Comments

THE HOFFMAN AFTERMATH: ANALYZING THE PLIGHT OF THE UNDOCUMENTED WORKER THROUGH A “WIDER LENS”

Mariel Martinez†

“If you can exploit with impunity workers who have no rights, then why not hire someone you can freely refuse to pay after a week’s work? Why not hire someone you can sexually harass, who has no right to be protected from that harassment? Why not hire people to work in unsafe conditions who, if they are injured or fall ill, have no place to go, no basis for protest?”

In Hoffman Plastic Compounds, Inc. v. NLRB, the Supreme Court denied an award of limited back pay to a worker who was unauthorized to work in the United States. This controversial decision has forced the American judicial system to reconsider the extent to which it is willing to value and protect a worker who has entered this country illegally. In finding that a plaintiff who had violated federal immigration law in entering this country was not entitled to receive full protection against labor violations under the National Labor Relations Act (NLRA), the Court sent an indirect message to all workers and employers that the elimination of workplace discrimination is valued only to the extent that workers have complied with federal immigration laws. As a result, employers have increasingly interpreted the Court’s holding as implying that an employee’s status as an illegal immigrant can lessen the employer’s liability for unlawfully discriminating against that employee.

For better or worse, several million immigrants are working in the

† J.D. Candidate 2005, University of Pennsylvania Law School; B.A. 2001, Columbia University. I would like to thank Eric Tilles for his assistance throughout my writing of this comment.


United States illegally.\(^3\) The Immigration and Naturalization Service (INS) has estimated that 275,000 undocumented workers enter the United States every year, in addition to the six million that already reside here.\(^4\) The numbers are certainly startling—but equally significant is the reality that the U.S. economy is highly dependent on the work provided by these illegal immigrants.\(^5\) The fact that undocumented workers are willing to receive low wages for high-risk occupations has fueled this dependency.\(^6\) For example, approximately 600,000 undocumented workers are employed in construction, 700,000 work in restaurants, 1.2 million work in the manufacturing sector, 1.3 million work in the services sector, and one million to 1.4 million serve as agricultural workers.\(^7\) Despite obviously running afoul of our federal immigration goals and policies, these numbers speak for themselves. The National Labor Relations Board (NLRB), in recognizing this disturbing reality, has acknowledged that undocumented workers deserve to be treated as “employees” within the meaning of the NLRA and therefore, has afforded them the same labor protections as those lawfully residing and employed in the United States.\(^8\)

However, providing labor protections to these workers has proven to be a grueling task. Courts are often forced to balance “the public policy interest in eliminating unlawful discrimination against the equitable principle that an employer should not be held liable for damages when the

\(^3\) Eric Schnapper, Righting Wrongs Against Immigrant Workers, TRIAL MAG., Mar. 2003, at 46 (stating that of those immigrants who are working in the United States illegally, many have entered the country illegally, while others are entitled to be here but do not have visas that authorize them to work).


\(^5\) See Julia Malone, U.S. Relies Heavily on Illegal Workers: Half on Farm, 25% in Home, 10% in Eateries, ATLANTA J-CONST., Mar. 22, 2002, at A6 (suggesting that the U.S. economy may be dependent on illegal workers); see also Dean E. Murphy, Imagining Life Without Illegal Immigrants, N.Y. TIMES, Jan. 11, 2004, § 4, at 1 (noting that some suggest that “Social Security would go broke without the payments of undocumented workers, many of whom . . . do have regular payroll taxes deducted from their paychecks by employers”).


\(^8\) See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984) (recognizing that since the task of defining the term “employee” was assigned by Congress to the NLRB, deference must be given to the Board’s interpretation that undocumented aliens are “employees” within the meaning of § 2(3) of the Act); see also NLRB v. Kolka, 170 F.3d 937, 940 (9th Cir. 1999) (holding that the enactment of the Immigration Reform and Control Act in 1986 did not change the Act’s definition of employee).
employee invokes the aid of the court with unclean hands." In 2002, the Supreme Court underwent a similar balancing of sorts in deciding *Hoffman Plastic Compounds v. NLRB.* In finding that the Immigration Reform and Control Act (IRCA) precluded the award of back pay to a worker who was not authorized to work in the country during the time in question, the Supreme Court used a “wider lens” approach to striking the right balance between punishing the discriminatory employer and protecting the undocumented plaintiff. In doing so, it sent a rather confusing message that has been interpreted by lawyers and employers alike to mean that a person who has violated federal immigration laws is precluded from seeking the protection of the judicial system.

What remains clear is that prior to the Court’s decision, undocumented workers were recognized as “employees” within the meaning of the NLRA. In a pre-*Hoffman* society, undocumented workers had the right to organize, the right to be paid for their work, the right to be free from

---


The guiding doctrine in this case is the equitable maxim that “he who comes into equity must come with clean hands.” This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. *Id.* at 814.


11. *Id.* at 147 (“For whether isolated sentences from *Sure-Tan* definitively control, or count merely as persuasive dicta in support of petitioner, we think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed.” (emphasis added)).

12. *Hoffman* holds an award of back pay to an undocumented alien who has never been legally authorized to work in the United States is foreclosed by federal immigration policy as expressed by Congress in IRCA. Although the issue arose in the NLRA context, the analysis did not turn on an interpretation of the NLRA’s remedial purpose. Rather, the court focused on the congressional policies underlying IRCA—the changed legal landscape resulting from the enactment of IRCA. The same rationale applies here.

Reply Brief of Appellant at 6–7, Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004) (No. 02-16532) (asserting that the Supreme Court’s analysis can logically be used to extend the scope of *Hoffman* to Title VII cases, thus limiting the federal court’s remedial authority to provide back pay to an undocumented alien); see Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 817 (2003) (“Con Ed now seeks to expand the holding in *Hoffman* to dismiss the plaintiff’s complaint for tortious conduct because he is an ‘illegal alien.’”).

13. See cases cited *supra* note 8 and accompanying text.
discrimination, and the right to be safe on the job.\textsuperscript{14} Since the controversial \textit{Hoffman}\textsuperscript{15} ruling in 2002, the rights of undocumented immigrants have seemingly become more and more obscure.\textsuperscript{16} In reality, however, undocumented workers still retain many of these rights today.\textsuperscript{17} In fact, a close reading of the \textit{Hoffman} holding suggests that the only true change created by the decision was that undocumented workers would no longer be entitled to receive back pay for unperformed work if they were illegally fired because of their involvement with labor activities.\textsuperscript{18} However, the ambiguous reasoning used by the Court can and has been used by employers to threaten undocumented workers into believing: 1) that the Supreme Court’s decision in \textit{Hoffman} asserts that violation of immigration laws precludes an employee’s ability to receive labor protections; and 2) that employers thus have a right to use the discovery process to show the courts that such a violation has taken place.\textsuperscript{19}

While the loss of back pay is undeniably significant, this comment will not focus on whether the Court was justified in overturning the NLRB’s decision.\textsuperscript{20} Instead, this comment will look beyond the Court’s actual holding, and examine the repercussions resulting from the Supreme


17. \textit{See Nat’l Employment Law Project, supra} note 14 (“Basically, you still have most of the same rights you had before the Supreme Court’s decision in \textit{Hoffman Plastic Compounds v. NLRB}.”).

18. \textit{See id.} (“The main change is that, if you are undocumented and illegally fired because you were involved in labor activities, you can no longer get back pay for the time you were not working.”).

19. \textit{See Reply Brief of Appellant at 11, Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004) (No. 02-16532)} (“Although Hoffman does not address discovery, the Court reasoned the NLRB could not ignore an employee’s illegal status without subverting IRCA. Completely prohibiting discovery regarding an employee’s work status is tantamount to ignoring the relevance of that status.”).

20. \textit{See generally Marianne Staniunas, Comment, All Employees Are Equal, But Some Employees Are More Equal Than Others, 6 U. Pa. J. Lab. & Emp. L. 393 (2004) (“The significance of this decision reaches far beyond undocumented immigrants: by distinguishing one group of employees to receive different treatment under the NLRA, the \textit{Hoffman} decision threatens to delegitimize the National Labor Relations Board’s (NLRB) authority to enforce the legal expectations and relationships among all employers and their employees, which Congress created through the NLRA.”).
Court’s “wider lens”\(^\text{21}\) approach to determining the rights of undocumented workers. In particular, this comment proposes that the Supreme Court’s big-picture sense of justice has given employers an upper hand that was never intended by the Court’s narrow holding. Most significantly, the Hoffman decision has shifted the focus from protecting the rights of workers to probing into the plaintiff’s work eligibility and, in particular, his or her immigration status.\(^\text{22}\) In doing so, it has facilitated a process of discovery so invasive and arguably irrelevant that the undocumented worker is left highly confused and intimidated at the thought of using the American legal system to seek labor protection, thereby bringing the goal of the entire process into question.\(^\text{23}\)

The case law discussed herein illustrates the conflicting messages sent to undocumented workers and those individuals who are in a position to counsel them.\(^\text{24}\) Instead of providing guidance on the issue,\(^\text{25}\) the Supreme Court’s “wider lens”\(^\text{26}\) approach to ascertaining the rights of undocumented workers has actually fueled a frenzy of experimental case law. Lower courts and state governments are left to deal with the day-to-day specifics, often in a way that is perceived as contradictory, or, at the very least, confusing, to the public. This comment seeks to mitigate that confusion by illustrating that the Hoffman decision does not stand for the notion that undocumented workers are no longer true “employees” in the eyes of our judicial system.\(^\text{27}\) In fact, regardless of the Court’s controversial decision to deprive undocumented workers of the right to receive back pay for work not performed under the NLRA, the reality is that, with the proper legal counseling, undocumented workers still have several means of protecting themselves from unlawful discrimination by their employers.

After providing a brief background of immigration and employment law, I will analyze the Hoffman decision, the Court’s reasoning, and how lower courts and employers are applying this reasoning. I will then set

\(^{21}\) See case cited supra note 11 and accompanying text.

\(^{22}\) See ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 325 (1994) (“The rule ABF advocates might force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes about credibility.”).

\(^{23}\) Id.


\(^{25}\) See id. (explaining that “[t]he judicial arena provides minimal assistance in clarifying this confusion” created by contradictory labor and immigration policy).

\(^{26}\) See supra note 11 and accompanying text.

forth the different measures being undertaken to preserve the rights that have survived Hoffman and offer suggestions as to how lawyers may best provide assistance to workers in safeguarding these rights. Finally, this comment proposes that courts should separate the issue of an employee’s eligibility for damages from the employer’s liability in order to best protect and clarify the rights to which undocumented workers are currently entitled, without disregarding the goals of our federal immigration laws.

I. BACKGROUND

A. Immigration Law

In an attempt to reduce the increasing growth of illegal immigration, Congress passed the Immigration Reform and Control Act of 1986 (IRCA), effecting the “most sweeping change in the United States’ immigration law in 34 years.” Essentially, the IRCA contains three major provisions: (1) imposition of employer sanctions, (2) anti-discrimination provisions, and (3) establishment of an amnesty program for the legalization of many undocumented aliens.

In examining the language of the IRCA, it is apparent that Congress placed emphasis on the actions of the employer. As emphasized by the

28. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1069 (9th Cir. 2004) (“The fact that a particular defendant’s violation of Title VII might be ‘inconsequential,’ because the plaintiff in question is not eligible for certain forms of relief, merely ‘goes to the issue of damages, not liability.’” (quoting Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997))); see also Amy Sugimori et al., Assessing the Impact of the Supreme Court’s Decision in Hoffman Plastic Compounds v. NLRB on Immigrant Workers and Recent Developments, National Employment Law Project and National Immigration Law Center, available at http://www.nilc.org/immsemplymnt/Hoffman_NLRB/Hoffman_NELP_NILC_FINAL.PDF (last visited Mar. 10, 2005) (“[T]he NLRB and the EEOC ... have concluded that while a worker’s immigration status may be relevant in determining remedies under the NLRA and the federal antidiscrimination laws, immigration status has no bearing on liability.”).

29. JASON JUFFRAS, IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON THE IMMIGRATION AND NATURALIZATION SERVICE 1 (1991) (finding that the IRCA has slightly improved the INS’ ability to enforce the law and serve immigrants).


31. See Smith, supra note 6 (“Notably, IRCA focuses entirely on the need to change employers’ behavior and motivations.”). In footnote 10 of that article, the authors explain that according to the Second Circuit, in NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 55 (2d Cir. 1997), “IRCA was passed to reduce the incentives for employers to hire illegal aliens.” Id. at n.10. In addition, the Eleventh Circuit, in Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir. 1988), reached the same conclusion in stating that “Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens.” Id. at 3 n.10.
House Report on the IRCA, “as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or violate status once admitted as a nonimmigrant in order to obtain employment will continue.” Thus, Congress predicted that the flow of undocumented workers would only decrease if their employment opportunities decreased. Consequently, Congress recognized that only by altering the mentality and actions of employers, particularly with respect to their role in attracting and bringing in undocumented workers, could Congress alter the system of exploitation. Similarly, the House Committee Report noted that “[t]he principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions.... Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”

Thus, in enacting the IRCA, Congress attempted to curtail the magnetic force that attracts illegal immigrants to the United States: employment opportunities. Realizing that only if such employment opportunities were unavailable or somehow less appealing would illegal immigrants truly rethink the whole process, Congress created specific disincentives for employers who violate the prohibition, such as sanctions, as well as civil and criminal penalties. As such, the IRCA was Congress’ bold attempt to reform the system by dealing first with employers, with the hope that by providing them with clear and distinct disincentives, the message would eventually reach those illegal aliens contemplating the move.


33. See Orrin Baird, Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond, 19 LAB. LAW. 153, 157–58 (2003) (“In short, the whole purpose of the IRCA was to diminish whatever incentives employers might have to hire undocumented workers in the belief that if employment opportunities for undocumented workers declined, so would the flow of undocumented workers across our borders seeking employment.”). See also id. at 156 (explaining that despite the criminal enforcement efforts of the INA, immigrants are still willing to take large risks in order to work in the United States, partly because of the huge economic disparities between the United States and their homelands).

34. See Our Border Brigades, WALL ST. J., Jan. 27, 2004, at A14 (“The idea was to harass employers to ensure the nationality of their new hires, under threat of fines or worse if they hired undocumented aliens.”).


36. Id.

37. See Baird, supra note 33, at 157 (“In the IRCA, Congress sought to reduce the economic incentives for employers to hire undocumented workers, realizing that this was
B. Employment Law

1. National Labor Relations Act

In 1935, Congress passed the National Labor Relations Act (NLRA) as a means of protecting employees from certain employer conduct.\(^{38}\) Specifically, the NLRA promotes and protects the collective-bargaining process by making it an unfair labor practice for employers to discriminate against workers seeking to unionize and by requiring employers to bargain with unions that succeed in organizing.\(^{39}\) Congress sought to carry out the goal of balancing this bargaining power between employees and employers by providing restorative, \(^{40}\) "make whole" remedies, such as back pay and reinstatement, to those employees who were discriminated against because of their involvement in union activities.\(^{42}\)

In particular, the NLRA provides the Board with the authority to issue an order requiring the violator to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the NLRA.\(^{43}\) While an award of reinstatement with or without back pay is designed to restore the employee as closely as possible to his or her situation prior to the discrimination, the remedy of back pay must be modified to reflect only the actual, as opposed to the speculative, effect of the labor violation.\(^{44}\) As a result, courts have recognized an employee's responsibility to mitigate any resulting damages\(^{45}\) and the Board has

---

39. Id.; see also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) (“Similarly, extending the coverage of the Act to such workers is consistent with the Act’s avowed purpose of encouraging and protecting the collective-bargaining process.”).
40. 29 U.S.C. § 160(c); see also The National Labor Relations Board: Recent Trends and Their Implications: Hearing Before the Subcomm. On Employer-Employee Relations of the House Comm. on Educ. and the Workforce, 106th Cong. 56 (2000) (explaining that the remedies seek to ensure that the victims of unfair labor practices are restored to their status quo by the perpetrators of such unfair practices).
41. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) (“Under that Act, ‘[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.’” (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941))).
42. 29 U.S.C. § 160(c).
43. Id.
44. Sure-Tan, 467 U.S. at 900 (citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941)).
45. See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953) (“[I]n making back pay awards, the Board operates under a further limitation. It must have regard for
consequently taken this factor into consideration in deducting any wages which that employee earned in the interim from the final award of back pay.46 Although the term "employee" has generally been defined as including "any employee" and has been interpreted to include undocumented workers employed in the United States,47 an illegal alien's inability to mitigate damages by legally reentering and/or obtaining employment in the United States without further violating federal immigration laws has raised numerous unresolved issues in this area.48

2. Title VII of the 1964 Civil Rights Act

In addition to the NLRA, the federal government protects illegal aliens from employment discrimination through a series of statutes,49 including Title VII of the 1964 Civil Rights Act.50 This statute prohibits discrimination on the basis of color, race, gender, national origin or religion.51 Equally significant is the fact that Title VII goes on to provide the employee with recovery of lost income due to an employer's discrimination.52 For example, the award of back pay usually provides the employee with the compensation he or she would have received absent the discrimination, such as lost wages, raises, overtime compensation, vacation pay, and pension benefits.53 However, like the NLRA, Title VII also

considerations governing the mitigation of damages . . . .").

46. See Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 51 (1935) (explaining that plaintiffs will be made whole by subtracting "the amount which each earned subsequent to discharge" from each of their back pay awards).

47. See supra note 8 and accompanying text; see also Robert M. Worster, III, If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals are Defeated Through Inadequate Remedies, 38 U. RICH. L. REV. 1073, 1074 (2004) (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984), as holding that undocumented aliens are "employees" within the meaning of the NLRA); see also Sugimori et al., supra note 28, at 3 (explaining that general counsel of the NLRB "reaffirmed that undocumented workers are covered by the NLRA").

48. Sure-Tan, 467 U.S. at 902-03 ("[I]mplementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. . . . By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided.").

49. These anti-discrimination statutes also include the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990.


51. Id.


An employee wrongfully discharged on the basis of sex thus may recover only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as
imposes a duty to mitigate on any individual seeking to recover such lost wages. 54 The statute requires the individual seeking back pay to use "reasonable diligence" in finding an alternate means of employment, and reduces the back pay award by the amount of interim earnings made by the individual while the individual's Title VII claim is pending. 55 Despite the fact that the language of Title VII makes no direct mention of illegal aliens, the Equal Employment Opportunity Commission (EEOC) has interpreted undocumented workers as falling within the scope of "any individual" in section 703 of the Civil Rights Act. 56 As a result, while the determination of back pay awards, in and of itself, can prove to be an arduous task due to the numerous variables involved, issues of entitlement and mitigation can make the equation far more convoluted, especially when the workers are undocumented. 57

The similar goals of the NLRA and Title VII in providing protection to workers by eliminating employer discrimination have raised a critical question—does a finding that back pay should be denied to an undocumented worker under the NLRA indicate that it should also be

---

vacation pay and pension benefits; similarly, an employee wrongfully denied a promotion on the basis of sex, or, as in this case, wrongfully discriminated against in salary on the basis of sex, may recover only the differential between the appropriate pay and actual pay for services performed, as well as lost benefits.

Id.


55. Id.

56. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 n.10 (9th Cir. 1989).

The EEOC has so interpreted the definitional section of Title VII. EEOC Compliance Manual (CCH) ¶ 3806 at 3810-11 (1982) ("the term 'any individual' in § 703 of the Act includes any person, whether documented or not, within the jurisdictional boundaries of any 'State' . . ."). The Commission notes, moreover, that the remedial provision of Title VII, 42 U.S.C. § 2000e-5(g), was "expressly modeled" on the analogous remedial provision of the NLRA, 29 U.S.C. § 160(c).

Id.

57. Compare Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 187 (4th Cir. 1998) ("A plaintiff is entitled to the above remedies only upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being 'qualified' for the position is not determined by the applicant's capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question."); with Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) ("As for the other remedies available under Title VII, including reinstatement and front pay, there is no authority cited by Spartan which directly addresses the availability of such remedies for an individual who was an undocumented worker at the time he was employed by the defendant, but who, following his termination, obtained legal work status in the United States.").
denied to a similar worker under Title VII? The Supreme Court’s decision in Hoffman has brought this issue to the forefront of employment law, leaving lower courts to balance the Court’s otherwise narrow holding with its ambiguous and easily extended reasoning.

II. HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB

In 2002, undocumented workers were dealt a major blow when the U.S. Supreme Court held that federal immigration policy prevented the NLRB from awarding back pay to those undocumented workers who had never been legally authorized to work in the United States in the first place. The plaintiff in this controversial case, Castro, was fired by his employer, Hoffman, and was later awarded back pay plus interest by the NLRB after a finding that Hoffman had unlawfully laid off four employees because of their support of union efforts. Contrary to the NLRB’s preliminary finding that the plaintiff was entitled to back pay, the Supreme Court reasoned that the NLRB was unable to adequately balance the interests of labor and federal immigration law on a case-by-case basis. As such, the Court determined that because the Board’s reinstatement order had to be conditioned on proof of the worker’s legal reentry into the United States, the back pay award in this case was inappropriate since the workers were not available for work during the period of time when they were not lawfully allowed in the United States. Interestingly, in Sure-Tan v. NLRB, the Supreme Court denied reinstatement and back pay to illegal aliens who had left the United States and returned to Mexico, because in order to collect back pay, the aliens would have had to reenter the country illegally. However, the Court in Hoffman essentially states that it makes no difference whether the undocumented immigrant voluntarily leaves the country or remains. Instead, the Court chose to leave this question unresolved, and instead addressed the overarching issue of whether an undocumented worker is entitled to back pay under the NLRA “through a
wider lens."  

While this "wider lens" perspective is certainly more practical in reaching the Court's final decision, it also raises one of many unanswered questions that continue to plague undocumented workers today: under what circumstances will the judicial system choose to deny anti-discrimination protections, such as those provided by Title VII, to undocumented workers? Perhaps by addressing this issue of illegal reentry as a reason for denying certain benefits to undocumented workers, as discussed in Sure-Tan, the majority in Hoffman would have sent a clearer message to undocumented workers as to how they might go about correcting the mistakes that they have already made. Instead, not only did undocumented workers lose a crucial remedy provided by the NLRA as a result of Hoffman, but more importantly, the majority's justification for this loss is ambiguous and inconclusive.

The Court determined that a back pay award to an undocumented worker "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA."  

Ironically, however, as elaborated by Justice Breyer in his dissent, "the effect of the majority's decision is to undermine the very policy upon which the IRCA is based." While the purpose of the IRCA was to diminish whatever incentives employers might have had to hire undocumented workers, "[a] failure to enforce labor protective legislation on behalf of undocumented workers would be counterproductive to this purpose."  

By denying such safeguards to undocumented workers, employers would likely have a greater incentive to hire illegal aliens, knowing that their liability would be far lower with these unprotected workers than it would be with lawful workers. As a result, employers would likely increase the number of employment opportunities for undocumented workers in the United States, thereby perpetuating the very cycle sought to be eliminated by the IRCA.

Although the Hoffman holding alone may not be viewed as such a radical departure from preexisting federal case law, at the very least, its

64. See supra note 11 and accompanying text.
65. 535 U.S. at 150.
66. Baird, supra note 33, at 156.
67. Id. at 158.
68. See Robert Vilensky & Lori K. Sapir, Undocumented Aliens' Right to Recover From Lost Earnings, N.Y.L.J., Dec. 19, 2003, at 4 ("Hoffman is not the radical decision some claim it to be since New York courts, prior to Hoffman, have consistently balanced common law remedies with violations of statutes, especially where it amounts to a crime. The criminal nature of an act has long been held to preclude recovery of damages based on the consequences of that act only where the act is a serious crime that directly caused the injuries."); see also Baird, supra note 33, at 161 (explaining that although some unscrupulous employers saw Hoffman as stripping undocumented workers of all of their rights and giving employers the green light to commit violations against them, in reality, the holding was much more narrow, and left intact many legal protections for undocumented
reasoning has left lower courts unclear about the status of undocumented workers in relation to the policy goals of immigration and labor law.

III. POST-HOFFMAN CONCERNS

Since the Court's controversial decision, the scope of the Hoffman holding has remained unclear. Despite the fact that the Court's holding was limited to a finding that undocumented workers are ineligible for awards of back pay under the NLRA, it is unsurprising that employers seek to use the reasoning behind the Court's dicta to argue that they are not liable for damages for discriminating against an employee who happens to be undocumented. In an attempt to make this argument, employers are increasingly using the discovery process as a means of inquiring, in many cases for the first time, into the validity of the plaintiff-employee's legal status. As this practice becomes more and more common, employers are in a position to use the possibility of this detrimental discovery as a means of deterring the undocumented worker from bringing a suit against them for fear that he or she will be prosecuted and deported for violation of federal immigration laws. As a result, although the Hoffman holding does not suggest that a violation of federal immigration law precludes one's ability to receive federal protection, the Court's loose dicta have been remolded by employers and used as a weapon to threaten those undocumented workers who would otherwise be entitled to statutory protection. Thus Hoffman has not only created confusion among lower courts, but it has also given the highest importance to arguably irrelevant factors, and has allowed use of

69. See Staniunas, supra note 20, at 417 ("Hoffman stands only for the principle that undocumented immigrants are ineligible for awards of back pay under the NLRA and does not determine whether or not undocumented immigrants may be eligible for benefits and remedies under other statutory schemes intended to protect employees.").
70. Id. at 417–18.
71. Smith, supra note 6, at 18.
72. See NAT'L EMPLOYMENT LAW PROJECT, supra note 14 (explaining that some employers are using Hoffman to threaten workers).
73. See Christian Harlan Moen, Immigration Status is Irrelevant to Title VII Claim, Ninth Circuit Rules, TRIAL MAG., July 1, 2004, at 96 (examining Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004), a case in which the defense counsel's deposition questions were unrelated to the merits of the plaintiff's Title VII claim and instead focused on her citizenship status). But see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining that in order to establish a prima facie case of racial discrimination, one of the key elements that the worker must prove is that he was qualified for the job).

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that,
the discovery process to reach this end.

A. Hoffman Has Fueled Contradictory Messages

The rationale behind the Court's holding in *Hoffman* seemed to be that "illegal activities disqualify an employee from NLRA protection." While the *Hoffman* case addressed back pay under the NLRA, it is clear that its effects have been much farther reaching. A closer examination of similar labor protections provided by other statutory schemes demonstrates that, not only are undocumented immigrants receiving contradictory messages from immigration and labor policies, but even within the sphere of labor protection, their posture remains both ambiguous and uncertain. For example, in *Cano v. Mallory Management*, an employer attempted to expand *Hoffman* to bar all workers who are not legal residents from using the New York State Court system to seek compensation from their employer for a tort violation. In disagreeing with the employer's attempt, the Supreme Court of Richmond County, New York pointed out that every case citing *Hoffman* since its decision in 2002 has distinguished itself.

Despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

74. Walsh, *supra* note 60, at 329 (stating that the legal analysis of the majority in *Hoffman* was flawed because it was based on a case where the undocumented worker had been fired for his illegal immigration status while the plaintiff in *Hoffman* had been fired for his union affiliation).


The sheer volume of cases since *Hoffman* was rendered is also an indication of the confusion occurring in the lower courts in applying the opinion. The majority of the confusion stems from the dicta in the *Hoffman* decision, that awarding damages to an illegal immigrant not only trivializes the immigration laws but also condones and encourages future violations.

Id.


77. Id.; see also cases cited *supra* note 16 and accompanying text.
1. Fair Labor Standards Act

Although the Supreme Court chose not to grant certain NLRA protections to undocumented workers in *Hoffman*, district courts have limited *Hoffman*'s application to claims brought by illegal aliens under the Fair Labor Standards Act (FLSA).\(^7\) Unlike the cases involving the extension of FLSA protections to illegal aliens, which focus on Congress' intent to create an "all-encompassing definition of the term 'employee' that would include all workers not specifically excluded,"\(^7\) the Supreme Court's focus on the enforcement of federal immigration policy in *Hoffman* leaves one contemplating the source of disparity.

The *Hoffman* decision likewise provides little guidance on whether there is a difference between work performed and work not performed when determining the protections to which undocumented immigrants are entitled. Scholars have compared cases of work performed to "contract-based or quantum meruit actions in which the employer has already received the agreed-upon consideration (services) and is called to perform its own part of the bargain."\(^8\) Several lower court decisions have subsequently limited the application of *Hoffman* to cases where work had not yet been performed.\(^3\) Similarly, in an Eastern District of New York case, *Flores v. Amigon*,\(^2\) involving an employee's suit seeking unpaid wages under the FLSA, the District Court examined the rationale behind the *Hoffman* holding and determined that discovery regarding an employee's immigration status was not relevant to a FLSA claim for work already performed.\(^8\) The court went on to state that the plaintiff's legal status "is not relevant to defendant's defense... [and] even if it were, the potential for prejudice far outweighs whatever minimal probative value such information would have."\(^3\)

Furthermore, while still following the

---


79. See Patel v. Quality Inn, 846 F.2d 700, 702 (11th Cir. 1988) (explaining that Congress must not have intended to exclude illegal aliens from FLSA protection because none of the exemptions listed by Congress mentioned any concern with immigration status).


81. See *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d at 192 (stating that an individual's immigration status was not relevant for a claim under the FLSA for work already performed); *Flores*, 2002 WL 1163623 at *5* (indicating that FLSA protections apply to undocumented aliens for work actually performed).

82. 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

83. Id. at 464.

84. Id. at 464–65.
Supreme Court's holding in *Hoffman*, the District Court's distinction between work performed and work not performed, as well as its recognition of the dangers behind allowing such probative discovery into the plaintiff's legal status with respect to claims brought under the FLSA, provide further indication that the aftereffects of *Hoffman* remain largely unsettled.

2. Title VII

    The *Hoffman* decision has prompted lower courts to consider whether the Supreme Court's reasoning with respect to an undocumented worker's inability to receive remedies under the NLRA should be extended to a worker's ability to receive similar protections for claims brought under Title VII. While employers have made the argument that the analysis under Title VII remedies should be the same, undocumented workers focus on the fact that Congress designed the NLRA as a process-based shield to protect labor relations from unrest, whereas Title VII was designed as a result-based "sword to eradicate invidious workplace discrimination," thereby allocating different remedial approaches to achieving the respective goals of each.

Even if courts are unwilling to distinguish remedies sought under the NLRA from those sought under Title VII, the Supreme Court's discussion of an undocumented worker's ability to mitigate his or her lost wages under the NLRA in *Hoffman* and *Sure-Tan* provides little guidance under either statutory scheme. Generally speaking, the *Hoffman* Court's holding was based partly on the fact that if an undocumented worker attempted to mitigate his or her wage losses, as required by the NLRB, the worker would be, in turn, violating the IRCA. As a result, the Court's rationale seems to indicate that had the plaintiff in *Hoffman* been permitted to mitigate without violating federal immigration law, and had he chosen to do so, the Supreme Court may have ruled differently. In other words, had Castro's hypothetical reentry into the United States or attempt to find

---

85. Id. (noting that such probative discovery creates the "potential for prejudice").
86. E.g., Reply Brief of Appellant at 7–8, Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004) (No. 02-16532) (stating that *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975) confirms that since both the NLRA and Title VII serve a 'make whole' purpose, then the standards developed under the NLRA regarding the discretion to award back pay should likewise guide in the construction of Title VII's remedial provisions).
87. Brief of Amici Curiae at 4, Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2003) (No. 02-16532) (explaining that "[unique historical circumstances prompted Congress to fashion different approaches to achieve the NLRA'S and Title VII's respective and distinct purposes.").
88. Id. at 5.
89. Id. at 4.
90. Schnapper, supra note 3, at 47.
another job in the United States not been illegal, per se, the Court could not so easily have relied on Sure-Tan. Without the ability to rely on Sure-Tan, the Court may have found that Castro was entitled to NLRA relief despite being unable to legally mitigate his lost wages by finding another job without violating federal immigration laws. Thus, without the mitigation-based justification, at the very least, the Hoffman Court would likely have addressed the possibility of granting federal relief to a plaintiff, who, in spite of having made a poor decision to illegally enter the United States, had demonstrated a willingness to ameliorate the already sour situation.

A closer look at the dicta in Hoffman shows that reference is made to the fact that no evidence had been provided indicating that Castro had applied for legal authorization to work in the United States. As a result, although it is unclear whether proof that Castro had, in fact, applied for legal status would have made a difference, the Court’s allusion to this factor clearly indicates its relevance. In a recent Southern District of Texas case, Escobar v. Spartan Security Service, the court takes a narrow view of the Hoffman holding in determining whether an undocumented worker, who subsequently attains legal status, may be entitled to certain Title VII protections. In this case, the plaintiff filed a suit against his former employer alleging sexual discrimination and sexual harassment after having been discharged for refusing his employer’s sexual advances. In response to the defendant’s allegations that the plaintiff was not entitled to Title VII relief because he was undocumented during his employment, the court concluded that the Hoffman ruling did not apply. In particular, the

91. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 902–03 (1984) (stating that “the Court of Appeals recognized, the implementation of the Board’s traditional remedies at the compliance proceedings must be conditioned upon the employees’ legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another ‘equally important Congressional objectiv[e]’ to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees’ legal reentry, a potential conflict with the INA is thus avoided.” (quoting Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942))).

92. See Hoffman, 535 U.S. at 141 (2002) (“Neither Castro nor the Board’s General Counsel offered any evidence that Castro had applied or intended to apply for legal authorization to work in the United States.”).


94. Id. at 896.

95. Id.

96. Id. at 897 (“[I]f viewed quite broadly, [Hoffman and Egbuna] would limit an undocumented worker’s remedies under Title VII, as well as other comparable federal labor statutes, in this case it is uncontroversed that Escobar is now a documented worker, authorized to work in the United States.”).
court stated that "Hoffman, however, did not specifically foreclose all remedies for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes, and did not . . . foreclose remedies for workers who have subsequently attained legal work status in the United States." 97 While the Escobar court acknowledges that the plaintiff would likely be foreclosed from receiving back pay by the Hoffman holding, it leaves open the possibility that an undocumented worker may redeem himself, to a certain extent, by subsequently applying for legal status—so much so that the worker may be entitled to front pay, or reinstatement. 98 Although the court does not directly address this possibility as an act of mitigation, per se, the implications of its holding may be construed as doing so.

Because the Escobar ruling was only on the defendant's motion for summary judgment, the plaintiff's ultimate fate is unclear. However, it is clear that this case has potentially introduced an innovative form of mitigation for undocumented workers—subsequent attainment of legal status. Perhaps intent to naturalize, in the form of having applied for legal status, will become sufficient to qualify as mitigation under Title VII. Or possibly, only the ultimate attainment of legal status will be deemed as a true form of mitigation, thus allowing the once undocumented worker to find new employment, legally. Notwithstanding the uncertainties that underlie this new possibility, it is clear that the notion that undocumented workers are not entitled to Title VII protections due to their inability to mitigate is no longer completely true.

B. Hoffman has Opened the Door to Invasive Discovery

Much of the case law arising post-Hoffman illustrates employers' attempts to expand the Hoffman holding to preclude workers who are undocumented from receiving labor protections, and thus entitling the employers to use discovery as a means of determining the plaintiffs' immigration status. 99 Employers implicitly hope that these measures will

97. Id. at 897.
98. Id.
99. See Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002) ("In arguing that plaintiff's immigration status may be relevant to limit defendant's liability for back pay, defendant relies on the Supreme Court's holding in Hoffman."); Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) ("[W]e deny Donna Karan's request for such discovery at this time. . . . It is not clear to us that the new Supreme Court case, Hoffman Plastic Compounds, Inc. v. NLRB . . . , upon which Donna Karan relies in making this discovery request, applies to the case currently before us."); Flores v. Albertsons, Inc., No. CV0100515AHM, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (upholding the Magistrate Judge's decision that plaintiffs' immigration documents are not relevant to the action, would have no bearing on the employer's liability, and that compelling production of these documents could cause a "miscarriage of justice."); Lopez v. Superflex, No. 01 CIV.
intimidate the plaintiff into dropping the charges, out of fear that the plaintiff will be deported or suffer other devastating immigration-related consequences. In fact, according to the National Employment Law Project, “some employers are improperly using the case to threaten or harass workers who are organizing to improve their work conditions. Some employers have falsely told workers that if they are undocumented they do not have the right to organize.”

Although the consensus of the lower courts seems to be that discovery into a plaintiffs immigration status is clearly irrelevant when the remedy being requested is for work actually performed and less irrelevant when the work has not been performed, it is clear that the Supreme Court’s “wider lens” take on resolving the inherent conflict between immigration and labor law has fueled the phenomenon of using discovery as a means of mitigating an employer’s liability. Without a clearer message from the

100. See supra note 6 and accompanying text.

101. NAT’L EMPLOYMENT LAW PROJECT, supra note 14, at 2 (explaining to workers the reasons why they should be concerned about the Hoffman decision).

102. See Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002) (holding that discovery into an employee’s immigration status was not relevant to FLSA claim for unpaid wages for work already performed); Liu v. Donna Karan Int’l, Inc., 207 F. Supp. 2d 191 (S.D.N.Y. 2002) (holding that a worker’s immigration status is not relevant for work already performed); Flores v. Albertsons, Inc., No. CV0100515AHM, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) (finding that an award of unpaid wages for work actually performed does not go against the goals of IRCA). But see Dennise A. Calderon-Barrera, Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?, 6 HARV. LATINO L. REV. 119, 140 (2003) (explaining that according to Justice Breyer’s dissent in Hoffman, the “very meaning of back pay under the NLRA is pay for work not performed . . . Nonetheless, distinguishing the FLSA from the NLRA based on the differences between earned and unearned wages is a worthwhile distinction to make in limiting the application of Hoffman II to the NLRA.”); see also Staniunas, supra note 20, at 418 (“This practice of explicitly distinguishing, whenever possible, where an employee’s immigration status is relevant and where it is not, suggests that the courts implicitly acknowledge the difficulties that Hoffman—by treating the two as mutually independent—presents for labor and immigration policies.”).

103. See supra note 11 and accompanying text.

104. See Flores, 2002 WL 1163623, at *5 (“[T]he Magistrate Judge specifically rejected Defendant’s contention that this information could somehow mitigate Albertson’s liability.”)
Supreme Court or Congress as to when discovery into a plaintiff’s immigration status is permissible, undocumented workers are left with little guidance in making a very difficult decision: at what expense should they use the United States judicial system to hold their employers accountable for violating employment statutes? If this trend continues, rather than take the chance that a court will determine that in their case, discovery into immigration status is relevant, thereby putting themselves and their families at risk, undocumented workers may be more likely to drop their claims or dismiss the idea of bringing claims altogether.

In 2004, the Ninth Circuit spoke to this very issue in *Rivera v. NIBCO, Inc.* The case involved twenty-three female immigrant employees who had performed their duties as production workers successfully throughout their employment with NIBCO, despite their limited proficiency in English. After they performed poorly on a basic skills examination, given only in English, some of the employees were demoted or reassigned. All of the plaintiffs were subsequently terminated and they brought this action against NIBCO, alleging that their former employer violated Title VII and the California Fair Employment and Housing Act by requiring them to take the English exam. Among the remedies sought by the plaintiffs were reinstatement and back pay.

The interlocutory appeal ultimately heard by the Ninth Circuit arose out of a dispute that occurred during the deposition of one of the plaintiffs, Martha Rivera. During her deposition, the defense counsel asked her where she was married and where she was born. After being instructed by her attorney not to answer the questions, she subsequently filed for a protective order against any further questions related to her immigration status. Their request was predicated on the claim that—because each plaintiff had already been verified for employment at the time of hiring and because further questions pertaining to immigration status were not relevant to their claims—additional questioning would have a chilling effect on their pursuit of their workplace rights.

The magistrate judge presiding over discovery recognized that although the “after-acquired” evidence doctrine might limit NIBCO’s

105. 364 F.3d 1057, 1065 (9th Cir. 2004) (“Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.”).
106. *Id.* at 1061.
107. *Id.* at 1061.
108. *Id.*
109. *Id.*
110. *See* Moen, *supra* note 73 and accompanying text.
111. Rivera, 364 F.3d at 1061.
112. *Id.* at 1062 “[T]he ‘after-acquired evidence’ doctrine precludes or limits an
liability if it was discovered that the plaintiffs were ineligible for employment, NIBCO was not entitled to use the discovery process in order to gain that information. As a result, the magistrate judge issued a protective order granting discovery protection over three types of questions—most notably one of which barred all discovery into questions regarding the plaintiffs’ immigration status. After filing a second motion to reconsider, which stated that “after Hoffman, each plaintiff’s immigration status was discoverable because of its direct relevance to potential remedies,” the plaintiffs responded by proposing a bifurcated proceeding whereby the liability phase of the trial would be determined separately and irrespectively from the damages phase. Since the district court deferred making its decision of whether to bifurcate the trial, the fate of the plaintiffs’ proposal remains uncertain. However, in granting the petition for interlocutory appeal and affirming the district court’s decision, the Ninth Circuit recognized that:

Granting employers the right to inquire into workers’ immigration status in cases like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case involving national origin discrimination under Title VII, countless acts of illegal and reprehensible conduct would go unreported.

The Rivera decision is therefore critical in that it is the first decision by an appeals court to address Hoffman and several of the post-Hoffman issues that remain unresolved by the Supreme Court’s holding. First, as explained by plaintiff attorney Christopher Ho of the Legal Aid Society-Employment Law Center in San Francisco, after Hoffman had been employee from receiving remedies for wrongful discharge if the employer later ‘discovers’ evidence of wrongdoing that would have led to the employee’s termination had the employer known of the misconduct.” Id. at 1070–71 (citing McKennon v. Nashville Banner Pub’l’g Co., 513 U.S. 352, 362–63 (1995)); see also supra note 9 and accompanying text.

113. Id. at 1062.

114. Id.

115. Id.; see discussion infra Part IV.B.

116. Id. at 1065.

117. See Moen, supra note 73 (“Although several district courts have addressed Hoffman, . . . Rivera is the first decision by an appeals court to do so.”).

118. For example, Rivera is the first post-Hoffman decision by a court of appeals to address the issue of whether Hoffman should be applied to Title VII cases, whether the NLRA and Title VII should be analyzed under similar frameworks, and whether defendants may use the discovery process to inquire into plaintiffs’ immigration status. Id.
decided, employers used it as an opportunity to make the “slippery-slope” argument that undocumented workers were thus completely precluded from employment rights and all corresponding remedies.\(^{119}\) "The language in *Rivera*, although arguably dicta, puts a brake on this argument that *Hoffman* means total obliteration of immigrant workers’ rights." In addition, the Ninth Circuit’s decision finally addressed the inherent problem with using discovery as a means for obtaining information regarding a plaintiff’s immigration status—that undocumented employees will simply cease reporting employment law violations and numerous acts of unlawful conduct will go unreported.\(^{121}\) Finally, and perhaps most significantly, in setting forth the suggestion that the issue of employer liability could conceivably be separated from the employee’s eligibility for recovery,\(^{122}\) the *Rivera* decision introduced the possibility that the Supreme Court’s effort reconciling the distinct goals of employment and immigration law may have been better spent actually separating the two distinct issues into two self-determining trial phases.\(^{123}\)

IV. POSSIBLE SOLUTIONS

Until the Supreme Court or Congress clarifies the true scope of the *Hoffman* holding,\(^{124}\) it is essential that workers and lawyers alike educate themselves about the rights maintained by workers in the aftermath of this controversial decision.\(^{125}\) Countless efforts throughout the country are being made to limit or distinguish the *Hoffman* holding—both on a large-scale and an individual level. While certain efforts will unquestionably prove more successful than others, only by identifying and understanding the often highly innovative solutions being proposed across the board will

---

119. *See Moen,* *supra* note 73.
120. *Id.* (quoting plaintiffs’ counsel, Christopher Ho).
121. *See Rivera,* 364 F.3d at 1065.
122. *Id.* at 1070 (“[I]t is clear that a separation between liability and damages would be consistent with our prior case law and would satisfy the concern that causes of action under Title VII not be dismissed, or lost through intimidation, on account of the existence of particular remedies.”).
123. *Id.* at 1069 (“Perhaps even more important, we have long recognized ‘the distinction between a violation [of Title VII] and the availability of remedies.’”) (quoting *Hashimoto v. Dalton,* 118 F.3d 671, 676 (9th Cir. 1997).
124. Staniunas, *supra* note 20, at 425–26 (“Congress could articulate a clear policy that allows the Board to impose the same penalties on employers for violations of the NLRA against any employee, while preventing undocumented immigrants from collecting those benefits until they have legalized their status, as was upheld in a number of decisions prior to *Hoffman*.”).
125. *See NAT’L EMPLOYMENT LAW PROJECT,* *supra* note 14 (explaining what workers can do to protect themselves from the confusion created by the Supreme Court’s holding in *Hoffman*).
employment attorneys truly be able to preserve the rights and remedies to
which their clients may still be entitled.

A. Large-scale Efforts

1. State Remedies

Certain states have chosen to provide their own labor law remedies,
applicable to all workers, regardless of their employment status.126 In 2003,
California, the state with the largest number of undocumented workers,127
chose to provide one such remedy to undocumented workers.128 In
particular, California Governor Gray Davis signed a bill, S.B. 1818,
providing that "[a]ll protections, rights, and remedies available under state
law . . . are available to all individuals regardless of immigration status."129
Essentially, S.B. 1818 would limit the effect of the Hoffman case in
California by establishing a separate civil penalty under state law
equivalent to a back pay award that would be assessed against employers
who violate state labor and employment laws.130 Since no cases have yet
been brought under S.B. 1818, it is unclear whether it will truly fill the void
left by the federal judiciary in Hoffman.131 However, the bill’s mere
existence serves as a solid indication of the sentiments of the State of

---

126. Schnapper, supra note 3, at 53.
127. Jeffrey S. Passel et al., Undocumented Immigrants: Facts and Figures, URBAN
INSTITUTE IMMIGRATION STUDIES PROGRAM, Jan. 12, 2004 available at
http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf. ("Based on the
Census 2000 and March 2002 Current Population Survey, this study found that, of the 9.3
million undocumented workers in the United States, 2.4 million (27%) currently reside in
the state of California.").
2002)).
129. Id. The bill also states that for the 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 no inquiry shall be permitted into a person’s immigration status except
when necessary to comply with federal immigration law. Id. Additionally, this bill adds
similar provisions to the Civil Code, the Government Code, the Labor Code, and the Health
and Safety Code in connection with enforcement actions pertaining to the rights of
employees. Id.
130. Jim Kuns, SB 1818 Would Quash Back Pay Prohibition for Undocumented
05/Legalbulletin.asp (stating that S.B. 1818 could set a precedent of nullifying the effect of
court decisions that potentially preempt state law).
131. See Reply Brief of Appellant at 32–33, Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th
Cir. 2004) (No. 02-16532) (asserting that the California Legislature’s enactment of
Government Code § 7285 in response to the Hoffman holding does not put the matter to rest
since this enactment is in direct conflict with the Murillo holding, and is preempted by the
IRCA).
California, and presumably many others. For example, Washington State's Human Rights Commission has also indicated that it will continue to seek back pay as a remedy for violation of Washington State's Law Against Discrimination.

2. Immigration Reform

In 2004, President Bush acknowledged that there was a serious problem with the current state of immigration laws in the United States. As such, in an effort to meet the increasing United States' labor demands, improve homeland security, and prevent further exploitation of undocumented workers, President Bush's proposal would give legal guest work status to approximately eight million illegal aliens, one-third of them in California. Specifically, President Bush's temporary worker

132. Christine Dana Smith, *Give Us Your Tired, Your Poor: Hoffman and the Future of Immigrants' Workplace Rights*, 72 U. CIN. L. REV. 363, 386 (2003) (indicating that the unique measures taken by California in resisting the effect of the *Hoffman* decision are actually indicative of a greater sentiment felt by other countries and many civil rights organizations).

Other countries, particularly members of the Organization of American States (OAS), have expressed concern over the *Hoffman* decision. In June 2003 in Santiago, Chile, the Inter-American Court of Human Rights heard arguments regarding a country's responsibility under international law to protect all workers, regardless of their immigration status. Mexico sought an advisory opinion on whether U.S. law post-*Hoffman* violated international human rights laws and norms. Fifty labor, civil rights, and immigrants' rights organizations in the United States filed an *amicus* brief in the matter. The *amici* argued that U.S. laws and judicial decisions deprive immigrant workers of labor rights and protections in violation of international nondiscrimination and freedom of association laws and norms.

Id. at 386-87.

133. *See Smith, supra* note 6, at 14 (citing Letter from Susan Jordan, Executive Director, Washington State Human Rights Commission, to Antonio Ginatta, Director, Washington State Commission on Hispanic Affairs (Oct. 7, 2002) (on file with the authors of that article)).


135. *See Bush Plan is Step Forward, Says Advocate for Migrants, AUSTIN AM.-STATESMAN, Jan. 25, 2004, at* H1 (noting that while migrant workers feel honored that a president has finally recognized their hardships and contributions, they feel there are two major disadvantages of Bush's proposal: 1) no bargaining power; and 2) no pathway for citizenship).

program provides that workers must pay a one-time fee to register in the program, and if chosen, they will receive a three-year, renewable guest visa. While the program stipulates that it is conditional upon the temporary workers abiding by the rules and returning to their homeland after their guest visas have expired, its premise clearly echoes the sentiment that the current system of immigration policy is not only providing inadequate protection to undocumented workers, but also providing insufficient safeguards for American workers.

Despite its reasonable attempt, however, it is clear that President Bush's proposal would not serve as a solution to the widespread problem of illegal immigration. As a result, it is unsurprising that many undocumented workers have not embraced his plan—largely due to the

that it looks like another version of IRCA, the Reagan-era Immigration Reform and Control Act of 1986 that offered amnesty to millions of illegal aliens. Id. Others compare it to the Mexican Bracero Program of the 1950s, which provided similar relief to Mexican farm workers in the United States. Joe Rodriguez, Immigrant Solution Requires Patience, PATRIOT-NEWS, Jan. 25, 2004, at D01. This program resulted in failure after most "temporary" workers illegally stayed or returned to the U.S. upon the completion of their temporary stay, in an underground fashion, after realizing that they still had no job opportunities in Mexico. Id. In the absence of a joint effort between both the home and host countries, a similar failure will likely result from Bush's guest-worker program. Id.

137. See Bush Plan Gives Illegal Workers Temporary Reprieve, supra note 134 (explaining that Bush's plan has a dual intent of filling low-wage jobs and treating immigrant workers with compassion).

138. Id.

139. See id. ("[President Bush] said workers entering the country illegally end up being abused and exploited, which is 'not the American way.'").

140. See id. (explaining that Bush's plan likewise calls for employers to make every reasonable effort to find an American to fill a job before seeking the assistance of temporary foreign workers).

141. See Staniunas, supra note 20, at 424.

The Bush administration's plan therefore avoids resolving all of the most important issues: it does not secure undocumented worker's rights to enforce labor laws; it does not prevent the continuing diminution of working conditions and wages for all workers; it does not acknowledge the significant incorporation of undocumented immigrant workers into our overall society. Fortunately, the response from Congress suggests that both the liberal and conservative members object to the proposal on numerous—and contrasting—grounds. The Administration's proposal thus may have the net positive effect of forcing Congress to step up and address these issues proactively.

Id. at 424. See also CHALLENGING FRONTERAS: STRUCTURING LATINA AND LATINO LIVES IN THE U.S. 115, 119 (Mary Romero et al. eds., 1997) (explaining that although the historical "ebb and flow" movement of Mexican workers to the United States is typically believed to be determined by seasonal labor demands, mass deportations and economic recessions, deep-seated macro-structural transformations in both Mexico and the United States have truly fueled the system of both legal and illegal migration).

fact that President Bush opposes any type of amnesty program that would facilitate their ultimate obtainment of citizenship.\textsuperscript{143} Particularly for those undocumented workers already residing in the U.S., many will choose to continue hiding indefinitely. Those workers would rather accept the risk that they may eventually be caught, even if this means being denied constitutional or statutory protections, rather than disclose their information to the Administration, which would essentially guarantee their deportation in six years.\textsuperscript{144} In addition, without providing a clear path to permanent residence or eventual citizenship for those undocumented immigrants already residing in the United States or those who may enter in the future, many are fearful that President Bush's plan will create a "permanent underclass of workers."\textsuperscript{145} While this plan is still shapeless and might ultimately go nowhere,\textsuperscript{146} it does suggest a possible solution to many of the issues that remain unresolved by the Supreme Court in Hoffman: providing temporary legal status to foreign workers, which would allow courts to afford the same protections to undocumented workers as it would to American workers, in a more consistent and tangible manner, albeit on a temporary basis.\textsuperscript{147}

3. Fairness: The Civil Rights Act of 2004

Also in response to the Court's controversial ruling in Hoffman, Senator Edward Kennedy (D-MA), and Representatives John Conyers (D-MI), John Lewis (D-GA), and George Miller (D-CA) have introduced a bill entitled "Fairness: Civil Rights Act of 2004" (Fairness).\textsuperscript{148} This bill was

\begin{footnotes}
\item[143] See Maureen Mineham, Bush's Temporary Worker Proposal Gives Employers Central Immigration Role, 21 No. 5 EMP. ALERT 2, Feb. 27, 2004 (quoting President Bush as saying, "I oppose amnesty, placing undocumented workers on the automatic path to citizenship. Granting amnesty encourages violation of our laws, and perpetuates illegal immigration. America is a welcoming country, but citizenship must not be the automatic reward for violating the laws of America.").
\item[144] See Majors, supra note 142 ("I don't want to give them [the government] any information because my kids are American citizens. . . . In six years, I want to establish myself here. I would have to take my kids back to a foreign country.").
\item[145] See Mineham, supra note 143.
\item[146] See Bush's Legalization Plan Could Fuel California Backlash, supra note 136 ("It's not even certain whether that's what Bush really wants, or whether he just wants it hanging around on the agenda, at least until after November, as a come-on to Latino voters and political moderates.").
\item[147] See Majors, supra note 142 ("But legalization, although temporary, would enable businesses to provide undocumented workers with all of the protections of legal workers with no fear of immigration raids.").
\end{footnotes}
introduced on February 11, 2004, and is supported by members of the House and Senate, including representatives from both the Congressional Hispanic and Black Caucuses and numerous civil rights organizations. It would “restore fundamental civil rights protections that were eroded by two recent Supreme Court decisions, Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, and Alexander v. Sandoval.” The goal of this multi-year initiative would essentially be to update the Civil Rights Act of 1964 by barring discrimination and to continue to level the playing field in job opportunities, housing, education, voting, and other areas. In particular, Title V of the Fairness Bill proposes fair treatment for all workers and confirms Congress’ intent that all workers have adequate remedies for unfair labor practices. Although it is unclear what implications the Fairness Bill will have on the rights of undocumented workers in the future, the fact that community leaders, activists, and members of the House and Senate have made such large-scale grassroots efforts to urge the reversal of Hoffman illustrates the real necessity for some clarification either by Congress or the Supreme Court.

149. News Release, Statement of Raul Yzaguirre, National Council of La Raza, President, On the Fairness: Civil Rights Act of 2004 and the Need to Continue the Struggle for Civil Rights (Feb. 11, 2004), available at http://www.nclr.org/content/news/detail/25061 (“I am very proud to stand here today with members of the House and Senate, including representatives from both the Congressional Hispanic and Black Caucuses and my colleagues from our sister civil rights organizations in strong support of the ‘Fairness: Civil Rights Act of 2004.’”); see also Statement of National Organization for Women, President, Kim Gandy (Feb. 11, 2004) at http://www.now.org/press/02-04/02-11.html (“As the United States government seeks to enshrine basic freedoms under law for the people of Iraq and Afghanistan, we must not forget those whose rights have been eroded at home.”).

150. Statement of Raul Yzaguirre, supra note 149.

Decisions like Hoffman undermine the ability of workers to ensure that all employers pay the minimum wage, comply with overtime requirements, and maintain a safe workplace. The “Fairness Act” restores a level playing field between business and labor, and ensures a safer and more secure workplace for all Americans. In passing the Fairness Act, Congress will reaffirm its promise of equal treatment for all Americans in all sectors of society, regardless of race, national origin, sex, disability, or age.


B. Safeguarding Remaining Rights Through Effective Lawyering

Until any large-scale reforms succeed in actually resolving the tension between immigration and employment law, or at least in clarifying the scope of the Hoffman holding, lawyers can assist the cause on a more personal level. They can help to safeguard the rights their immigrant clients may retain, as set forth in lower court decisions attempting to limit or distinguish the Hoffman holding. Lawyers can also anticipate certain defense tactics. For example, lawyers should seek formal discovery protections, particularly when they are uncertain as to the relief available to their client. Such protections may be sought through protective discovery orders or motions in limine.

As discussed above, the Ninth Circuit made a bold attempt to assert that an employee's immigration status is irrelevant in determining employer liability under Title VII claims. In reaching this conclusion,

153. See Bollerup, supra note 78 ("Various district courts have limited the impact of Hoffman by granting undocumented workers' requests for protective orders in order to prevent discovery of the employee's immigration status.").

154. For instance, lawyers should anticipate that their adversaries may file a motion for summary judgment based on the plaintiff's inability to "qualify" for employment. In particular, defense counsel may claim that the undocumented plaintiff is unable to satisfy the qualification requirement, and is therefore unable to meet his initial burden in establishing a prima facie case of discrimination against his or her employer. See supra note 73 and accompanying text for the list of the four elements necessary to satisfy a prima facie case of racial discrimination, as set forth by the court in McDonnell Douglas and adopted in the national origin context in Carino v. University of Oklahoma Board of Regents, 750 F.2d 818 (10th Cir. 1984). In 1998, the Fourth Circuit addressed this very issue, in Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, where it stated that:

A plaintiff is entitled to the above remedies only upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being "qualified" for the position is not determined by the applicant's capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question. Id. at 187. As such, plaintiff's counsel should be prepared at the outset to address the issue of qualification under the McDonnell Douglas test, and perhaps distinguish the Egbuna holding. For example, in cases where the discrimination occurred during the workers' employment, Egbuna may be distinguished since the discrimination being examined by the court in Egbuna occurred during the hiring process, as opposed to having occurred after the employee was already hired by and working with the employer. Id.

155. Smith, supra note 6, at 19 ("In many cases, advocates are well-advised to seek formal discovery protections.").

156. Id.

157. Id. at 20 (referring to Rodriguez v. The Texan, Inc., (No. 01C1478), 2002 WL 31061237 (N.D. Ill. Sept. 16, 2002)).

158. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1070 ("The principal question to be decided in the action before us is whether NIBCO violated Title VII. It makes no difference to the resolution of that question whether some of the plaintiffs are ineligible for certain forms of
the court affirmed the district court's decision to grant the plaintiffs a protective discovery order, preventing the defendant from using the discovery process to obtain information regarding the plaintiffs' immigration status.\footnote{159} According to the National Employment Law Project, "[w]here it is less clear that a particular form of relief is now available to the undocumented, it still may be helpful to request a protective order so that a ruling on relevance can be had before the plaintiff decides whether or not to disclose status, plead the Fifth Amendment on potential criminal violations, or modify his or her requests for relief."\footnote{160}

Because the \textit{Hoffman} decision was based in part on the fact that Castro, the undocumented plaintiff, could not mitigate damages without further violating the law, employers have since argued that immigration status \textit{is} relevant in determining whether a plaintiff lawfully mitigated damages.\footnote{161} In 2002, the Northern District Court of Illinois spoke to this issue within the context of the Fair Labor Standards Act in deciding \textit{Rodriguez v. The Texan, Inc.}\footnote{162} After receiving the plaintiff's motion in limine requesting that the court bar the employer's ability to raise the issue of mitigation—an issue that had not been previously pled by the defendant—the court found for the plaintiff, explaining that because it was an affirmative defense, it must be actually pled by the defendant, or it is considered waived.\footnote{163} Thus, lawyers are provided with an additional tool that may be used in protecting the rights of immigrant workers.\footnote{164}

Aside from preserving formal discovery protections, the ability to identify a "knowing employer"\footnote{165} can also serve as a means of safeguarding an immigrant worker's post-\textit{Hoffman} rights because an employee who does not deceive an employer by providing false documents, in turn, has not actually violated any law.\footnote{166} Instead, at least one scholar has argued that

\footnotesize
\begin{itemize}
\item 159. \textit{Id.} at 1064.
\item 160. Smith, \textit{supra} note 6, at 19.
\item 161. \textit{Id.} at 20 (stating that a recent case from Illinois has added the use of motions in limine as an additional tool for advocates in seeking to protect the rights of undocumented workers).
\item 162. 2002 WL 31061237 (N.D. Ill. Sept. 16, 2002).
\item 163. \textit{Id.} at *2–3
\item 164. \textit{Id.}
\item Allowing back pay to an illegal employee who was hired by an unknowing employer, then, runs contrary to immigration policy. However, as the dissent notes "[w]here the Board forbidden to assess back pay against a knowing employer . . . this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious."
\item \textit{Id.} (referring to the dissent in \textit{Hoffman}, 535 U.S. at 155).
\item 166. \textit{See} Wishnie, \textit{supra} note 75, at 512.
\end{itemize}
where an employer knowingly hires an undocumented worker, "it is consistent with both immigration and labor policy to conclude that such an employer has waived, and is estopped from raising, any objection to an award of back pay based on an employee's immigration status." For instance, in *Singh v. Jutla*, Jutla recruited Singh, an undocumented employee, to come work in the United States. After working for Jutla for several years, Singh brought a wage claim against Jutla, for failing to pay him for any of the work he had performed. Singh claimed that Jutla subsequently used the incriminating information regarding Singh's immigration status—information of which Jutla had been completely aware since hiring Singh—as a means of retaliating against Singh. As a result, Singh sought relief for retaliation under the FLSA. In denying defendant's motion to dismiss, the district court reasoned that those employers who deliberately choose to violate the IRCA by knowingly hiring an undocumented worker should be forced to pay for their illegal treatment of that worker. Thus, lawyers can distinguish the *Hoffman* holding and shift the burden of proof back to the employer, by carefully questioning any immigrant clients as to whether or not their employer knew of or made an attempt to verify their status.

Finally, attorneys can also bring the focus of the court proceeding back to the central issue of the alleged employer violation by requesting a bifurcation of the trial proceeding. As explained by the Ninth Circuit in *Rivera v. NIBCO, Inc.*:

Under the plaintiff's proposal, the case would proceed to trial on liability first. If the plaintiffs were able to prove NIBCO's liability for the alleged disparate impact violation, the court would then hold an *in camera* proceeding designed to preserve the plaintiffs' anonymity, protect their statutory rights, and avoid prejudicing the defense. The proceeding would allow each plaintiff to testify regarding her immigration status, provide documents supporting her entitlement to back pay, and provide a formal certification from the Social Security Administration.

167. *Id.* (citing Kelley v. NLRB, 79 F.3d 1238, 1247–48 (1st Cir. 1996)).
169. *Id.* at 1057.
170. *Id.*
171. *Id.*
173. See Smith, *supra* note 6, at 17 ("Where employers never complied with the law and asked about status, it is likely that the employer, and not the worker, has violated the immigration law. In such a case, it may well be possible to argue that a back pay remedy still exists under federal discrimination laws.").
attesting that she was authorized to work throughout the back pay period. The judge would make deductions from the aggregate award back pay for any plaintiff who failed to prove eligibility. Once the aggregate award was thus reduced to encompass only eligible plaintiffs, plaintiffs’ counsel would then have the responsibility of giving each eligible plaintiff her share of the total.174

Perhaps by conducting proceedings in a bifurcated manner, courts will shift the focus of labor litigations away from where employees may have been married, or when they may have entered the United States,175 and back to enforcing employer accountability.176 Once the employer’s liability is determined irrespective of the plaintiff’s immigration status, a separate proceeding may be held to determine the plaintiff’s eligibility for damages. Although this proposal may not always “make whole” an undocumented worker who ultimately fails to prove that he or she is legally entitled to receive certain damages to which he or she may have otherwise been entitled as a documented worker,177 it will, at the very least, prevent employers from relying on the discovery process as a means of mitigating their own liability. Additionally, it may force Congress to revisit this issue, perhaps by codifying “specific procedures whereby employers could be held financially accountable for violating the rights of their undocumented immigrant employees, just as they are for violations of the rights of documented—immigrant and U.S.—citizen employees, but without extending any financial reparations to the undocumented employees themselves.”178

V. CONCLUSION

In outwardly balancing the interests of labor and employment law with those of federal immigration law, the Supreme Court in Hoffman also indirectly balanced the public policy interest in eliminating unlawful discrimination against the notion that an employer should not be held liable for damages when the employee was never legally authorized to work in the United States in the first place. As a result, despite the Court’s narrow holding, in suggesting that the interests of federal immigration law trump those of employment law, the Court sent an unintentional message to

---

174. Rivera v. NIBCO, Inc., 364 F.3d 1057, 1062 (9th Cir. 2004).
175. See Moen, supra note 73 and accompanying text.
176. See Sugimori, supra note 28 (explaining that regardless of the worker’s immigration status, an employer who discharges an employee in violation of the NLRA will be held liable).
177. Such as back pay for unperformed work under the NLRA, as held by Hoffman.
employers, lawyers and workers alike, that the United States judicial system values the elimination of workplace discrimination only to the extent that workers have complied with federal immigration laws. This contingency has, in turn, fueled the belief that a worker's immigration status can somehow alleviate or lessen an employer's liability for unlawful discrimination. Ironically, although the Supreme Court never specifically addressed these factors, beliefs, or contingencies, its failure to do so has actually solidified their validity.

The Supreme Court hoped that it would radically improve federal immigration restrictions by using a “wider lens” approach to employment law. However, by ambiguously enforcing immigration goals, the Supreme Court's holding in Hoffman has allowed overly broad interpretation by employers and lower courts reviewing similar issues. This overly broad interpretation has begun to strip undocumented workers of many of their pre-Hoffman rights—namely the right to organize, the right to be paid for their work, the right to be safe on the job, and the right to be free from discrimination. It has likewise given employers an unjustified conviction that they have a right to use the discovery process to disclose a worker's immigration status because Hoffman specified that violation of immigration laws precludes an employee's ability to receive labor protections. Although a close reading of Hoffman indicates that the only true change the Court intended was that undocumented workers would no longer be entitled to receive back pay for unperformed work under the NLRA, until the Supreme Court or Congress revisit the logic behind this decision, it will continue to be conveniently stretched and analogized by employers. In the interim, lawyers can safeguard the rights to which undocumented workers


180. Seitz, supra note 24, at 371 (illustrating that prior to the Hoffman decision, the circuits had been split on access for undocumented workers to back pay remedies, and that although the Supreme Court presumably chose to seize the opportunity to resolve this tension in making the Hoffman decision, the outcome has continued to fuel divergent interpretations, and has left many related questions unresolved).

Numerous initiatives aimed at deterring illegal immigration have focused on proscribing illegal employment, but the presence of nearly eight million undocumented persons in the country demonstrates that the prospect of employment, combined with the political, social, and economic uncertainty of their native countries, outweighs the risk of an illegal crossing and undocumented life in the United States. However, inconsistent immigration and labor policies made by state and federal entities create confusing circumstances for those illegal immigrants. The judicial arena provides minimal assistance in clarifying this confusion.

Id. at 368–69.

181. NAT'L EMPLOYMENT LAW PROJECT, supra note 14.
are still entitled by seeking formal discovery protections, in the form of orders of protections and motions in limine; identifying "knowing employers;" and proposing a bifurcated trial proceeding.

By leaving so many questions unanswered, the Supreme Court's decision in *Hoffman* will likely do very little in terms of enforcing federal immigration policy, and instead will perpetuate the influx of undocumented workers by leaving their status vulnerable and undefined. Ultimately, in order to create a system where employment and immigration laws truly carry out their mutual goals, Congress will need to send a clearer message to prospective immigrants and their employers as to where they stand. Until then, undocumented immigrants will continue to be caught in the chaotic aftermath of *Hoffman*—without substantial protection from employer exploitation, and without a comprehensible means of ascertaining the few protections to which they are actually entitled.