

## Chapter 4: Focus on Enforcing the Labor Rights of all Workers: Post Hoffman Plastics Issues

### The U.S. Supreme Court's Decision in *Hoffman Plastic Compounds v. NLRB*

In March 2002, the U.S. Supreme Court decided a case called *Hoffman Plastic Compounds, Inc. v. NLRB*<sup>1</sup> that has generated concern among immigrant workers, communities, and advocates. In *Hoffman*, the Supreme Court held that a worker who is undocumented could not recover the remedy of back pay under the National Labor Relations Act (NLRA).

The case involved a worker named José Castro who was working in a factory in California. Mr. Castro was fired in clear violation of the NLRA for his organizing activities. The National Labor Relations Board (NLRB) ordered the employer to cease and desist, to put up a posting that it had violated the law, and to reinstate Castro and provide him with back pay for the time he was out of work because of the illegal discharge.

During an NLRB hearing, it came out that Castro had used false documents to establish work authorization and that he was undocumented. The D.C. Circuit Court of Appeals rejected the employer's argument that Mr. Castro should not receive back pay because he is undocumented and held that back pay can be tolled to the date when the employer obtained "after-acquired" evidence of a worker's undocumented status. However, the Supreme Court held that Mr. Castro could not be awarded back pay at all because he is undocumented.

**There is a strong argument that, whatever the outcome of these issues at the federal level, states are free to make their own policy choices under their own state laws regarding what remedies are available to the undocumented.**

This decision has raised concern about whether the lower courts will extend its application to other federal worker protections. Prior to the Supreme Court's decision in *Hoffman*, various lower federal courts had addressed the question of what relief undocumented workers may seek for discrimination under Title VII of the Civil Rights Act,<sup>2</sup> as well as wage and overtime violations under the Fair Labor Standards Act (FLSA),<sup>3</sup> and violations of the National Labor Relations Act.

<sup>1</sup> 535 U.S. 137; 122 S.Ct. 1275 (2002).

<sup>2</sup> See, e.g., *Rios v. Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

<sup>3</sup> See, *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

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## Effect of *Hoffman* Ruling on Workers

### **Availability of remedies under NLRA and federal anti-discrimination laws**

Federal case law as well as federal agency guidances regarding eligibility of undocumented workers for relief leave concern about the ability of undocumented workers to adequately enforce their rights under the NLRA and the federal anti-discrimination laws. As discussed above, in *Hoffman*, the Supreme Court held that an undocumented worker is not eligible for back pay if he or she is unlawfully discharged under the NLRA.

### **National Labor Relations Act**

Following the *Hoffman* decision, employers have claimed, in a number of cases, that workers are not entitled to certain remedies under the NLRA. The *Tuv Tamm* case is instructive. In that case, a group of workers were engaged in organizing in a wholesale food distribution facility in Brooklyn. The workers were subjected to surveillance, videotaping, interrogation, wage reductions and threats – all clearly violations of their rights under the NLRA. The employer violated a settlement agreement reached the day before *Hoffman* was decided. In the NLRB proceedings, the employer claimed that it was not required to provide back pay to some of the workers, because it had received a Social Security no-match letter. The employer claimed that the letter proved “immigration fraud” on the part of the workers. The Board held that the no-match letter was not sufficient proof of illegal status, and that status issues could not be raised in the liability phase of the Board’s consideration of the matter.<sup>4</sup>

### **Federal Anti-Discrimination Law**

While the Supreme Court has not spoken on whether undocumented workers are eligible for back pay under the federal anti-discrimination laws, it is possible that courts following *Hoffman* will conclude that they are not. Prior to *Hoffman*, one circuit, the Fourth Circuit Court of Appeals, had already held that an undocumented job applicant was not covered by Title VII of the Civil Rights Act, because he was not eligible to be employed in the United States;<sup>5</sup> the same court had held that a Mexican national applying for a job through the H-2A guestworker program was not protected by the Age Discrimination in Employment Act.<sup>6</sup>

Following *Hoffman*, the EEOC rescinded its guidance on remedies available to undocumented workers.<sup>7</sup> However, it issued a statement reaffirming its commitment to protecting undocumented workers from discrimination.<sup>8</sup> Shortly after this, the EEOC settled an action for sexual harassment and discrimination on behalf of a group of immigrant workers, some of whom were undocumented, making it clear that undocumented workers continue to be eligible for at least some types of monetary remedies following *Hoffman*.<sup>9</sup>

<sup>4</sup> *Tuv Taam*, 30 NLRB No. 86, 2003 WL 22295361 (2003).

<sup>5</sup> *Egbuna v. Time Life*, 153 F.3d 184 (4th Cir. 1998).

<sup>6</sup> *Reyes Gaona v. NCGA* 250 F.3d 861 (4th Cir. 2001).

<sup>7</sup> U.S. Equal Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002), available at <<http://www.eeoc.gov/docs/undoc-rescind.html>>(rescinding E.E.O.C. Enf. Guidance 915.002).

<sup>8</sup> U.S. Equal Employment Opportunity Commission Press Release, *EEOC Reaffirms Commitment to Protecting Undocumented Workers From Discrimination* (June 28, 2002), available at <<http://www.eeoc.gov/press/6-28-02.html>>

<sup>9</sup> U.S. Equal Employment Opportunity Commission Press Release, *EEOC And Decoster Farms Settle Complaint For \$1,525,000*, (Sept. 30, 2002) available at, <<http://www.eeoc.gov/press/9-30-02-b.html>>.

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At the time of this writing, it is still uncertain what courts will decide with regard to undocumented workers' eligibility for back pay under the federal anti-discrimination laws. However, it seems likely that, following the lead of the EEOC, that most federal courts will continue to hold that workers are eligible for compensatory and punitive remedies regardless of immigration status.

### **Availability of Remedies Under Federal Minimum Wage and Overtime Law**

Of least concern is the effect of *Hoffman* on undocumented workers' rights to recover "back pay" for work actually performed under the FLSA. "Back pay" under FLSA is different from back pay under the NLRA and the anti-discrimination laws. Under the other laws, back pay is payment of wages that the worker would have earned if not for the unlawful termination or other discrimination. Under FLSA, "back pay" is payment of wages the worker actually earned but was not paid.<sup>10</sup> Following the Supreme Court's decision in *Hoffman*, federal courts have held that *Hoffman* is not relevant to back pay under the FLSA, and have made rulings favoring plaintiffs.<sup>11</sup>

The U.S. Department of Labor has stated that the Department will fully and vigorously enforce the Occupational Safety and Health Act (OSHA), the FLSA, the Migrant and Seasonal Worker Protection Act (AWPA), and the Mine Safety and Health Act without regard to whether an employee is documented or undocumented.<sup>12</sup> The DOL statement leaves open the issue of back pay for undocumented workers who suffer retaliation on the job.<sup>13</sup>

### **Concerns About Discovery of Workers' Immigration Status**

Statements by the NLRB General Counsel and the EEOC following the *Hoffman* decision suggest that a worker's immigration status may be relevant in determining remedies under the NLRA and the federal anti-discrimination laws. The NLRB General Counsel, in a guidance memorandum dated July 19, 2002, has stated that immigration status may become relevant in determining remedies.<sup>14</sup> However, it also stated that immigration status is not an issue in determining liability.<sup>15</sup>

<sup>10</sup> There is one form of back pay under the FLSA that resembles back pay under the NLRA and the anti-discrimination laws. This form of back pay appears in the anti-retaliation provision of the FLSA – and is payment of wages that the worker would have earned if not for his or her unlawful termination by the employer in retaliation for having initiated a complaint under the FLSA. 29 U.S.C. § 215(a)(3).

<sup>11</sup> See, *Flores v Albertson's, Inc.*, 2002 WL 11623 (CD Cal 2002); *Liu v Donna Karan International, Inc.*, 2002 WL 1300260 (SD NY 2002).

<sup>12</sup> U.S. Department of Labor, *HOFFMAN PLASTIC COMPOUND, INC. v NLRB, QUESTIONS AND ANSWERS*

<sup>13</sup> See also, U.S. Department of Labor, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics decision on laws enforced by the Wage and Hour Division (2002)* available at <<http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm>>

<sup>14</sup> NLRB General Counsel, *Procedures and Remedies for Discriminatees Who may be Unauthorized Aliens after Hoffman Plastic Compounds, Inc.* (Jul. 19, 2002) available at <<http://www.nlr.gov/gcmemo/gc02-06.html>> (pointing out that "Regions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue.... A substantial immigration issue is lodged when an employer establishes that it knows or has reason to know that a discriminatee is undocumented." At this point, the Region is to "investigate the claim by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence.... a mere assertion is not a sufficient basis to trigger such an investigation.")

<sup>15</sup> *Id.*

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The EEOC has stated that it will not consider an individual's immigration status when examining the underlying merits of a charge.<sup>16</sup> However, with regard to the availability of remedies, EEOC stated that "[t]he Commission will evaluate the effect *Hoffman* may have on the availability of monetary remedies to undocumented workers under the federal employment discrimination statutes."<sup>17</sup>

Moreover, at least one court following *Hoffman* has suggested that *Hoffman* has made the issue of immigration status relevant to a worker's standing to sue for relief under the anti-discrimination laws. In denying a defendant's motion to dismiss in *Lopez v. Superflex, Ltd.*,<sup>18</sup> a judge in the Southern District of New York remarked:

If Hoffman Plastics does deny undocumented workers the relief sought by plaintiff, then he would lack standing. As that issue is not ripe for decision, we decline to rule on it at this time. However, if plaintiff were to admit to being in the United States illegally, or were to refuse to answer questions regarding his status on the grounds that it is not relevant, then the issue of his standing would properly be before us, and we would address the issue of whether Hoffman Plastics applies to ADA claims for compensatory and punitive damages brought by undocumented aliens.<sup>19</sup>

The Court goes on to observe in a footnote: "If we do ultimately reach this issue, it could result in a judicial finding that plaintiff is illegally residing in the United States and therefore is subject to deportation."<sup>20</sup>

In addition to concern about whether undocumented workers continue to be covered by the labor and employment laws and eligible for the same relief as other workers, this raises questions about what happens to a worker whose undocumented status is revealed in the course of proceedings. Determination that immigration status is relevant to determination of remedies or even standing to sue would mean that undocumented workers could no longer invoke protective orders to keep their immigration status out of the proceedings. As observed by the Court in *Lopez*, there could result a judicial finding that the worker is undocumented and subject to deportation. Such a possibility would have a severe chilling effect on workers seeking to enforce their rights.

Given the pessimistic outlook for obtaining some forms of relief under some federal laws, it becomes increasingly important, to the extent possible, to look to the states to enforce workers' rights.

## State Enforcement of Workers' Rights

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. Of the cases litigated thus far, none has squarely addressed the issue of the continuing availability of back pay under state law.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 01 Civ. 10010, 2002 U.S. Dist. LEXIS 15538 (S.D.N.Y. Aug. 21, 2002).

<sup>19</sup> *Id.*, slip op. at 6-7.

<sup>20</sup> *Id.*, at n.4.

### **State Agency Enforcement**

A useful action that advocates can urge on the state level is for state agencies to develop pro-worker policies for enforcing labor and employment laws as well as providing benefits, such as workers' compensation. Such a policy would reaffirm a commitment to performing its duties without regard to the immigration status of workers who come before it. Shortly after the *Hoffman* decision, state agencies in California and Washington delivered such statements.

The *California Department of Industrial Relations* recently posted a statement on its website clarifying that it will "Investigate retaliation complaints and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about wages or workplace safety and health, without regard to the worker's immigration status."<sup>21</sup>

The Director of the *Washington State Department of Labor and Industries* has issued a statement that undocumented immigrants continue to be entitled to both time loss and wage replacement after the *Hoffman* decision:

The 1972 law that revamped Washington's workers' compensation system is explicit: All workers must have coverage. Both employers and workers contribute to the insurance fund. The Department of Labor and Industries is responsible for ... providing workers with medical care and wage replacement when an injury or an occupation disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.<sup>22</sup>

Following *Hoffman*, there is still a great deal state agencies can do to continue to enforce the labor and employment rights of all workers, regardless of immigration status. Below is a model policy state agencies should be encouraged to adopt and publicize.

### **Model State Labor Agency Statement**

**Anti-discrimination laws:** State agencies responsible for enforcing anti-discrimination laws may adopt the following policy:

All workers, regardless of immigration status, are covered by state anti-discrimination employment laws, and are eligible for all remedies under the law unless explicitly prohibited by federal law.

- 1) The [Agency Name] will:
  - a. Investigate complaints of violations of the anti-discrimination in employment laws and file court actions to seek and collect back pay, compensatory and punitive damages, and all other appropriate remedies, including equitable relief. This shall be done

<sup>21</sup> CALIFORNIA DEPT. OF INDUSTRIAL RELATIONS, "All California workers are entitled to workplace protection," available at <<http://www.dir.ca.gov>>

<sup>22</sup> Statement dated May 21, 2002 by Gary Moore, Director, available at <<http://www.nelp.org>>

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without regard to the worker's immigration status, unless explicitly prohibited by federal law.

- b. Investigate retaliation complaints and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about unlawful discrimination, without regard to the worker's immigration status, unless explicitly prohibited by federal law.<sup>23</sup>
- 2) The [Agency Name] will not ask a complainant or witness for their social security number (SSN) or other information that might lead to disclosing an individual's immigration status, will not ask workers about their immigration status and will not maintain information regarding workers' immigration status in their files.
  - 3) During the course of court proceedings, the [Agency Name] will oppose efforts of any party to discover a complainant's or witnesses' immigration status by seeking a protective order or other similar relief.
  - 4) In the rare occasion that [Agency Name] must know the complainant's immigration status, it will keep that status confidential, and will have a policy of nondisclosure to third parties (including to other state or federal agencies), unless otherwise required by federal law.
  - 5) If a party raises the issue of an employee's immigration status in the course of proceedings, the party must show that the evidence is more probative than prejudicial, and that it obtained such evidence in compliance to 8 CFR § 274a.2(b)(1)(vii).
  - 6) [Agency Name] will train its staff (including intake officers, investigators, attorneys, and other relevant staff) on this policy and will work closely with community-based organizations to conduct this training.
  - 7) [Agency Name] will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.

**Wage and hour laws:** State agencies responsible for enforcing wage and hour laws may adopt the same policy, except the first paragraph should read:

All workers, regardless of immigration status, are covered by state wage and hour laws, and are eligible for all remedies under the law unless explicitly prohibited by federal law.

- 1) The [Agency Name] will:

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<sup>23</sup> Based on California Dept. of Industrial Relations, *All California workers are entitled to workplace protection*, available at <[www.dir.ca.gov](http://www.dir.ca.gov)>

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- a. Investigate complaints of violations of the wage and hour laws and file court actions to seek and collect unpaid wages and all other remedies authorized under state law without regard to the worker's immigration status, unless explicitly prohibited by federal law.
- b. Investigate retaliation complaints and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about unpaid wages, without regard to the worker's immigration status unless explicitly prohibited by federal law.

**Occupational safety and health laws:** State agencies responsible for enforcing occupational safety and health laws may also adopt the same policy, except the first paragraph should read:

All workers, regardless of immigration status, are covered by state occupational safety and health, and are eligible for all remedies under the law unless explicitly prohibited by federal law.

1) The [Agency Name] will:

- a. Investigate complaints of violations of the occupational safety and health laws and file court actions to enforce the law without regard to the worker's immigration status unless explicitly prohibited by federal law.
- b. Investigate retaliation complaints [if state law includes an anti-retaliation provision] and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about unpaid wages without regard to the worker's immigration status unless explicitly prohibited by federal law.

**Workers' compensation:** State agencies responsible for enforcing workers' compensation laws should adopt the following policy:

The [Agency Name] is responsible for providing workers with medical care and wage replacement when an injury or an occupational disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.<sup>24</sup>

- 1) The [Agency Name] will provide medical expenses, wage replacement and all other benefits and remedies authorized under state law to all workers regardless of immigration status unless explicitly prohibited by federal law.
- 2) The [Agency Name] will not ask injured workers or their witnesses for their social security number (SSN) or other information that might lead to disclosing an individual's immigration status, and will not ask injured workers or their witnesses about their immigration status and will not maintain information regarding immigration status in their files.
- 3) Worker's immigration status is not relevant to determine eligibility for medical expenses or wage replacement.<sup>25</sup>

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<sup>24</sup> Based on Statement dated May 21, 2002 by Gary Moore, Director of Washington State Department of Labor and Industries.

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- 4) During the course of court proceedings, the [Agency Name] will oppose efforts of any party to discover an injured worker's or witnesses' immigration status by seeking a protective order or other similar relief.
- 5) In the rare occasion that [Agency Name] must know the injured worker's or witnesses' immigration status, it will keep that status confidential, and will have a policy of nondisclosure to third parties (including to other state or federal agencies), unless otherwise required by federal law.
- 6) If a party raises the issue of an injured worker's or witnesses' immigration status in the course of proceedings, the party must show that the evidence is more probative than prejudicial, and that it obtained such evidence in compliance to 8 CFR § 274a.2(b)(1)(vii).
- 7) [Agency Name] will train its staff (including intake officers, investigators, attorneys, and other relevant staff) on this policy and will work closely with community-based organizations to conduct this training.
- 8) [Agency Name] will make reasonable efforts to work closely with community-based organizations to conduct outreach and education to the immigrant community on this policy.

## State Legislative Action

Another approach to ensuring undocumented workers that their rights will be protected after *Hoffman* focuses on state legislation. The California legislature has become the first in the country to adopt an affirmative state law post-*Hoffman*.

### **Highlighted State Legislation: California Law**

The bill, SB 1818, which was signed into law by former California Governor Gray Davis on September 29, 2002, was introduced in the California legislature on February 22, 2002, as a means of protecting the employment rights of workers, regardless of immigration status, under state law. The law amends the Civil, Government, Health and Safety and Labor Codes and makes declarations of existing law. It 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."<sup>26</sup> It also reaffirms that:

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<sup>25</sup> However, immigration status may be relevant to determine employer's obligation to provide vocational rehabilitation. See *Tarango v. State Industrial Insurance System*, 25 P.3d 175 (Nev. 2001); *Foodmaker v. Workers' Compensation Appeals Board*, 78 Cal. Rptr.2d 767 (Cal Ct. Apps. Div 2 1999).

<sup>26</sup> See CAL. CIV. CODE § 3339 (2002); CAL. GOV'T CODE § 7285, *et seq.* (2002); CAL. HEALTH & SAFETY CODE § 24000, *et seq.* (2002); CAL. LAB. CODE § 1171.5 (2002).

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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.<sup>27</sup>

### **What Can Advocates Do?**

- √ Help educate undocumented workers about their rights.<sup>28</sup>
- √ Continue to encourage undocumented workers to assert their labor rights. Assist them in filing claims and protect the confidentiality of their status.
- √ If you can do it safely for the workers involved, publicize stories of unscrupulous employers who take advantage of immigrant workers.
- √ Work to get your state labor agency and/or legislature to reaffirm undocumented immigrant workers' rights and to publicize their will to protect the undocumented.

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<sup>27</sup> Id. The full text of California's law is reprinted in the Appendix.

<sup>28</sup> Use the NELP fact sheets for workers and advocates, published at <<http://www.nelp.org/publications/immigrant>>

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