

NELP

National
Employment
Law
Project



NATIONAL IMMIGRATION
LAW CENTER

National
Employment
Law Project
55 John Street, 7th Floor
New York, NY 10038
Tel. (212) 285-3025
Fax (212) 285-3044
www.nelp.org

National
Immigration
Law Center
3435 Wilshire Blvd., Ste.
2850
Los Angeles, CA 90010
Tel. (213) 639-3900
Fax (213) 639-3911
www.nilc.org

NLRB Policy post-*Hoffman Plastic* Fact Sheet for Organizers

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Following the Supreme Court's decision in NLRB v. Hoffman Plastic Compounds, the NLRB General Counsel issued a memorandum outlining NLRB policy. In that memorandum, the General Counsel (G.C.) reaffirmed:

- Undocumented workers are covered by the NLRA
- An employer who discharges an employee in violation of the NLRA has violated the law regardless of the employee's immigration status.

Relevance of immigration status during proceedings

- **Status irrelevant at merits stage.** The G.C. states that evidence of work authorization or immigration status is "irrelevant to a respondent's liability under the Act and [] questions concerning that status should be left for the compliance stage of the case."
- **Presumption workers are documented.** Regions are instructed to presume that employees are lawfully authorized to work. They are to refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.
- **At remedies stage, burden on employer to establish that immigration status is a genuine issue.** Regions are instructed to investigate the employee's immigration status only after an employer establishes that it knows or has reason to know that an employee is undocumented -- a mere assertion is not a sufficient basis to trigger such an investigation. *** Note -- advocates should watch out for retaliatory investigations into immigration status and argue that the employer should show that it lawfully obtained the information regarding immigration status.
- **Representation cases.** Immigration status is not relevant in establishing whether a worker can belong to a bargaining unit, or in proceedings challenging the result of an election. (i.e. representation cases).

Remedies available to undocumented workers

Notice to workers:

- Regions are encouraged to require that the employer read the notice to employees.

Conditional reinstatement:

- **Employer knowingly employed undocumented workers.** Conditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented workers.
- **Employer did not knowingly employ undocumented workers:** Where a respondent establishes that it would not have hired or retained the worker had it known of his or her undocumented status during the period of employment, Regions are instructed to refrain from seeking a reinstatement remedy.

Backpay:

- **No backpay for time not working.** GC instructed regions not to seek a back pay remedy once the evidence establishes that a worker was not authorized to work during the backpay period, regardless of whether the employer knowingly or unknowingly employed the undocumented worker.
- **Issue of backpay for unlawful change in pay or benefits left open.** GC left open the issue of compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions (such as a unilateral change of pay or benefits) and instructed Regions facing the issue to submit the question for Advice.