchange visitor or temporary worker).

Basically, foreign born individuals in the U.S. will fall into one of the following classifications: 1) naturalized U.S. citizens; 2) lawful permanent residents (LPR or “green card” holder); 3) nonimmigrants (including B, H, E, F, J, L, O, P, TN (NAFTA) and dependants); 6) asylees or refugees (individuals granted this status because they have been persecuted or have a well-founded fear of being persecuted if they return to their homeland); 4) Temporary Protected Status (TPS) granted to nationals of foreign states in which armed conflict, natural disaster, or other circumstances pose a serious threat to personal safety; 5) Adjustment of Status (AOS) - those who have filed their applications to become permanent residents but are caught up in a visa backlog waiting for their applications to be approved; and 6) individuals who entered without inspection (EWI) or overstayed their authorized periods of nonimmigrant stay.

Not all foreign born individuals who are in the U.S. are authorized to work. Naturalized U.S. citizens and lawful permanent or conditional residents have unrestricted authorization to work in the U.S. for any employer. Nonimmigrants authorized to work for a specific employer (e.g., in H-1B, H-2B, E-3, J, L-1, TN, etc.) must have a valid I-94
Arrival/Departure Card showing the designation and expiration date of the authorized stay/employment. In order to legally work in the U.S., the following classifications, among others, must have a valid Employment Authorization Document (EAD) issued by the CIS: Asylees and asylum seekers, refugees, students authorized to work following degree completion, individuals in or applying for TPS, certain individuals in K status (fiancé or nonimmigrant spouse of U.S. citizen), applicants for AOS permanent residence status, dependants of individuals holding E or L status, and B-1 domestic servants of an employer in nonimmigrant status. Foreign nationals in the U.S. as tourists or who entered without inspection or overstayed their authorized period of stay do not have authorization to work legally in the U.S.

All noncitizens—whether they are here lawfully or unlawfully—can still be subjected to removal or deportation proceedings if they violate certain criminal laws, fail to maintain their immigration status, engage in marriage fraud, or engage in document fraud. An individual’s admission that he or she was not authorized to work and used false documents to obtain employment, in violation of 8 U.S.C. §1324c could render her ineligible for other various immigration benefits. See, 8 U.S.C. §1182(a). Use of false documents to obtain employment is also a separate crime. 18 USC Sec. 1546(b). An admission under oath by a previously deported client that he has been ordered deported but willfully failed to depart the U.S., or that he re-entered the U.S. unlawfully after a deportation order could lead to severe immigration and criminal consequences.

Foreign nationals who are in the U.S. in immigrant or nonimmigrant status may not always remain in the status they currently hold. For example, an individual who enters the U.S. as a lawful permanent resident may become a naturalized U.S. citizen after meeting all of the applicable requirements. Also, an individual in nonimmigrant status may become a lawful permanent resident through employment or a family relationship. Even an individual who entered the U.S. legally but overstayed his authorized stay may become a permanent resident based on marriage to a U.S. citizen.

When representing a foreign born national it is critical to determine the following: (1) how and in what status the individual originally entered the U.S.; (2) whether he is currently in legal status; (3) whether he has always maintained legal status; (4) whether he has authorization to work in the U.S. for any employer or a specific employer and under what conditions/restrictions; and (5) what immigration processes or applications are currently pending for that individual. Establishing a relationship with an immigration lawyer would be beneficial if your practice includes representing foreign nationals.

B. When Counsel Suspects Defendant Will Raise the Immigration Flag

First, counsel may be able to head off employer inquiries with cites to the appropriate cases, or by seeking protective orders or other injunctive relief. Second, plaintiffs’ counsel should seek to subject employers who retaliate to additional liability under the anti-retaliation provisions of applicable laws. Third, there are mechanisms in place for plaintiff’s counsel to help prevent ICE from responding to an employer’s retaliatory tip. It
will be helpful to explain to opposing counsel that immigration status is irrelevant to the underlying claim and that any threats to turn a worker into ICE will be considered retaliation under many state and federal laws. See, e.g., Sure-Tan v. NLRB, 467 U.S. 883 (1984) (NLRA); Singh, 214 F.Supp.2d at 1061 (FLSA); Contreras v. Corinthian Vigor Ins. Co., 25 F.Supp.2d 1053 (N.D. Cal. 1998) (FLSA) and agency statements post-Hoffman, noted above.

ICE will generally not respond if it is aware that an employer is reporting suspected undocumented immigrants in retaliation for the immigrants’ assertion of rights. According to ICE Special Agent Field Manual (SAFM) § 33.14(h) (formerly INS Operating Instruction 287.3a); "Questioning Persons During Labor Disputes," when the agency receives information concerning the employment of undocumented or unauthorized aliens, officials must "consider" whether the information is being provided to interfere with employees’ rights to organize or enforce other workplace rights, or whether the information is being provided to retaliate against employees to vindicate those rights.

Specifically, the SAFM requires immigration authorities to ascertain the name of the informant, whether there is a labor dispute in progress, whether the informant is employed at the site or by a union representing workers at the site, whether the informant is or was employed as a manager or supervisor at the site or is related to anyone who is and whether there are pending grievances, charges or complaints at the worksite. The SAFM also directs immigration authorities to inquire how the informant obtained information regarding the person’s alleged unlawful status and to determine the source and reliability of that information.

If ICE determines 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, "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." SAFM 33.14(h).

**Practice Pointer:** In appropriate circumstances, counsel should consider notifying ICE about labor disputes at a particular workplace in order to alert them that any "tips" they receive related to that worksite may be motivated by retaliation. Advocates may want to provide copies of charges or complaints (redacting information identifying particular employees) and a copy of the Field Manual section since ICE officials may be unfamiliar with it or lack easy access to it. Before advocates consider this course, they should make sure that they are familiar with local ICE practice in this regard, since the SAFM does not prohibit enforcement action during a labor dispute.

Finally, when the plaintiff has any suspicions that the employer might indeed contact the immigration authorities, it is also critical to educate plaintiff about their rights in case of an immigration enforcement action. Immigrants have the right to remain silent and refuse to sign any documents until they have had a chance to contact counsel.
Immigrants have the right to not admit to their lack of U.S. citizenship, and do not have to provide any information about their particular alienage or country of birth or citizenship. Most importantly, workers should know never to carry any false documents on their person.

C. When the Defendant Has Retaliated

Despite the fact that an employer may have violated anti-retaliation law by reporting a plaintiff to ICE, there is no assurance that the plaintiff will not be deported. Counsel should intervene immediately by seeking the assistance of immigration counsel that is experienced in detention and removal issues. Counsel should also make sure that plaintiff does not admit or sign anything that waives her rights or that harms the litigation. Finally, counsel must look into the various means of keeping plaintiff physically present in the U.S. in order to fully litigate the employment case.

**Motion to Suppress** -- It may still be possible to seek relief by arguing that the evidence was illegally obtained and therefore that it should be suppressed. In a recent and important immigration court case, *In re Herrera-Priego.* (Lamb, I.J.) (NY, July 10, 2003), the immigration judge granted a motion to suppress evidence and terminated the removal proceedings against the workers. The evidence was obtained in violation of the former Operating Instruction 287.3a, (now SAFM § 33.14) discussed above, when the garment workers had been detained in an immigration raid as a result of a retaliatory tip by their employer after they filed overtime claims with the New York Department of Labor. Because the evidence was suppressed, the workers were not deported and no further action was taken against them. However, they remain undocumented.

Under certain circumstances, undocumented workers may be granted authorization to work while they pursue various remedies against deportation or pending applications for legal status, at least through the end of the pending litigation. Before applying for any of the relief listed below, counsel should consult with an immigration attorney, preferably one who specializes in immigration relief for immigrant crime victims and witnesses.

**S visas:** “S” visas may be available for aliens assisting in criminal prosecutions. *See, 8 U.S.C. §101(a)(15)(S).* This visa can be available if the person has critical reliable information about a criminal organization or enterprise, is willing to supply such information to federal or state law enforcement authorities or a federal or state court; and whom the Attorney General deems essential to a criminal investigation or prosecution of an individual involved in criminal organization or enterprise. “S” visa is also available who provide information about terrorist organizations. If DHS approves the S visa, the person can be admitted for 3 years with work authorization, and may be able to adjust their immigration status to lawful
permanent resident status.

**T Visas:** These visas are available to victims of human trafficking, as defined by the Victims of Trafficking and Violence Protection Act of 2000. T visa status is a form of non-immigrant status, and authorizes presence in the U.S. for 3 years. During these 3 years, a T visa holder is eligible to receive work authorization. The DHS issues work authorization for one-year periods, and the T visa holder must apply each year for a renewal. After 3 years, a T Visa holder may be eligible to apply for Lawful Permanent Residence. See, 8 U.S.C. §101(a)(15)(T).

**U Visas.** These visas, also created by the Victims of Trafficking and Violence Protection Act of 2000, are available to immigrants of certain crimes enumerated in the Act, and who meet other requirements established by the statute. The listed crimes include, *inter alia*, sexual assault, abusive sexual contact, prostitution, sexual exploitation, extortion, false imprisonment, assault, battery, involuntary servitude, human trafficking, and witness tampering. U Visa holders can be granted work authorization, and may be eligible to apply for Lawful Permanent Residence after 3 years of maintaining U Visa status. See 8 U.S.C. §101(a)(15)(U).  

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5 The “U” Visa was passed by Congress as part of the Victims of Trafficking and Violence Protection Act in October 2000. After seven years, the U.S. Department of Homeland Security, which includes Citizenship and Immigration Services, (DHS) issued interim regulations effective October 4, 2007 for the implementation of the U Visa provisions. 8 CFR §103, et seq. See also, www.uscis.gov. According to the DHS regulation, Congress recognized that “alien victims may not have legal status and, therefore may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States. In passing this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes. (citation omitted). Congress also sought to encourage law enforcement officials to better serve immigrant crime victims.”

For example, rape or assault and battery, criminal acts, can also constitute sexual harassment. Other acts of violence can constitute racial and/or national origin harassment. Thus, violations of federal employment discrimination laws may include acts that constitute criminal activity. See attached “Fact Sheets” “USCIS Publishes Rule for Nonimmigrant Victims of Criminal Activity” for eligibility requirements and definitions of criminal activity, and “Certifying U Nonimmigrant Status” from U.S. Citizenship and Immigration Services (CIS) dated September 5, 2007, at www.uscis.gov.

Essentially, the U Visa allows an individual who has suffered substantial mental or physical abuse because of qualifying activity to remain in the United States for up to four years during if he/she is willing to cooperate with the certifying governmental entity in the investigation or prosecution of that criminal activity. A person granted a U Visa is automatically authorized to work in the United States and will receive an “Employment Authorization Document” (EAD). Under special circumstances the visa can be continued if the person’s ongoing presence is needed for the government’s case. Under the statute, an individual who has held a U-visa for three years can adjust to lawful permanent resident status (“green card holder”) at the discretion of the DHS. To obtain permanent resident status, DHS must conclude that the “alien’s continued presence in the United States is justified on humanitarian grounds, to ensure the family unity, or is otherwise
in the public interest.”

To qualify for the U nonimmigrant classification:

1) The alien must have suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity;
2) The alien must be in possession of information about the criminal activity of which he or she has been a victim;
3) The alien must be of assistance to a Federal, State or local law enforcement official or prosecutor, a Federal or State judge, the Department of Homeland Security (DHS), or other Federal, State or local authority investigating or prosecuting that criminal activity; and
4) The criminal activity must have violated U.S. law or occurred in the United States (including Indian country and military installations) or the territories and possessions of the United States.


**Qualifying criminal activity** is defined by statute to be “activity involving one or more of the following or any similar activity in violation of Federal, State or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.” Id.

There is no need to have an actual criminal prosecution. The law only requires that a federal agency, like EEOC, is investigating violations whose acts also amount to criminal activity.
Deferred Action – This is a form discretionary relief which rests entirely with the local ICE District Director who can agree to defer all or part of the immigration enforcement or removal proceedings in a particular case. This may be for a particular time period (i.e. pending the end of litigation) or an indefinite period. Persons granted deferred action may also get work authorization. See, 8 C.F.R. § 274a.12 (c)(14). However, advocates should know that this is a very difficult form of relief to obtain, particularly during these times of heightened enforcement. If the case is still in the administrative stage, counsel should contact the administrative agency involved so that they can intervene with ICE. As noted above with the *Holiday Inn Express* case, agencies like the EEOC can work with the immigration authorities to find a means of keeping the person in the U.S. See former INS Operating Instruction 242.1a(22).

Stay of Removal – Similar to deferred action, but granted on a more frequent basis, is a petition for a stay of removal or deportation proceedings. This is also a discretionary form of relief that is not subject to review. However, an immigration judge or the Board of Immigration Appeals may also grant a stay of removal. A stay of removal may be granted if “(i) immediate removal is not practicable or proper; or (ii) the alien is needed to testify in the prosecution of a person for a violation of a law of the United States or of any State.” See, INA § 241(c); 8 C.F.R. § 241.6.

Final Order of Supervision – Finally, in situations where the person has already signed voluntary departure and agreed to leave the U.S. or has a final order of deportation entered against them, counsel may seek a final order of supervision (FOS) to ensure that the worker will be present at least through the discovery period, trial, or end of the litigation. See, INA § 241(a)(3); 8 C.F.R. § 274a.12 (c)(18).

V. SOME OTHER IMPORTANT MATTERS

A. No Match Letter

A No-March” letter issued by the Social Security Administration (SSA) is notification to the employer that they have submitted reports that contain names and Social Security numbers that do not match SSA records. A No-Match letter is not evidence of immigration status and an employer should not take disciplinary action based solely on the latter. In August 2007, the Department of Homeland Security (DHS) issued a rule amending the regulations relating to the hiring or employment of foreign nationals who do not have authorization to work legally in the United States. The rule is entitled “Safe Harbor Procedures for Employers Who Receive a No-Match Letter” and sets forth the legal obligations of an employer when it receives a no-match letter from the Social Security Administration (SSA) or a letter from the DHS regarding
employment verification forms. Each year, the SSA analyzes W-2 tax return data. SSA will send out a no-match letter to an employer who has submitted more than ten W-2s where the name and number shown on the W-2 do not match SSA records and this amounts to more than one-half of one percent of all the W-2s submitted by the employer. The rule describes safe harbor procedures to follow after receiving one of these letters to ensure that the DHS will not later use the letter against the employer as proof of constructive knowledge that the employee referred to in the letter was not authorized to work in the U.S.

On October 10, 2007, the U.S. District Court for the Northern District of California issued a preliminary injunction blocking implementation of the August 2007 final rule after the AFL-CIO, the American Civil Liberties Union (ACLU), the National Immigration Law Center (NILC), and other labor groups filed a lawsuit. AFL-CIO, et al. v. Chertoff, 552 F. Supp; 2d 999 (N.D. Cal. 2007) The Court questioned whether DHS had: (1) provided a reasoned analysis to support the position that a no-match letter from the SSA may alone put an employer on notice that an employee named in the letter may not be authorized to work; (2) exceeded its authority by creating an exception for employers who follow the safe-harbor protocol; and (3) failed to conduct a required regulatory flexibility analysis. As a result of the preliminary injunction, the DHS was prevented from sending the 2007 SSA mis-match letters it intended to send out starting in September 2007 and prohibited further implementation of the mis-match rule until further ruling from the court. (for more information see www.nilc.org)

On March 21, 2008, the DHS released a Supplemental Proposed Rulemaking seeking to address the issues raised by the Court in hopes that the Court will dissolve the injunction. The DHS cites several public and private studies in support of its conclusion that there is a clear connection between the no-match letters and lack of work authorization and its belief that some employers ignore no-match letters because risk of immigration enforcement is less costly than complying with immigration laws. The DHS believes that other employers are unsure of what they are required to do when they receive a no-match letter and the rule will provide guidance. The DHS rescinded the statements in the preamble to the Rule describing an employer’s obligations under anti-discrimination law or discussing the potential for anti-discrimination liability faced by employers that follow the safe harbor procedures. Finally, the DHS provided an estimate of the average cost that an employer would incur when it receives a no-match letter and decides to follow the safe harbor procedures. In addition, the DHS clarified that the rule does not apply to workers hired before November 6, 1986 and that employers who choose to follow the safe harbor steps set forth in the rule are not required to make or retain any new documentation or records.

**Practice Pointer:** If the Court dissolves the injunction, the rule will go into effect immediately. The next round of no-match letters will most likely be issued in the spring of 2009. Even if the DHS loses the case on the merits, it is probable that the agency will retool its rule based on instructions issued by the Court and republish it for immediate implementation.

In order to trigger the safe harbor protections of the rule, as it stands following the March 2008 clarification by the DHS, the employer must follow these steps:
Within thirty calendar days of receipt of a No-Match letter from the SSA the employer must check its records to determine whether the problem is a result of typographical or other clerical error, and if so, contact the SSA to correct the error and verify that the corrections match the SSA’s records. A record of the efforts engaged in to correct such a clerical error should be documented and retained in the employer’s records. Once the correction has been made, the employer should update the I-9 form for the affected employee. If the employer determines that the problem is not due to an error in its records, the employer must promptly notify the employee (either as soon as the employer receives the no-match letter or within five business days of the employer completing its internal review) that there is a discrepancy between the employer’s records and the records of the SSA. If it is determined that the information in the employers records is incorrect, the employer must correct its records, inform the SSA of the correct information, and document the actions taken. If the employee confirms the accuracy of the information in the employer’s records, the employer must notify the employee that he or she has 90 calendar days from the date of receipt of the letter to cure the problem.

Within thirty days (or less depending upon the instructions in the letter) of receipt of a notice of discrepancy from DHS, the employer must contact the local DHS office and try to resolve the problem raised in the letter.

Within 93 days of receipt of a No-Match letter from the SSA or a letter from DHS:

1. If the employee is unable to resolve the discrepancy with the SSA or DHS within 90 days, the employer is required to attempt to reverify the employee’s eligibility to work by completing a new I-9 form within three days. The employee cannot present a document that is in dispute and must present a document that contains a photograph. The employer must retain the new I-9 form with any prior I-9 form completed by the employee;
2. If the employer is unable to verify the employee’s work eligibility, the employer must terminate the employee or risk being penalized for continuing to employ a foreign national who is not authorized to work in the U.S.

The rule expands the circumstances under which an employer will be considered to have “constructive knowledge” to include when an employee requests sponsorship for labor certification or a visa petition, receipt of a no-match letter from the SSA, and receipt of a letter from the DHS that the employee’s employment authorization documents used to verify employment eligibility when completing the I-9 form do not match DHS records.

**Practice Pointer:** The employer should not terminate an employee until the process is complete, unless it obtains actual knowledge that the employee is not authorized to work in the U.S. The employer may also be charged with actual or constructive knowledge of an employee’s unauthorized status when the employee makes the request for sponsorship and admits to the employer that he or she is unauthorized or where the request is inconsistent with the information provided by the employee at the time of completion of the I-9 form (e.g., the employee checked the box in Part 1 of Form I-9 that he or she was a U.S. citizen or permanent resident).
There are many causes for a no-match to occur in the SSA database, including a clerical error or name change. A no-match can also result when an individual uses a false Social Security number or a number assigned to someone else to verify employment eligibility. Reverification procedures should be applied uniformly to all employees with a non-match. Employers that selectively reverify certain employees may be liable under applicable anti-discrimination laws and knowledge that an employee is unauthorized may not be inferred from the employee’s foreign appearance or accent. As an advocate of the plaintiff, it will be your job to ensure that any termination resulting from implementation of the safe harbor protocol is valid and that proper procedures were followed, was not due to discriminatory factors, and working with the affected employee and the employer to resolve the issues that resulted in that individual being included in a no-match letter originally.

B. E-Verify

E-Verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet based system operated by the DHS in partnership with the SSA. E-verify allows participating employers to electronically verify the employment eligibility of their newly hired employees. Several states have enacted laws that require employers to register for and use E-Verify (e.g., Arizona, Colorado) or allow for a phase-in based on the size of the employer (Mississippi). Other states have enacted laws that prohibit employers from enrolling in the E-verify program (e.g., Illinois). Still other states have enacted legislation requiring only certain employers to enroll in E-Verify (e.g., Georgia, Oklahoma, Rhode Island - public employers and contractors with the State). DHS filed a lawsuit against the state of Illinois asking the court to declare the new law illegal. That lawsuit is still pending. For all states where no E-verify legislation has been enacted, E-verify enrollment is voluntary. On April 4, 2008, DHS authorized the extension of the normal period of Optional Practical Training (OPT) for foreign students from 12 months to 29 months for students who have received STEM degrees (science, technology, engineering and mathematics), are currently in an approved post-completion OPT period, and the student’s employer is enrolled in E-Verify.

C. ICE Worksite Enforcement

U.S. Immigration and Customs Enforcement (ICE) worksite enforcement investigations focus on egregious conduct by employers involved in criminal activity or worker exploitation (alien smuggling, document fraud, human rights abuses, among other things). Targets include business traditionally considered to employ illegal workers, such as companies in need of manual labor, including agriculture, construction, food processing, and landscaping. Possible criminal charges against employees based on the raids include, identify, document, and Social Security fraud.

D. RICO
A Federal Judge in Ohio declined to dismiss racketeering charges against three airline officials accused by an ex-employee of cooperating with a temporary worker agency to hire undocumented workers in an effort to reduce wages (*Hager v. ABX Air Inc.*, S.C. Ohio, No. 07-00317, 3/25/08). The court rejected Racketeer Influenced and Corrupt Organizations Act (RICO) claims against the airline and its parent DHL Express. The judge said that, “a corporate employee is separate from the corporation and can conduct the corporations’ affairs in violation of RICO.”

E. Benefits

An employee’s immigration status is irrelevant for purposes of ERISA or the Tax Code. However, the language of the benefit plan may exclude undocumented aliens. This is a developing area. Assume an individual has been employed by the company for five years and is fully vested in its retirement plan but departed when the government raided the job site. He now returns but with a different name and/or documentation showing his eligibility to work. What rights does this individual have to the retirement account established for him under the old name or Social Security number? If the benefits plan does not exclude undocumented aliens, the employer may treat the situation as a correction of a previously inaccurate Social Security number or name, correct the inaccurate information, and reinstate the employee.

F. Fraud Claims

Workers who alleged they were convinced by false promises of wages and working conditions to leave Mexico to work at a California restaurant were not barred from raising fraud and false-inducement claims. (*Noble v. Draper*, 27 IER Cases 174, Cal. Ct. App., No. C053918, 1/31/08).

G. H-1B Wage Violations

The U.S. Department of Labor Wage and Hour Division is investigating and assessing penalties for violations of the H-1B provisions of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1182(n), *et. seq.*, and alleged overtime violations of the Fair Labor Standards Act (FLSA), 28 U.S.C. § 201-209. One of the requirements for approval of a H-1B petition is that the employer attests on the Labor Condition Application (Form 9035E), among other things, that it will pay the H-1B employee at least the prevailing wage as determined by the U.S. Department of Labor and pay for non-productive time. Remedies include back pay (the difference between the wage actually paid and the prevailing wage for the period of validity of the H-1B authorization) and liquidated damages.

H. State Immigration Legislation

Many states have enacted laws requiring employers doing business with the state to verify the legal status to work in the U.S. of each employee (Arkansas, Georgia, Idaho, Pennsylvania) or to certify compliance with the Immigration Reform and Control Act of
1986 (IRCA) (Delaware, Massachusetts). Iowa requires any business that receives economic development assistance from the state or that receives public moneys must ensure that jobs are filled solely by individuals authorized to work in the U.S. Kansas HB 2157 limits unemployment benefits and employment protection status to citizens and those with legal immigration status (including those who were admitted to the U.S. legally and completed work during this time period are eligible for benefits for that period). Kansas SB 108 provides employment security measures and unemployment benefits to legal residents of the state. Montana (HB 111) and New Mexico (HB 247) revised unemployment insurance laws to exclude from the definition of employment services performed by an alien having a residence in a foreign country coming temporarily to the U.S. to perform agricultural services.

CONCLUSION

This is an exciting area of practice in which employment and labor lawyers can have a great impact in developing the evolving case law as well as taking on some of the most egregious employment and labor law violations. Moreover, enforcing the rights of immigrant workers results in better enforcement with respect to the rights of all workers. Immigration law, like employment law, is constantly changing. Courts have recognized that immigration status has a significant bearing on the protections and remedies available to workers, yet, in certain circumstances, can have a prejudicial and/or chilling effect when raised. Counsel should be cognizant of any new developments and how they may impact employment litigation. Because of the demographic changes taking place throughout the country, there is a greater need for competent lawyers who are willing to take on enriching and challenging employment cases involving immigrant workers.