THE INTERSECTION OF IMMIGRATION LAW AND LABOR LAW – THE
HOFFMAN PLASTIC CASE AND BEYOND

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Last year, in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), the U.S. Supreme Court ruled in a 5 to 4 decision that an undocumented worker who was not authorized to legally work in the United States was not eligible to receive back pay under the National Labor Relations Act (“NLRA”), even when the worker’s termination was an unfair labor practice. The Court noted that back pay was not available to undocumented aliens because to grant such a remedy would contravene the policies behind the Immigration Reform and Control Act of 1986 (“IRCA”). “It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations,” Chief Justice William H. Rehnquist noted, writing for the majority. Id. at 152. In Hoffman, the Supreme Court consequently attempted to balance the legal parameters of the protections offered to employees under federal labor law with the objectives of current immigration law.

While the decision finally resolved a split that had existed for some time among various circuit courts of appeals regarding whether illegal workers were entitled to back pay under the NLRA, the far-reaching implications of the decision and its potential impact on other labor law protections for undocumented workers still remains a topic of wide debate and concern. This article provides an overview of the Supreme Court’s decision in Hoffman as well as the responses to Hoffman by various courts, governmental agencies and the legislature. This article also assesses Hoffman’s potential impact on employers who hire foreign workers for their businesses, and provides general guidelines on how employers should manage labor issues relating to undocumented workers in today’s evolving legal climate.

Hoffman Plastic Compounds, Inc. v. NLRB

In May 1988, Hoffman Plastic Compounds, Inc. (“Hoffman”) hired Jose Castro to work in its plastics production facility. At the time of hiring, Hoffman relied on documents that Castro had presented that appeared to verify his right to work in the United States. Shortly thereafter, a union launched an organizing campaign at Hoffman’s production plant. Castro participated in the campaign by distributing union authorization

1 The author wishes to acknowledge Zach Hutton and Frank Castro for their assistance in preparing this article.

2 Compare NLRB v. A.P.R.A. Fuel Oil Buyers Group, 134 F.3d 50, 56 (2d Cir. 1997) (holding that illegal workers could collect back pay under the NLRA), and Local 512, Warehouse & Office Workers’ Union v. NLRB, 795 F.2d 705, 723 (9th Cir. 1986) (same), with Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992) (holding that illegal workers could not collect back pay under the NLRA). The issue has given rise to conflicting results before the NLRB as well. Compare Felbro, Inc., 274 N.L.R.B. 1268, 1269 (1985) (illegal workers could not be awarded back pay, with A.P.R.A. Fuel Oil Buyers Group, Inc. v. Local 553 Teamsters, 320 N.L.R.B. 408, 415 (1995) (illegal workers could be awarded back pay).
cards. In January 1989, to rid the company of union supporters, Hoffman selected known union supporters in its workforce for lay off. Castro was one of the workers who was fired.

One discharged employee filed charges with the National Labor Relations Board (“NLRB” or “Board”). Three years later, in 1992, the Board found the lay offs violated section 8(a)(3) of the NLRA and ordered Hoffman to reinstate and award back pay to the illegally fired workers, including Castro. During a compliance hearing in June 1993, Castro admitted to the Administrative Law Judge (“ALJ”) that he was an illegal worker who had tendered fraudulent papers to secure employment with Hoffman. The ALJ determined that because of Castro’s illegal status, he could not be awarded back pay or be reinstated because such a remedy would conflict with the Supreme Court’s decision in *Sure-Tan, Inc., v. NLRB*, and because the IRCA prohibits employers from knowingly hiring illegal aliens using fraudulent documents to obtain employment. However, the NLRB overturned the ALJ’s findings and decided that back pay would be the most effective way to further the immigration policies in IRCA by insuring that the NLRA’s protections and remedies extended to undocumented workers in the same manner as to other employees. The NLRB consequently awarded Castro approximately $67,000 in back pay up to the date of the compliance hearing, plus interest. Hoffman then petitioned the Supreme Court for a writ of certiorari which was granted in September 2001.

In reversing the NLRB’s decision and denying back pay, the Supreme Court examined how the Board’s authority to design remedies under the NLRA although “generally broad” was “not unlimited.” *Hoffman*, 535 U.S. at 142-43. The Supreme Court cited to a line of cases following *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), where the courts refused to enforce the NLRB’s remedies when it encroached on “other and equally important Congressional objectives,” such as federal laws against mutiny or the regulations under the Bankruptcy Code. Id. at 47. The Court noted that these cases “established that where the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.” *Hoffman*, 535 U.S. at 147.

The Court then evaluated whether the NLRB’s award of back pay infringed on important federal policies. The Court considered its 1984 decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984), a factually similar case wherein the Court permitted the awarding of back pay to illegal aliens as long as they were “lawfully entitled to be present and employed in the United States” in order to collect. Rather than clarify the scope of *Sure-Tan’s* language, the Supreme Court focused in *Hoffman* on the fact that the “legal landscape” had now “significantly changed,” specifically because Congress had enacted

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3 The purpose of the NLRA is:

“To eliminate . . . obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

the Immigration Reform and Control Act of 1986 (IRCA).  *Hoffman*, 535 U.S. at 147. Under the IRCA, “forcefully” combating the employment of illegal aliens was a central part of the policy of immigration law.  *Id.* Employers were now prohibited from knowingly hiring undocumented workers, facing stiff civil fines and possible criminal prosecution. Likewise, illegal aliens who use or attempt to use false papers to secure employment face similar fines and criminal penalties for their actions.

Against the backdrop of the IRCA, the Supreme Court noted that a back pay award “for a job obtained in the first instance by [the applicant’s] criminal fraud ... not only trivializes the immigration laws, it also condones and encourages future violations.” *Id.* at 149, 150. Moreover, the *Hoffman* Court disallowed back pay because an illegal worker would not be able to comply with Board law requiring him to mitigate his damages by seeking lawful interim employment. *Id.* at 151. Accordingly, the Court reversed the Board’s Order with respect to the back pay award.

However, the Court noted that the lack of authority to award back pay “does not mean that the employer gets off scot-free.” *Id.* at 152. The Court noted that in the *Hoffman* case the Board had already imposed other significant sanctions against the employer, including a traditional cease and desist order and a posting provision. The Court also left intact its ruling in *Sure-Tan* that aliens were still to be considered “employees” under the Act – empowering the Board to provide other remedies for protection.

**The Fall Out From Hoffman**

It is clear that the *Hoffman* ruling from the Supreme Court has eroded an important protection afforded to undocumented workers under the NLRA. Significantly, the NLRB and other agencies have responded by continuing to recognize that even illegal aliens have the right to protections under labor law. As set forth below, the response to the *Hoffman Plastic* decision by various governmental agencies, courts and the legislature, indicates that there continues to be support for worker protection irrespective of immigration status.

**A. National Labor Relations Board General Counsel Memorandum On Hoffman Plastic**

In response to the Supreme Court’s decision in *Hoffman Plastic*, the National Labor Relations Board issued a memorandum to its regional and field offices, advising them how to handle cases involving workers who may be undocumented. In that memorandum, the NLRB noted that that the *Hoffman* decision did not alter the status of undocumented workers as “employees” under the NLRA. Accordingly, the Board asserted that aliens “enjoy protections from unfair labor practices and the right to vote in NLRB elections without regard to their immigration status.”

In accordance with this principle, the Board will treat an employee’s immigration status as irrelevant to unit determinations, board elections, and employer liability for
unfair labor practices. They instructed regional offices to “continue to object” to employer attempts to raise a worker’s undocumented status as a defense to an unfair labor practice. Because *Hoffman* limits the remedies available to undocumented workers, but does not deprive them of their legal rights under the NLRA, the Board stated that an employee’s immigration status is “irrelevant” until the regional office decides the merits of an unfair labor practice claim.

The NLRB also construed *Hoffman* to have a limited effect on the remedies available under the NLRA. According to the Board, the decision will not prevent them from ordering reinstatement of illegal aliens, provided that they condition reinstatement on the employees’ future compliance with federal immigration laws. Further, the Board determined that *Hoffman* does not preclude them from awarding back-pay to illegal aliens who are victims of unfair labor practices that do not result in termination, because the Supreme Court did not directly address this issue. The Board distinguished situations where employees are not terminated from *Hoffman* because terminated employees receive back-pay for work “not performed,” whereas back-pay for other purposes makes employees whole for work “actually performed.” The Department of Labor and lower courts have embraced this distinction to avoid applying *Hoffman* in other contexts (see below).

Finally, the Board’s memorandum advised regional offices to refrain from conducting any investigation of an employee’s immigration status, unless an employer confronts them with evidence that “affirmatively establishes the existence of a substantial immigration issue.” A claim that a worker is undocumented will be ignored, unless it is accompanied by sufficient proof. However, if an employer submits evidence which creates a “genuine issue” about the immigration status of an employee, the Board will conduct a limited investigation, and ask the union and the accused employee to respond to the evidence. At the conclusion of the investigation, the regional office will submit the issue to the General Counsel for advice on how to proceed.

**B. Equal Employment Opportunity Commission**

The Equal Employment Opportunity Commission (“EEOC”) has determined that the Court’s reasoning in *Hoffman* applies to federal anti-discrimination statutes as well as the NLRA. As a result, they have reexamined their position that undocumented workers are entitled to all forms of monetary relief under Title VII, the Americans with Disabilities Act, and similar laws. However, they have also emphasized that the decision “in no way calls into question the settled principle that undocumented workers are

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4 *E.g.*, where the employer violates its duty to bargain by unilaterally changing working conditions.

5 Arguably, the policy arguments driving the Supreme Court’s opinion conflict with this approach. The Court stressed that a back-pay award “for a job obtained in the first instance by criminal fraud…not only trivializes immigration laws, it also condones and encourages future violations.” *Hoffman*, 535 U.S. at 149, 150. Undocumented workers seeking compensation for work actually performed commit no less of a “criminal fraud” than alien workers who seek compensation for the loss of their jobs. However, this interpretation does illustrate the unwillingness of federal agencies and courts to extend *Hoffman’s* rationale beyond its facts.
covered by federal anti-discrimination statutes, and that it is illegal for employers to
discriminate against them.” In addition, the EEOC, like the NLRB, announced that they
would treat the immigration status of employees as irrelevant to the merits of a charge,
and that they would not investigate the immigration status of employees on their own
initiative. The Commission avowed that “enforcing the law to protect…immigrant
workers remains a priority for the EEOC.”

C. Department Of Labor

The Department of Labor (“DOL”) has followed both the NLRB and the EEOC’s
restricted interpretation of Hoffman’s scope. Toward that end, the DOL issued a “Fact
Sheet” vowing to continue to seek back pay under both the Fair Labor Standards Act
(“FLSA”) and the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”) without inquiring whether a worker is an undocumented alien. In its memorandum
analyzing the effect of Hoffman Plastic on laws enforced by the Wage and Hour Division,
the DOL reiterates that undocumented aliens continue to have rights under the FLSA and
MSPA, and that actions under these statutes are distinguishable from the situation in
Hoffman. The DOL noted that that in Hoffman, the Board was seeking back pay for the
time an employee would have worked had he not been discharged; while under the FLSA
or MSPA proceeding, the DOL or individual is seeking pay for hours the employee has
already actually worked. The DOL also acknowledged that several courts, after Hoffman,
reaffirmed that undocumented aliens continued to have other protections under various
labor laws. (See Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers:
Effect of Hoffman Plastic decision on laws enforced by the Wage and Hour Division
attached).

D. Lower Court Cases

Nearly every lower court case to address Hoffman has either distinguished it, or
declined an invitation to extend it. The following cases illustrate the reluctance of federal
judges to apply Hoffman outside the context of the NLRA.

Flores v. Albertsons, Inc.,

Eight janitors brought a class action suit against several supermarket chains,
alleging that the companies failed to pay them overtime wages in violation of the Fair
Labor Standards Act. The defendants argued that the plaintiffs were illegal aliens, and
therefore not entitled to back pay under the Supreme Court’s decision in Hoffman. The
court rejected their request for discovery of the plaintiff’s immigration documents, stating
that Hoffman did not apply because the plaintiffs had not requested back pay for work
“not performed.” Rather, they requested back pay for work “actually performed.”

Singh v. Jutla,
214 F. Supp. 2d 1056 (N.D. Cal. 2002)
An undocumented worker sued his employer under the FLSA, claiming he worked for the defendant for three years without receiving any compensation. The case settled, and the following day the INS arrested and detained the man. After spending fourteen months in INS custody, he sued his former employer for retaliation in violation of the FLSA. The defendant asked the court to dismiss the claim, and argued that *Hoffman* precluded illegal aliens from bringing any claims under the FLSA. The court rejected this argument, and interpreted *Hoffman* as applying only to the “very specific” remedy of back pay for work “not performed.”


In an FLSA claim seeking unpaid wages, the court denied the defendant’s request to compel disclosure of documents relating to the plaintiff’s immigration status, ruling that they had no relevance since *Hoffman* did not apply to such claims. Further, the court said that even if the documents were relevant, the harm that disclosure would cause to the plaintiff outweighed the defendant’s need for them.


Plaintiff sued his employer under the FLSA for failing to pay overtime wages. The defendants asserted that *Hoffman* precluded the suit because the plaintiff was an undocumented alien. The court disagreed, holding that *Hoffman* only applies when an undocumented worker seeks back pay for work “not performed”; it does not prevent recovery of unpaid wages owed for work “actually performed.”

A recent New York case suggests that state judges are no more eager to embrace *Hoffman* than are their colleagues on the federal bench. In *Cano v. Mallory Mgmt.*, 2003 N.Y. Misc. LEXIS 562 (N.Y. Sup. Ct. Apr. 10, 2003), a state court refused to extend *Hoffman*’s prohibition on back pay for work “not performed” by illegal aliens to tort claims brought under state law. *Cano* involved an undocumented alien who suffered third degree burns when the defendant’s electric meter exploded in his vicinity. He sued the company for negligence, seeking back pay for time missed from work, and other relief. The defendant asked the court to dismiss the claim, but the court refused, declaring that it was “contrary to the public policy of New York State that a person who claims to be injured as a result of tortious conduct may be barred from pursuing that claim [because of his] resident status. Defendants cannot negligently injure someone…and then not be responsible to that injured person for the injuries sustained.”

**D. Legislative Response**

The California legislature responded to the Supreme Court’s decision in *Hoffman* by amending the state’s labor, employment, civil rights, and housing laws to confirm that the immigration status of persons who have worked, or applied for employment, in
California is irrelevant to the rights and remedies afforded under state law. The amendment also declares that, for purposes of enforcing state labor and employment laws, “no inquiry shall be permitted into a person’s immigration status except where the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law.” This provision applies to citizen suits, as well as enforcement actions brought by a state agency. The new law took effect on January 1, 2003.

E. Recommendations For Employers

Although various agencies and the legislature have responded to the Hoffman Plastic decision by reaffirming that undocumented workers will continue to receive protection under the law, there is a lingering question as to what impact the Supreme Court’s decision will have on employers who manage large foreign workforces in this country. As the illegal alien population in the United States grows each day, so too does the potential for more and more employers to take action similar to that found in the Hoffman Plastic case. Because of the significant penalties that exist under the ICRA, employers would be well advised to:

- Limit inquiries into immigration status to those clearly necessary to comply with current immigration law;
- Verify employment documentation for all applicants as required by the IRCA and Form I-9 regulations;
- Act promptly if you discover that an employee is in fact ineligible for employment; and,
- Treat both undocumented and documented workers in a lawful manner.

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6 See www.leginfo.ca.gov for more information.