

Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation *Per Se* Rule

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Undocumented workers typically work in some of the lowest-paying and most dangerous jobs in the country. Although they experience abnormally high workplace injury rates, undocumented employees injured on the job rarely enforce their workplace rights due to fear of employer retaliation and possible deportation. The Supreme Court's decision in Hoffman Plastic Compounds made the situation for injured undocumented workers even worse by creating a legal basis for employers to demand discovery of a complainant-worker's immigration status, leading to a grave chilling effect on undocumented workers' willingness to enforce their workplace rights. This Note argues that current tools used to protect undocumented workers from such intrusive discovery demands — such as protective orders and invocation of the Fifth Amendment — do not sufficiently deter employers from retaliating against their injured workers. This Note thus calls for greater use of retaliation claims under both federal and state laws and, more specifically, the development of a retaliation per se rule, which would make inquiry into a worker's immigration status at any point after injury a per se violation of the anti-retaliation provisions in federal labor laws.

I. INTRODUCTION

Undocumented workers in the United States have become an increasingly hot topic of discussion and debate. This debate is

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due in part to the recent economic recession¹ and the significant increase in the undocumented population in the United States in the last dozen years,² which have in turn sparked the passage of anti-immigrant bills and laws in various states across the country,³ most notably S.B. 1070 in Arizona.⁴ There are about eight million undocumented workers in the United States, most of whom work in the construction, agriculture, manufacturing, and food preparation industries.⁵ Undocumented workers are mostly low-wage workers employed in the lowest-paying jobs in the country;⁶ about four million undocumented workers are low-wage workers making less than twice the minimum wage.⁷

Due to their undocumented status and their economic desperation,⁸ these immigrants work in some of the most dangerous jobs in the country.⁹ For example, a 1996 survey conducted by

1. Moira Herbst, *Immigration amid a Recession*, BLOOMBERG BUSINESSWEEK, May 8, 2009, http://www.businessweek.com/bwdaily/dnflash/content/may2009/db2009058_701427.htm.

2. JEFFREY S. PASSEL & ROBERTO SURO, PEW HISPANIC CTR., *RISE, PEAK, AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992–2004*, at i (2005).

3. See, e.g., Nicholas Riccardi, *States Take on Border Issues*, L.A. TIMES, Jan. 16, 2006, at A1 (“In New Hampshire . . . two sheriffs last year began arresting illegal immigrants, reasoning that their presence violated state laws against criminal trespass.”); Ginger Rough, *States Mull Own Versions of Immigration Law*, ARIZ. REPUBLIC (Phx.), May 13, 2010 (“Lawmakers in at least nine U.S. states have introduced or plan to craft legislation that mirrors Arizona’s tough new immigration law.”), available at <http://www.azcentral.com/12news/news/articles/2010/05/13/20100513arizona-immigration-law-followers.html>.

4. See S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010); Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

5. Archibold, *supra* note 4; JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* iii–iv, 14–15 (2009).

6. PASSEL & COHN, *supra* note 5, at 14 (“Disproportionately likely to be less educated than other groups, unauthorized immigrants also are more likely to hold low-skilled jobs Consequently, undocumented immigrants are overrepresented in several sectors of the economy, including agriculture, construction, leisure/hospitality and services.”).

7. JEFFREY S. PASSEL ET AL., URBAN INST., *UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 2* (2004), available at http://www.urban.org/UploadedPDF/1000587_undoc-immigrants_facts.pdf.

8. PASSEL & COHN, *supra* note 5, at 16–17 (“Low levels of education and low-skilled occupations lead to undocumented immigrants having lower household incomes than either other immigrants or U.S.-born Americans. . . . Poverty rates are much higher among unauthorized immigrants than for either U.S.-born or legal immigrant residents.”).

9. REBECCA SMITH, NAT’L EMP’T LAW PROJECT, *IMMIGRANT WORKERS’ ENTITLEMENT TO WORKER’S COMPENSATION POST-HOFFMAN PLASTIC COMPOUNDS V. NLRB 1* (2008) (“Undocumented immigrant workers are often subject to dangerous and illegal workplace conditions because employers know they will not complain.”); see also AFL-CIO,

the U.S. Department of Labor (“DOL”) determined that nearly half of the garment-manufacturing businesses in New York City — businesses that employ high numbers of undocumented immigrants — could be characterized as sweatshops.¹⁰ An increasing number of undocumented workers are also employed in the construction industry,¹¹ one of the most dangerous industries in the country and the industry with the highest fatal injury rate of any industry in the private sector.¹² Finally, low-wage undocumented workers are increasingly working in the meatpacking industry,¹³ an industry in which approximately twenty-five percent of employees report suffering from work-related illness or injury — although the actual rate is likely even higher when one accounts for the industry’s systematic underreporting of health and safety violations.¹⁴

These dangerous working conditions translate into high rates of workplace injury and death. To truly grasp the urgency of the situation, it is helpful to look at some of the injury and death rates for low-income Latino workers; looking at this demographic’s injury and fatality rates underscores how perilous working conditions are for undocumented workers in general (most of

IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS 10 (2005).

10. BUREAU OF NAT’L AFFAIRS, U.S. DEP’T OF LABOR, *Close to Half of Garment Contractors Violating Fair Labor Standards Act*, 1996 DAILY LABOR REPORT 87 (1996).

11. Approximately seventeen percent of construction workers are undocumented. PASSEL & COHN, *supra* note 5, at iii.

12. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2009 (PRELIMINARY RESULTS), at 3 (2009), *available at* <http://www.bls.gov/news.release/pdf/cfoi.pdf>. *See also* AFL-CIO, *supra* note 9, at 7 (“Between 1996 and 2001, private construction . . . [was one of] the three industries in which fatally injured foreign-born workers most frequently were employed. *Nearly one in four fatally injured foreign-born workers was employed in the construction industry.*” (emphasis added)).

13. Dell Champlin & Eric Hake, *Immigration as Industrial Strategy in American Meatpacking*, 18 REV. POL. ECON. 49, 63 (2006) (“The exact number of unauthorized workers in meatpacking is unknown, but estimates range from 20% to 50%.”); *see also* SMITH, *supra* note 9, at 5.

14. Jeremy Olson & Steve Jordon, *Special Report: The Job of Last Resort*, OMAHA WORLD-HERALD, Oct. 12, 2003, at 1A; *see also* Kate Linthicum, *A Modern Tale of Meatpacking and Immigrants*, L.A. TIMES, Jan. 28, 2010 (“Meatpacking is hard, dangerous work; the Department of Labor says it results in more injuries than any other trade.”), *available at* <http://articles.latimes.com/2010/jan/28/nation/la-na-immigrant-nebraska28-2010jan28>.

whom are Latino).¹⁵ While the overall number of workplace fatalities dropped between 1992 and 2002, the number of fatalities for foreign-born workers increased by forty-six percent and the number of workplace fatalities among Latinos specifically increased by an astonishing fifty-eight percent.¹⁶ In the construction industry alone Latino workers in 2000 “were nearly twice as likely to be killed by occupational injuries” than their non-Latino counterparts.¹⁷ This trend continues: a 2007 survey conducted by the U.S. Bureau of Labor Statistics determined that there had been a seventy-six percent increase in the number of Latino worker deaths since 1992, even though the total number of workplace fatalities during this period declined.¹⁸ Notably, the injury rates for Latino workers and undocumented workers are likely much higher due to severe underreporting by immigrant workers.¹⁹

Yet, despite these high injury and fatality rates, undocumented workers rarely enforce their right to seek remedies for workplace injuries.²⁰ This reluctance is due to their fear of employer retaliation, including discharge or even deportation.²¹

15. PASSEL & COHN, *supra* note 5, at i (“About three-quarters (76%) of the nation’s unauthorized immigrant population are Hispanics.”).

16. AFL-CIO, *supra* note 9, at 3.

17. *Id.* at 9.

18. Rick Jervis, *Hispanic Worker Deaths Up 76% Since 1992*, USA TODAY, July 20, 2009, available at http://www.usatoday.com/money/workplace/2009-07-19-workerdeaths_N.htm; see also U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES CHARTS 1992–2007 (2009), <http://www.bls.gov/iif/oshwc/cfoi/cfh0006.pdf>.

19. AFL-CIO, *supra* note 9, at 7–8 (“[W]orkers repeatedly risk adverse consequences for attempting to complete the steps necessary to document [injury] cases, while the systems to ensure completion of documentation are weak or absent. Underreporting especially occurs among workers with insecure immigration status Researchers [have] found that low-wage and immigrant workers are most likely to be fired or threatened for complaining.”).

20. *Id.* at 7–8.

21. *Id.* at 8. See also *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[F]ear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”); REBECCA SMITH ET AL., NAT’L EMP’T LAW PROJECT ET AL., ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS 7 (2009) [hereinafter NELP ET AL., ICED OUT] (“[E]mployers commonly threaten to turn workers into immigration authorities to gain the upper hand in a labor dispute”); SMITH, *supra* note 9, at 3 n.4; AMY M. TRAUB ET AL., DRUM MAJOR INST. FOR PUB. POLICY, PRINCIPLES FOR AN IMMIGRATION POLICY TO STRENGTHEN AND EXPAND THE AMERICAN MIDDLE CLASS 12 (2009) (“Technically, minimum wage and overtime laws and health and safety regulations extend to every worker in the U.S., regardless of immigration status. But in practice, undocumented immigrants face the threat of deportation if they try to exercise any of these rights.”).

Another barrier to enforcement of injured workers' rights is the poor enforcement of labor laws²² and health and safety laws and regulations in the United States.²³ For those workers who do seek to enforce their rights, the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*²⁴ has created further barriers for obtaining relief for work-related injuries.

This Note analyzes how *Hoffman Plastic* has affected the remedies available to undocumented workers injured on the job. Part II of this Note provides a brief history and overview of the *Hoffman Plastic* case. Part III includes a summary of the legal remedies that are usually available to workers injured on the job, such as workers' compensation and tort litigation, as well as a detailed discussion of *Hoffman Plastic's* effects in cases where an undocumented immigrant is seeking relief for injuries sustained at work. Part III also analyzes how, post-*Hoffman Plastic*, employers in workplace injury cases are emboldened to argue that it

22. NELP ET AL., ICED OUT, *supra* note 21, at 9–10 (explaining in close detail the decline in labor standards enforcement, including numerous failures by the U.S. Department of Labor between 2007 and 2009, such as the DOL's failure to document, respond to, and investigate most complaints by workers, as well as its failure to keep operational many hotlines and voicemail systems designed to accept complaints and use available enforcement tools such as penalties for willful and repeat violations).

23. See, e.g., Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555, 564 (2007) (explaining how the Occupational Safety and Health Administration ("OSHA"), the main federal agency charged with the enforcement of safety and health legislation, has "too few resources to adequately protect worker safety and health" and noting that, "[a]t current staffing levels, it would take the OSHA 117 years to inspect the workplaces under its jurisdiction. In the meantime, penalties for serious violations of the Occupational Safety and Health Act . . . those that pose a substantial probability of death or serious physical harm, carry an average penalty of only \$883"); see also David Barstow, *When Workers Die: U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003 ("Over a span of two decades, from 1982 to 2002, OSHA investigated 1,242 . . . instances in which the agency itself concluded that workers had died because of their employer's 'willful' safety violations. Yet in 93 percent of those cases, OSHA declined to seek prosecution [A]t least 70 employers willfully violated safety laws again [after having escaped prosecution once], resulting in scores of additional deaths. Even these repeat violators were rarely prosecuted. OSHA's reluctance to seek prosecution . . . persisted even when employers had been cited before for the very same safety violation. It persisted even when the violations caused multiple deaths, or when the victims were teenagers. And it persisted even where reviews by administrative judges found abundant proof of willful wrongdoing." (emphasis added)), available at <http://www.nytimes.com/2003/12/22/us/us-rarely-seeks-charges-for-deaths-in-workplace.html?src=pm>.

24. 535 U.S. 137 (2002).

is necessary and relevant to discover a worker's immigration status because undocumented workers have limited or no workplace rights. For undocumented workers, the mere threat of having their undocumented status publicly revealed has significantly chilled their willingness to enforce their workplace rights. Finally, Part IV outlines some of the tools that advocates and attorneys have used to protect undocumented workers from these discovery requests — tools that this Note argues fail to sufficiently deter employers from retaliating against their injured employees. Part IV of this Note thus offers a possible solution to this problem, arguing for greater use of retaliation claims under federal and state laws and, more importantly, the development of a retaliation *per se* rule in workplace injury cases that would make employer inquiries into a worker's immigration status, at any point after injury, a *per se* violation of federal law.

II. *HOFFMAN PLASTIC*: CASE HISTORY AND OVERVIEW

In May 1988, Jose Castro was hired by Hoffman Plastic Compounds, Inc. (“Hoffman Plastic”).²⁵ When he applied for work, Mr. Castro presented Hoffman Plastic with paperwork that appeared to verify his authorization to work in the United States.²⁶ Less than a year after being hired, Mr. Castro, along with other employees, was illegally fired for participating in a union-organizing campaign at work.²⁷ This firing was a direct violation of the National Labor Relations Act (“NLRA”)²⁸ and, as such, the National Labor Relations Board (“NLRB”),²⁹ among other relief granted, ordered Hoffman Plastic to offer Mr. Castro and his co-workers

25. *Id.* at 140.

26. *Id.*

27. *Id.*

28. The NLRA is a federal law that, inter alia, prohibits employers from discriminating “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3) (2006) (emphasis added).

29. The NLRB is an independent federal agency that enforces the NLRA and safeguards employees' rights to organize and unionize. *What We Do*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/what-we-do> (last visited Mar. 10, 2011). The NLRB also acts “to prevent and remedy unfair labor practices committed by private sector employers and unions.” *Id.* The NLRB has forty Administrative Law Judges and a five-member board appointed by the President and confirmed by the Senate. *Id.*

reinstatement and backpay.³⁰ While at a hearing to determine the amount of backpay owed, however, Mr. Castro admitted that he was an undocumented immigrant who had entered the United States illegally and that the paperwork he had presented to his employer at the start of employment belonged to a friend.³¹ After this revelation, his employer argued that awarding Mr. Castro backpay or reinstatement was contrary to the Immigration Reform and Control Act (“IRCA”).³²

In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* the Supreme Court, in a 5-4 decision, ruled that Mr. Castro was not entitled to either reinstatement or backpay.³³ The Supreme Court focused on Mr. Castro’s fraudulent use of work authorization documents as part of the reason why the NLRA remedies of backpay and reinstatement would not be allowed, noting: “we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment.”³⁴ The Court stated that awarding backpay to an undocumented immigrant would essentially be rewarding the immigrant “for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.”³⁵ Finally, the Court stressed that allowing such a remedy to an undocumented worker would directly conflict with Congress’ intent as expressed in IRCA of deterring illegal immigration by “encourag[ing] the successful evasion of apprehension by immigration

30. *Hoffman Plastic Compounds, Inc. & Casimiro Arauz*, 306 N.L.R.B. 100 (1992).

31. *Hoffman Plastic*, 535 U.S. at 141.

32. Brief for Petitioner at 2, *Hoffman Plastic Compound, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000) (No. 98-1570), 1999 WL 34814374 (“By awarding backpay to Castro, who admittedly entered this country illegally and fraudulently represented his immigration status when obtaining employment, the NLRB ignored the clear intent of Congress by flouting the fundamental policies embodied in IRCA.”). The Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.), was passed “in order to control and deter illegal immigration to the United States,” and includes, inter alia, provisions which “stipulate legalization of undocumented aliens who had been continuously unlawfully present since 1982 . . . [and] sanctions for employers who knowingly hire undocumented workers.” *Resources: Immigration Reform and Control Act of 1986 (IRCA)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow “Resources” hyperlink; follow “Glossary” hyperlink; then follow “I” hyperlink; finally follow “Immigration Reform and Control Act of 1986 (IRCA)” hyperlink) (last visited Feb. 24, 2011).

33. *Hoffman Plastic*, 535 U.S. at 140–41, 143–46.

34. *Id.* at 143.

35. *Id.* at 149.

authorities, condon[ing] prior violations of the immigration laws, and encourag[ing] future violations.”³⁶

Since *Hoffman Plastic*, courts have struggled to determine how to apply its holding to other cases involving undocumented employees seeking to enforce workplace benefits and rights. *Hoffman Plastic* emboldened employers to argue that undocumented workers have no employment rights in the United States.³⁷ The success of these claims has varied, depending on the type of claim brought, the jurisdiction in which it was brought, and the specifics of each case. This Note focuses only on how *Hoffman Plastic* has affected the ability of undocumented workers to recover for work-related injuries. As such, it is helpful to first give a brief overview of the type of remedies typically available to workers injured on the job.

III. REMEDIES FOR WORKERS INJURED ON THE JOB AND *HOFFMAN PLASTIC*'S CONSEQUENCES

A. TYPICALLY AVAILABLE REMEDIES

1. *Workers' Compensation*

Workers' compensation is a state system that provides remuneration for employees who have been injured while working on the job.³⁸ Responsibility over individual programs — legislative, administrative, and operational — lies with the state, rather than the federal government.³⁹ The types of relief typically available include the following: payment of medical bills; death benefits; pensions; lost wages, including temporary disability benefits and permanent disability benefits; and, sometimes, retraining for new jobs.⁴⁰

Workers' compensation laws were a response to the hazards and problems associated with the rise of modern industry and the

36. *Id.* at 151.

37. SMITH, *supra* note 9, at 2 (discussing how, in many states, “employers have renewed arguments that undocumented workers . . . are either not entitled to worker’s compensation benefits at all, or not entitled to certain types of benefits . . .”).

38. *Id.* at 15.

39. Debra T. Ballen, *The Sleeper Issue in Health Care Reform: The Threat to Workers' Compensation*, 79 CORNELL L. REV. 1291, 1291 (1994).

40. *Id.*

realization that injured workers often could not recover for their injuries through the common law process.⁴¹ These laws provide injured workers with a faster and more efficient, streamlined procedure by which workers can avoid the expense and delay of litigation.⁴² State legislatures have thus enacted workers' compensation laws to "provide financial and medical benefits to victims of work-connected injuries in an efficient, dignified, and certain form."⁴³ Workers' compensation laws are generally no-fault schemes, providing a form of strict liability that requires employers, regardless of fault, to compensate employees for injuries suffered during the course of employment.⁴⁴

2. *State Tort Litigation*

For workers whose employers do not provide workers' compensation, an alternative method of obtaining relief for workplace injuries is tort litigation. As tort law is governed by state law, the remedies available to workers differ from state to state.⁴⁵ Some of the causes of action that may be available to workers include personal injury, wrongful death, and wrongful discharge.⁴⁶ However, suing in tort is generally "untenable for undocumented workers who often lack the resources to instigate litigation, have limited English proficiency, and fear the immigration consequences of appearing in court."⁴⁷

41. Daniel J. Phillips, Note, *The Role of Discovery in Workers' Compensation Proceedings in Michigan: An Analysis of Stokes v. Chrysler, LLC*, 55 WAYNE L. REV. 1155, 1155 (2009).

42. *Id.*

43. *Id.*

44. Marjorie A. Shields, *Application of Workers' Compensation Laws to Illegal Aliens*, 121 A.L.R.5th 523 (2004).

45. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1456 (1988).

46. Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 39 (2008).

47. Brief for the New Orleans Workers' Center for Racial Justice et al. as Amici Curiae Supporting Respondents at *11-12, *Bollinger Shipyards, Inc. v. Rodriguez*, 604 F.3d 864 (5th Cir. 2010) (No. 09-60095), 2009 WL 6706826.

B. *HOFFMAN PLASTIC'S EFFECT ON AVAILABLE REMEDIES FOR INJURED UNDOCUMENTED WORKERS*

In the courtroom, *Hoffman Plastic* has been somewhat cabined by subsequent cases. Most courts that have considered the applicability of *Hoffman Plastic* to workers' compensation cases have determined that it does not act as a complete bar to an undocumented worker's ability to obtain relief for his or her work-related injuries.⁴⁸ Nevertheless, some courts have used *Hoffman Plastic* to limit the type of remedies and amount of damages and wage loss compensation that injured, undocumented workers are entitled to.⁴⁹ Perhaps most important, however, are the indirect effects that *Hoffman Plastic* is having outside of the courtroom: the case has created a legal basis for employers to pry into — or threaten to pry into — a worker's immigration status, thereby discouraging injured undocumented workers from filing complaints or bringing suit.⁵⁰ This effect, in turn, has created a perverse incentive for employers to hire undocumented immigrants, as undocumented workers are less likely to file complaints or otherwise cause trouble due to their fear of employer retaliation and deportation.⁵¹

1. *Legal Realm: Most Courts Have Refused to Expand Hoffman Plastic to Bar Undocumented Workers from Obtaining Legal or Administrative Relief for their Work-related Injuries*

Although courts have split on this issue, most courts that have considered the effect of *Hoffman Plastic* on the ability of undocumented workers to collect workers' compensation benefits have determined that *Hoffman Plastic* is inapplicable.⁵² This is undoubtedly due to the fact that a majority of states' workers' compensation laws include "alien" in the definition of covered employees;⁵³ while other statutes apply generally to all "individuals"

48. See *infra* Part III.B.1 and particularly notes 60–61.

49. See *infra* Part III.B.2.

50. See *infra* Part III.B.3.

51. See *infra* Part III.B.3.

52. See *infra* Parts III.B.1.a–c.

53. SMITH, *supra* note 9, at 7 (citing ARIZ. REV. STAT. ANN. § 23-901(5)(b) (2010); CAL. LAB. CODE § 3351(a) (West 2010); FLA. STAT. § 440.02(15)(a) (2010); 820 ILL. COMP. STAT. 305/1(b) (West 2010); KY. REV. STAT. ANN. § 342.0011(21) (West 2010); MICH. COMP. LAWS

or “persons.”⁵⁴ Only one state, Wyoming, has explicitly excluded undocumented workers from receiving workers’ compensation in its statute, and even there, such workers are only barred from workers’ compensation if they are both unauthorized to work *and* their employer failed to follow the I-9 process.⁵⁵ Thus, the statutory language in almost all states’ labor or workers’ compensation laws has made it possible for courts across the United States to determine that immigration status is irrelevant to a worker’s eligibility for workers’ compensation benefits.⁵⁶

Furthermore, after *Hoffman Plastic*, the Department of Labor, the NLRB, and the Equal Employment Opportunity Commission (“EEOC”) have stated unequivocally that federal employment laws still cover undocumented immigrants.⁵⁷ Courts have likewise determined that undocumented immigrants are still considered employees under the Fair Labor Standards Act (“FLSA”)⁵⁸

ANN. § 418.161(1)(l) (West 2010); MINN. STAT. § 176.011(9) (2010); MISS. CODE ANN. § 71-3-27 (2010); MONT. CODE ANN. § 39-71-118(1)(a); NEB. REV. STAT. §§ 48-115(2), 48-144 (2010); NEV. REV. STAT. ANN. § 616A.105 (2010); N.M. STAT. ANN. § 52-3-3 (2010); N.C. GEN. STAT. 97-2(2) (2010); N.D. CENT. CODE § 65-01-02(17)(a)(2) (2010); OHIO REV. CODE ANN. § 4123.01(A)(1)(b) (2010); S.C. CODE ANN. § 42-1-130 (2010); TEX. LAB. CODE ANN. §§ 401.011, 406.092 (West 2010); UTAH CODE ANN. § 34A-2-104(1)(b) (LexisNexis 2010); VA. CODE ANN. 65.2-101 (2010).

54. See, e.g., ARK. CODE ANN. § 11-9-102(9)(A) (West 2010); GA. CODE ANN. § 34-9-1(2) (West 2010); ME. REV. STAT. ANN. tit. 39-A, § 102(11)(A) (2010); OKLA. STAT. ANN. tit. 85, § 3(9) (West 2010); TENN. CODE ANN. § 50-6-102(10)(A) (West 2010).

55. SMITH, *supra* note 9, at 7; WYO. STAT. ANN. § 27-14-102(a)(vii) (2005). The I-9 process refers to Form I-9, a U.S. Citizenship and Immigration Services (“USCIS”) form that all employers must complete to verify an employee’s identity and ensure that a prospective employee is legally authorized to work in the United States. *I-9, Employment Eligibility Verification*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow the “Forms” hyperlink; followed by the “Employment Based Forms” hyperlink; then follow the “Employment Eligibility Verification” hyperlink) (last visited Mar. 10, 2011). The I-9 process requires an employer to check a prospective employee’s identity and work authorization documents to determine “whether the document(s) reasonably appear to be genuine and relate to the individual . . .” *Id.* Furthermore, the employer must document this information on Form I-9 and keep this form for either three years after the date of hire, or one year after employment is terminated, whichever is later. *Id.*

56. See, e.g., *Farmers Bros. Coffee v. Workers’ Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23 (Ct. App. 2005); *Fernandez-Lopez v. Jose Cervino, Inc.*, 671 A.2d 1051 (N.J. Super. Ct. App. Div. 1996).

57. *Cunningham-Parmeter*, *supra* note 46, at 39.

58. The Fair Labor Standards Act is a federal statute passed in 1938 which “establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.” *Compliance Assistance — Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB., <http://www.dol.gov/whd/flsa/> (last visited Mar. 10, 2011). FLSA requires employers to pay

and the NLRA.⁵⁹ Finally many state courts — including courts in Arizona, California, Florida, Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas⁶⁰ — have concluded that unauthorized immigrant workers may bring workers' compensation suits to recover for work-related injuries even after *Hoffman Plastic*.⁶¹

These plaintiff-favorable decisions seem to follow four main lines of reasoning: 1) *Hoffman Plastic* is inapplicable where the employee did not commit fraud by submitting fraudulent work authorization documents; 2) *Hoffman Plastic* is inapplicable even if the employee submitted fraudulent work authorization documents because there is no causal connection between the false representation and the injury which warrants denial of benefits; 3) *Hoffman Plastic* is inapplicable because workers' compensation law and tort law are both state law, and these laws are not preempted either by IRCA or *Hoffman Plastic*; and 4) the *Hoffman Plastic* rationale should not apply to workplace injury contexts due to public policy concerns. The following subparts address each of these lines of reasoning.

covered employees "at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay." *The Fair Labor Standards Act (FLSA)*, U.S. DEPT OF LAB., <http://www.dol.gov/compliance/laws/comp-flsa.htm> (last visited Mar. 10, 2011). FLSA is administered by the Wage and Hour Division of the U.S. Department of Labor. *Id.*; see also 29 U.S.C. §§ 201–219 (2006).

59. See, e.g., *Agri-Processor Co., Inc. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008); see *supra* note 28 for a brief explanation of the NLRA.

60. SMITH, *supra* note 9, at 7–8.

61. See, e.g., *Farmers Bros. Coffee*, 35 Cal. Rptr. 3d 23; *Safeharbor Emp'r Servs. I, Inc., v. Velazquez*, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003); *Earth First Grading v. Gutierrez*, 606 S.E.2d 332, 334 (Ga. Ct. App. 2004) ("[T]his court has already concurred with other states that have concluded that 'neither *Hoffman* nor the IRCA intended to prohibit the awarding of workers' compensation benefits to illegal aliens.'" (citations omitted)); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817 (Md. 2005); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003) ("As written, the IRCA does not prohibit unauthorized aliens from receiving state workers' compensation benefits generally or temporary total disability benefits conditioned on a diligent job search"); *Rajeh v. Steel City Corp.*, 813 N.E.2d 697 (Oh. Ct. App. 2004); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798 (Okla. Civ. App. 2003); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo)*, 810 A.2d 99 (Pa. 2002); *Curiel v. Env'tl. Mgmt. Servs.*, 655 S.E.2d 482 (S.C. 2007) ("IRCA does not preempt an award of workers' compensation benefits under state law.").

a. *Hoffman Plastic Is Inapplicable Where the Employee Did Not Commit Fraud by Submitting Fraudulent Work Authorization Documents*

This reasoning is probably the least controversial basis upon which courts have distinguished *Hoffman Plastic*. In *Hoffman Plastic*, Chief Justice Rehnquist went to great lengths to highlight the criminal fraud that Mr. Castro had committed by submitting false work authorization paperwork and stressed how it would be wrong to “reward” employees “found guilty of serious illegal conduct in connection with their employment.”⁶² However, the Court left open the question of how undocumented workers who had not committed a crime in connection with their employment would fare under the *Hoffman Plastic* analysis.

Many courts have since determined that undocumented immigrants who did not commit fraud when applying for work are eligible for workers’ compensation and tort relief. For example, in *Gomez v. F&T Int’l LLC* the court determined that the injured workers had not committed fraud because their employer had never asked them for any paperwork or work application form prior to the start of their employment. On that basis, the court held that the injured workers could pursue their tort claim against the employer.⁶³ The court stressed: “Only in situations, unlike the present case, where the worker uses false documents to obtain employment, will he be subject to criminal penalties.”⁶⁴ Similarly, in *Balbuena v. IDR Realty LLC*, the New York Court of Appeals determined that the fact that the claimants had not submitted fraudulent paperwork was one of the reasons why *Hoffman Plastic* did not bar recovery for the injured employees.⁶⁵ The court there noted: “IRCA does not make it a crime to work without documentation. *Hoffman* is dependent on its facts, including the critical point that the alien tendered false documentation that allowed him to work legally in this country.”⁶⁶ Finally, in *Madeira v. Affordable Housing Foundation, Inc.*, the Second Circuit likewise determined that injured undocumented workers

62. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143 (2002).

63. 842 N.Y.S.2d 298 (Sup. Ct. 2007).

64. *Id.* at 301.

65. 845 N.E.2d 1246 (N.Y. 2006).

66. *Id.* at 1258.

who had not violated IRCA by using false identification to obtain work could recover lost wages.⁶⁷ Thus, some courts have determined that an employee who has not committed fraud is entitled to workers' compensation benefits.

b. Hoffman Plastic Is Inapplicable Even if the Employee Submitted Fraudulent Work Documents Because There Is No Causal Connection Between the False Representation and the Injury Which Warrants Denial of Benefits

In many cases, courts have found employers liable even if the employee submitted false paperwork during the hiring process.⁶⁸ In these types of cases, courts have determined that injured, undocumented employees may still recover because there is no causal connection between the false representation and the injury that warrants denial of benefits or remedies. Courts have seemed to focus on two main rationales: either 1) the employer did not rely on these fraudulent documents when agreeing to employ the undocumented worker; or 2) the initial fraudulent conduct is not directly connected, and thus is irrelevant to, the workplace injury giving rise to the claim.

The court in *Balbuena* highlighted the fact that, under IRCA, the onus is on the employer to "verify the prospective worker's identity and work eligibility by examining the government-issued documentation. . . . An employer who knowingly violates the employment verification requirements . . . is subject to civil or criminal prosecution and penalties."⁶⁹ Based on this rationale, the court in *Coque v. Wildflower Estates Developers, Inc.* determined that a worker's submission of false documentation is sufficient to bar recovery for lost wages "only where the conduct *actually induces* the employer to hire the worker."⁷⁰ Although the undocumented worker in *Coque* had submitted false documentation, the

67. 469 F.3d 219 (2d Cir. 2006).

68. See *infra* notes 69–73 and accompanying text. *But see* *Ambrosi v. 1085 Park Ave. LLC*, No. 06-CV-8163(BSJ), 2008 U.S. Dist. LEXIS 73930 (S.D.N.Y. Sept. 25, 2008) (holding that the court is "compelled" to conclude that "undocumented workers *who violate IRCA* may not recover lost wages in a personal injury action based on a violation of New York Labor Law").

69. *Balbuena*, 845 N.E.2d at 1253.

70. 58 A.D.3d 44, 44 (N.Y. App. Div. 2008) (emphasis added).

court found that the employer's failure to verify the worker's eligibility for employment, as required by IRCA, meant that the false documents the plaintiff had presented were not necessary "to obtain employment."⁷¹ Likewise, the Supreme Court of Tennessee stated that an employer who asserts the defense of fraud and misrepresentation in a workers' compensation case must prove that he relied on the employee's false representation and that "such reliance must have been a substantial factor in the hiring."⁷² The New Hampshire Supreme Court used similar reasoning to find that an employee's submission of fraudulent documents is not a bar to recovery unless the employer "reasonably relied upon those documents."⁷³

Even before *Hoffman Plastic*, courts across the United States had concluded that an undocumented employee was not barred from collecting workers' compensation benefits when there was no causal connection between the employee's original misrepresentation and the injury subsequently suffered.⁷⁴ Since *Hoffman Plastic*, courts have continued to use this line of reasoning to allow undocumented immigrant workers to recover workers' compensation benefits. For example, the California Court of Appeals determined that an undocumented worker's use of a false Social Security number to obtain employment did not bar the injured plaintiff from receiving workers' compensation.⁷⁵ The court reasoned that it was "employment, not the compensable injury, that [the plaintiff] obtained as a direct result of the use of fraudulent documents" and that only a claimant who has obtained compensation as a direct result of fraudulent misrepresentation is prohibited from recovering workers' compensation benefits.⁷⁶ In *Matrix Employee Leasing v. Hernandez*, a Florida court also determined that an undocumented worker did not become ineligible for workers' compensation benefits by using a false social security number

71. *Id.* at 53.

72. *Silva v. Martin Lumber Co.*, No. M2003-00490-WC-R3-CV, 2003 WL 22496233, at *2 (Tenn. July 31, 2003).

73. *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005).

74. *See, e.g.*, *Dynasty Sample Co. v. Beltran*, 479 S.E.2d 773 (Ga. Ct. App. 1996); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. Super. Ct. App. Div. 1996); *Billy v. Lopez*, 434 S.E.2d 908 (Va. Ct. App. 1993).

75. *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23 (Ct. App. 2005).

76. *Id.* at 31.

to secure employment, as that fraud was unrelated to the worker's application for workers' compensation.⁷⁷

c. *Hoffman Plastic Is Inapplicable Because Worker's Compensation and Tort Law Are State Law, and No Federal Law Preempts These*

One of the most powerful arguments that courts have used to distinguish *Hoffman Plastic* from workers' compensation cases turns on the lack of federal preemption in this area.⁷⁸ Courts using this reasoning have noted that states "possess broad authority under their police powers to regulate the employment relationship to protect workers within the State," which includes the power to enact "laws affecting occupational health and safety."⁷⁹ Workers' compensation is solely state law and most courts have determined that *Hoffman Plastic* and IRCA do not preempt state workers' compensation laws or tort laws.⁸⁰ For example, the *Balbuena* court determined that New York's labor law was not preempted by *Hoffman Plastic*, thereby allowing the injured undocumented worker to recover for violations of the labor law.⁸¹ Similarly, the Second Circuit Court of Appeals determined that federal immigration law does not clearly preempt New York state law, thereby allowing undocumented workers to recover lost earnings where the wrong being compensated is "not authorized by IRCA under any circumstance."⁸² Notably, this line of reasoning is also directly in line with Congress' intent when it enacted

77. 975 So. 2d 1217 (Fla. Dist. Ct. App. 2008).

78. For a detailed explanation of the Supremacy Clause and Preemption Principles in regards to *Hoffman Plastic*, see *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1252–60 (N.Y. 2006).

79. *Balbuena*, 845 N.E.2d at 1256 (quoting *De Canas v. Bica*, 424 U.S. 351, 356 (1976)).

80. See, e.g., *Farmers Bros. Coffee*, 35 Cal. Rptr. 3d at 26–29; *Safeharbor Emp'r Servs. I, Inc. v. Cinto Velazquez*, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003) (finding that there is no federal preemption barring undocumented worker from obtaining workers' compensation benefits); *Cont'l PET Techs. v. Palacias*, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004) (finding that injured worker is entitled to workers' compensation because there is no federal preemption); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329–30 (Minn. 2003) (concluding that IRCA does not preempt undocumented immigration from receiving workers' compensation).

81. *Balbuena*, 845 N.E.2d at 1256.

82. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 223 (2d Cir. 2006).

IRCA; a 1985 report by the House of Representatives clearly stated that IRCA was not intended to be used to

undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.⁸³

d. Hoffman Plastic Does Not Extend to the Workplace Injury Context Because of Public Policy Concerns

Some courts have clearly asserted that they will not extend *Hoffman Plastic* because of serious public policy concerns. The Court of Appeals of Maryland, for example, has noted that excluding undocumented immigrants from the protection of workers' compensation laws would "retard the goals of workers' compensation laws" and that "unscrupulous employers could . . . take advantage of this class of persons and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers."⁸⁴ The California Court of Appeals has likewise noted that excluding undocumented aliens from workers' compensation benefits would encourage exploitative employers "to hire [unauthorized] aliens . . . by taking the chance that the federal authorities would accept their claims of good faith reliance upon immigration and work authorization documents that appear to be genuine."⁸⁵

In fact, courts have used this line of reasoning for years to protect undocumented employees, long before *Hoffman Plastic* jeopardized workers' compensation protections for this class of workers.⁸⁶ Thus, as shown above, some of the more recent court decisions that have limited the application of *Hoffman Plastic*

83. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 1986 WL 31950.

84. *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 826 (Md. 2005).

85. *Farmer Bros. Coffee*, 35 Cal. Rptr. 3d at 28.

86. See, e.g., *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998); *Mendoza v. Monmouth Recycling Corp.*, 672 A. 2d 221 (N.J. Super. Ct. App. Div. 1996).

have merely relied on traditional public policy rationales that allow undocumented employees to recover for workplace injuries.⁸⁷ These courts have aptly noted that safeguarding the rights of undocumented workers will in fact *strengthen* enforcement of immigration laws by eliminating the incentives for employers to hire them.⁸⁸

2. *Legal Realm: Hoffman Plastic Has Been Used to Limit the Type of Remedies and Amount of Damages and Wage Loss Compensation to Which Injured, Undocumented Workers are Entitled*

What the aforementioned cases and the reasoning behind them make clear is that many courts have interpreted *Hoffman Plastic* as narrowly as possible and have mostly refused to expand the *Hoffman Plastic* reasoning beyond the NLRA realm. However, one area where *Hoffman Plastic* is adversely affecting undocumented workers' ability to recover for workplace injuries is in the type and amount of damages and workers' compensation benefits that undocumented workers are able to obtain.

Some courts have applied *Hoffman Plastic* to limit the amount that injured employees may recover, even where an employer is deemed liable for those injuries.⁸⁹ These courts reason that undocumented workers are due less compensation because their undocumented status prevents them from legally securing reemployment, thereby preventing them from mitigating damages as required by law. For example, the court in *Balbuena* explained that "any conflict with IRCA's purposes that may arise from permitting an alien's lost wage claim" may be solved by allowing the jury to consider a plaintiff's immigration status as one factor in its determination of damages for violation of state labor laws.⁹⁰ The court in *Cano v. Mallory Management* likewise determined that the jury could consider an undocumented worker's immigration status in determining the issue of lost wages.⁹¹

87. See *supra* notes 84–85 and accompanying text.

88. *Id.*; see also *Dowling*, 712 A.2d at 404–05 (collecting cases).

89. See *infra* notes 90–94 and accompanying text.

90. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1259 (N.Y. 2006).

91. 760 N.Y.S.2d 816 (Sup. Ct. 2003).

In a similar vein, the Michigan Court of Appeals held that an undocumented immigrant's wage loss benefits can be suspended from the date that the employer discovers the worker's unauthorized legal status because employment for an undocumented worker is "impossible" without committing a crime.⁹² The Pennsylvania Supreme Court has also held that even though an undocumented immigrant is entitled to medical benefits, his or her undocumented status may justify terminating benefits for temporary total disability.⁹³ Finally, courts in California and Oklahoma have determined that the *Hoffman* rationale may prevent an undocumented worker from obtaining vocational rehabilitation benefits.⁹⁴

In sum, although courts across the United States are split, the majority of courts have found that *Hoffman Plastic* does not automatically prohibit undocumented workers from obtaining workers compensation benefits or tort damages from employers when they are injured in the course of employment. However, the *Hoffman Plastic* line of reasoning has been used to limit the type and amount of benefits and remedies that undocumented workers may claim.

3. *Indirect Effects: Hoffman Plastic Has Given Employers Legal Footing to Demand Information About a Worker's Immigration Status, Thereby Discouraging Undocumented Workers from Enforcing Their Workplace Rights*

Perhaps even more disturbing than the effect that *Hoffman Plastic* is having in the courtroom is the effect the case is having outside of the courtroom on workers' willingness to enforce their rights. Although undocumented workers have always been less likely to enforce their workplace rights due to their relatively low

92. *Sanchez v. Eagle Alloy*, 658 N.W.2d 510 (Mich. Ct. App. 2003). Note, however, that this determination was based on a specific state law that allows suspension of wage-loss benefits for a worker who commits a "crime" that prevents him from working or obtaining work. *Id.* at 512.

93. *Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Astudillo)*, 810 A.2d 99 (Pa. 2002).

94. *De Jesus Uribe v. Aviles*, No. B166839, 2004 Cal. App. Unpub. LEXIS 9698, at *12-13 (Cal. Ct. App. Oct. 26, 2004); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798, 801 (Okla. Civ. App. 2003).

bargaining power,⁹⁵ fear of retaliation (in the form of suspension, demotion, physical threats or violence, harassment, termination, and even deportation),⁹⁶ and cultural and linguistic barriers,⁹⁷ *Hoffman Plastic* has arguably made the situation worse. In the more extreme cases, *Hoffman Plastic* has emboldened employers to argue that undocumented workers have absolutely no employment rights.⁹⁸ More commonly, however, employers demand information about a complainant-worker's immigration status, thereby chilling undocumented workers' desire to enforce their workplace rights.⁹⁹ These employers typically argue that, pursuant to the *Hoffman Plastic* line of reasoning, a worker's immigration status is relevant to his or her ability to obtain certain work-related protections.¹⁰⁰

Hoffman Plastic has thus created yet another disincentive for undocumented workers to enforce their workplace rights: em-

95. Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, 12 J. POPULATION ECON. 91, 91–95 (1999) (“[Undocumented workers] illegality allows employers to exert monopsonistic power over these workers because of their great fear of being reported to immigration authorities, which would lead to immediate deportation.”).

96. S. POVERTY LAW CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 6 (2009) (noting that the situation for undocumented workers is “particularly oppressive” because “unscrupulous employers use [the workers] immigration status against them, threatening to have them deported”), <http://www.splcenter.org/legal/undersiege/UnderSiege.pdf>; see also ACLU WOMEN'S RIGHTS PROJECT & NAT'L EMP'T LAW CTR., NO FREE PASS TO HARASS: PROTECTING THE RIGHTS OF UNDOCUMENTED IMMIGRANT WOMEN WORKERS IN SEXUAL HARASSMENT CASES 10 (2007) (“Workers have reported that employers sometimes threaten physical abuse or violence to dissuade them from coming forward.”), available at http://www.aclu.org/pdfs/womensrights/no_free_pass_20071119.pdf; AFL-CIO, *supra* note 9, at 7.

97. AFL-CIO, *supra* note 9, at 8.

98. REBECCA SMITH ET AL., NAT'L EMP'T LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER *HOFFMAN PLASTIC COMPOUNDS V. NLRB* 1 (2003) (“[*Hoffman Plastic*] has emboldened employers to argue in a variety of contexts that immigrant workers simply have NO employment rights in the United States.”), available at http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf. See also Mariel Martinez, Comment, *The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a “Wider Lens,”* 7 U. PA. J. LAB. & EMP. L. 661, 682 (2005) (summarizing the argument that some employers have made since *Hoffman Plastic* that “undocumented workers [are] . . . completely precluded from employment rights and all corresponding remedies”).

99. Cunningham-Parmeter, *supra* note 46, at 42–44 (“[Post-*Hoffman Plastic*,] employers have adopted aggressive discovery practices designed to uncover plaintiffs' immigration status. . . . Defendants now pose status-based questions to immigrant employees as a matter of course.”).

100. *Id.* (“The stated purpose of these requests is to pursue the defendant's argument that *Hoffman* imposes new remedial limitations on unauthorized immigrants.”).

ployers can now legitimately and legally inquire into a worker's immigration status, which all too often intimidates workers into not filing lawsuits or complaints. One critic has noted that *Hoffman Plastic* and its progeny have "provided employers with a 'prying device' that allows employers to achieve ends in litigation that remain illegal in the workplace."¹⁰¹ This issue has been the subject of judicial notice as well. The Fifth Circuit has recognized the harassing and intimidating effect that inquiries about a worker's immigration status have on employees, noting that such information "could inhibit [workers] in pursuing their rights . . . because of . . . embarrassment and inquiry into their private lives."¹⁰² The court in *Gomez v. F&T International LLC* has likewise noted that "[w]hat is really happening under the guise of litigating lost wages is that undocumented workers are being intimidated with the prospect of being deported and having their families and lives torn apart."¹⁰³

For many undocumented workers, the mere thought that their undocumented status will be divulged in a courtroom and may become public record is enough to chill their desire to enforce their rights: employer threats to expose a worker's immigration status could very well lead to the employee's deportation.¹⁰⁴ This is especially true considering the sharp increase in immigration

101. While an employer may not, in retaliation against an employee, threaten to call immigration officials, an employer may threaten to depose a worker about his or her immigration status. *Id.* at 42, 47.

102. *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987).

103. 842 N.Y.S.2d 298, 303 (Sup. Ct. 2007); *see also* *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) ("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 . . . [W]ere we to direct district courts to grant discovery requests for information related to immigration status in every case . . . countless acts of illegal and reprehensible conduct would go unreported.") (ruling under Title VII).

104. *See, e.g.*, *NELP ET AL., ICED OUT*, *supra* note 21, at 20 ("Fifty percent of those who told their employer about [an] . . . injury were reported to immigration authorities, fired, or were instructed not to file claims."). Some critics also believe that immigration status requests discourage legal workers, like legal permanent residents, from enforcing their workplace rights. *See* *Cunningham-Parmeter*, *supra* note 46, at 44 ("[Q]uestions about status dissuade lawful permanent residents from going to court. These legal immigrants often live in 'mixed families' in which some family members are U.S. citizens and others are unauthorized immigrants. If litigating workplace claims entails extensive discovery about status, many of these legal immigrants will decline to sue in order to avoid answering invasive questions about their families and themselves.").

raids and detentions between 2006 and 2008¹⁰⁵ and the fact that, during this same time period, Immigrations and Customs Enforcement (“ICE”)¹⁰⁶ increasingly intervened in ongoing labor disputes despite an internal policy advising otherwise.¹⁰⁷ In fact, in one case, an undocumented worker who had filed a workers’ compensation claim was arrested by ICE as he entered a judicial complex for a pre-trial hearing related to his claim.¹⁰⁸

These barriers to enforcement of undocumented workers’ workplace rights negatively affect all workers, regardless of immigration status. Undocumented workers’ failure to enforce their workplace rights not only jeopardizes workplace standards for their coworkers,¹⁰⁹ but also creates a perverse incentive for employers to hire more undocumented workers.¹¹⁰ Numerous cases

105. NELP ET AL., ICED OUT, *supra* note 21, at 10.

106. Immigrations and Customs Enforcement is a federal administrative agency under the U.S. Department of Homeland Security. *ICE Overview*, U.S. IMMIGR. & CUSTOM ENFORCEMENT, <http://www.ice.gov/about/overview/> (last visited Mar. 10, 2011). The Enforcement and Removal Operations (“ERO”) branch of ICE is charged with enforcing the nation’s immigration laws, as well as identifying, apprehending, and deporting removable aliens. *ICE Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOM ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/> (last visited Mar. 10, 2011).

107. NELP ET AL., ICED OUT, *supra* note 21, at 23–27 (noting how ICE enforcement either occurred during ongoing labor disputes or directly on the heels of worker claims, in violation of the 1998 Memorandum of Understanding (MOU) signed between ICE and the U.S. Department of Labor); *see also* Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES, Feb. 2, 2010, at A12 (detailing how ICE cooperated with Signal International, Inc., an employer of guest workers from India, to deport guest workers who had been protesting over their job conditions).

108. NELP ET AL., ICED OUT, *supra* note 21, at 28.

109. *Id.* at 5 (noting that failure “to vigorously enforce . . . labor laws would lower labor standards for all workers in America”); *see also* De Canas v. Bica, 424 U.S. 351, 356–57 (1976) (“[A]cceptance by illegal aliens of jobs on substandard terms as to . . . working conditions can seriously depress . . . working conditions of citizens and legally admitted aliens . . .”); H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 1986 WL 31950 (“[A]pplication of the NLRA [to undocumented workers] ‘helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.’” (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984))).

110. Megan A. Reynolds, Comment, *Immigration-Related Discovery After Hoffman Plastic Compounds, Inc. v. NLRB: Examining Defending Employers’ Knowledge of Plaintiffs’ Immigration Status*, 2005 MICH. ST. L. REV. 1261, 1271 (2005) (noting that, despite IRCA, there remains an incentive to hire undocumented workers “because the risk of an employer actually being sanctioned under the IRCA is far too low to offset the employer’s competitive advantage from lower labor costs and insulation from liability under protective statutes. IRCA sanctions range from \$250 to \$2,000 for a first time offense, whereas the typical claim for unpaid wages or backpay is significantly higher. Moreover, sanctions are rare”); *see also* TRAUB ET AL., *supra* note 21, at 12 (“As long as a cheaper and more

before *Hoffman Plastic* recognized and emphasized “the danger of creating incentives for increased employment of undocumented immigrants” if these workers were to receive fewer workplace protections than others.¹¹¹ Indeed, Justice Breyer highlighted exactly this issue in his dissent in *Hoffman Plastic*, stating:

To deny the [NLRB] the power to award backpay [to undocumented aliens] . . . might very well increase the strength of [the] magnetic force [which pulls undocumented immigrants to the United States]. That denial lowers the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). *It thereby increases the employer’s incentive to find and to hire illegal-alien employees.*¹¹²

In order to avoid these negative consequences, more must be done to encourage undocumented workers to enforce their workplace rights, including their right to workers’ compensation

compliant pool of immigrant labor is available to employers who are willing to wield the threat of deportation against their workers, those same employers will be less willing to hire U.S.-born workers if they demand better wages and working conditions.”); Christopher Ho, *Illegal Immigrants Deserve Protection of American Labor Law*, CHI. TRIB., Apr. 7, 2002 (“If you can exploit with impunity workers who have no rights, then why not hire someone you can refuse to pay after a week’s work? . . . 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?”), available at http://articles.chicagotribune.com/2002-04-07/news/0204070379_1_unscrupulous-employers-undocumented-workers-illegal.

111. Reynolds, *supra* note 110, at 1270. See, e.g., *Sure-Tan, Inc.*, 467 U.S. at 893–94 (“If an employer realizes that there will be no advantage under the [National Labor Relations Act] in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.”); *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (“If [federal labor laws] did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions”); *Nizamuddowlah v. Bengal Cabaret, Inc.*, 415 N.Y.S.2d 685, 685 (App. Div. 1979) (allowing an undocumented worker to recover backpay under the state minimum wage law in “order to prevent the unjust enrichment of the defendants”). See also H.R. REP. NO. 99-682, pt. 1, at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 1986 WL 31950 (“[A]pplication of the NLRA [to undocumented workers] ‘helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.’” (quoting *Sure-Tan, Inc.*, 467 U.S. at 893)).

112. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (emphasis added).

and disability benefits when they are injured on the job. One critical step in this direction includes protecting injured undocumented workers who do file complaints from the threat of intrusive discovery into their immigration status.

IV. PROTECTING WORKERS FROM INTRUSIVE DISCOVERY REQUESTS: CURRENT TOOLS AND IMPROVEMENTS

Hoffman Plastic has emboldened employers to argue that undocumented workers have few or no workplace rights and has given employers legal footing to pry into a worker's immigration status when a worker brings a work-related injury claim.¹¹³ Since then, immigrants' and workers' rights advocates and attorneys have struggled to find ways to stop or limit the discovery of a workers' immigration status. Some advocates have used protective orders or invocation of the Fifth Amendment to limit discovery into a worker's immigration status with relative success. However, this Note posits that protective orders and invocation of the Fifth Amendment are imperfect tools that fail to sufficiently deter employers from harassing and intimidating injured employees.¹¹⁴ To better address the issue of employer discovery of a worker's immigration status, this Note advocates for greater use of anti-retaliation provisions in federal and state laws, as well as the development of a retaliation *per se* rule in workplace injury cases — a rule which would make inquiry into a worker's immigration status, at any point after injury, *per se* harassment and retaliatory conduct in violation of FLSA, Title VII, and other applicable federal and state laws.

A. PROTECTIVE ORDERS AND THE FIFTH AMENDMENT: CURRENT TOOLS USED TO PROHIBIT AND LIMIT DISCOVERY OF A WORKER'S IMMIGRATION STATUS

Attorneys often use protective orders to prohibit or limit an employer's ability to ask about a worker's immigration status.¹¹⁵

113. See *supra* Part III.B.3.

114. For other tools being used by advocates and attorneys, see ACLU WOMEN'S RIGHTS PROJECT & NAT'L EMP'T LAW CTR., *supra* note 96, at 22–25.

115. SMITH, *supra* note 9, at 2 (noting how, in most labor law claims, courts “as a matter of routine” enter protective orders barring inquiry into immigration status).

To date, most courts, for a number of reasons, have granted these protective orders barring inquiry into a worker's documented status.¹¹⁶ Many courts have banned or limited such inquiry because they have recognized that allowing such discovery would deter workers from asserting their rights, thus destroying a cause of action for undocumented workers.¹¹⁷ The Ninth Circuit perhaps put it best when it noted 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 Indeed, were we to direct district courts to grant discovery requests for information related to immigration status in every case . . . countless acts of illegal or reprehensible conduct would go unreported.¹¹⁸

Other courts have granted protective orders due to the highly prejudicial effect that disclosure of a claimant's immigration status has on plaintiffs compared to its minimal probative value for defendants.¹¹⁹

Despite the relative success of these protective orders in limiting or prohibiting inquiry into a worker's immigration status,

116. *Id.* See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004); *Pontes v. New England Power Co.*, No. 0300160A, 2004 WL 2075458 (Mass. Super. Aug. 19, 2004). See also *infra* notes 117–19.

117. See, e.g., *Rengifo v. Erevos Enters., Inc.*, No. 06 Civ. 4266, 2007 WL 894376 (S.D.N.Y. Mar. 20, 2007) (granting protective order because of *in terrorem* effect); *De La O v. Arnold-Williams*, No. CV-04-0192-EFS, 2006 U.S. Dist. LEXIS 76816 (E.D. Wash. Oct. 20, 2006) (granting protective order because inquiry into immigration status would discourage plaintiffs from coming forward); *EEOC v. Bice of Chi.*, 229 F.R.D. 581 (N.D. Ill. 2005) (protective order granted because discovery of immigration status would have a “chilling effect on victims of discrimination from coming forward to assert discrimination claims”).

118. *Rivera*, 364 F.3d at 1065.

119. See, e.g., *Lozano v. City of Hazleton*, 239 F.R.D. 397 (M.D. Pa. 2006) (prohibiting discovery of plaintiffs' immigration statuses because the harm to plaintiffs of this disclosure outweighed the benefit to defendants); *Garcia-Andrate v. Madra's Café Corp.*, No. 04-71024, 2005 WL 2430195 (E.D. Mich. Aug. 3, 2005) (prohibiting discovery of worker's immigration status because harm to plaintiff outweighed any relevance to the case); *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (plaintiff's motion for a protective order granted where information about worker's immigration status deemed not relevant to the case and where the potential for prejudice outweighed the probative value of such information).

protective orders serve only as band-aids for this wide-spread problem. First, employers can turn protective order litigation into a protracted and costly legal battle.¹²⁰ Second, in many cases protective orders are only granted at the liability stage of the trial, allowing for the disclosure of a worker's immigration status at the damages or benefits determination stage of the case.¹²¹ As noted earlier, these courts have determined that immigration status is relevant to a determination of the amount of damages or wage loss that an undocumented immigrant may recover.¹²² Third, protective orders often fail to stop retaliatory conduct at the outset, as employers can still threaten to inquire into a prospective claimant-worker's immigration status if the worker elects to pursue legal or administrative relief, thereby discouraging undocumented workers from filing a complaint in the first place. Finally, as one critic noted, "[p]rotective orders cannot meet the immigrant's interest in anonymity, speed, or consistency."¹²³

Another tool that has been used to limit discovery of a worker's immigration status is invocation of the Fifth Amendment's privilege against self-incrimination.¹²⁴ In one instance, the court in *Pontes v. New England Power Co.* allowed invocation of this privilege where disclosure of the worker's immigration status could provide "a link in the chain of evidence needed to prosecute [the crime of tendering fraudulent documents to an employer]."¹²⁵ Although helpful, invoking this privilege may give rise to an adverse inference,¹²⁶ which may increase undocumented workers' fear of removal. Furthermore, the Fifth Amendment can generally only be used in certain circumstances, such as when an individual is asked to be a "witness against himself."¹²⁷ Finally, like protective orders, invocation of the Fifth Amendment is simply too reactive in that it fails to stop employer retaliation at the out-

120. Cunningham-Parmeter, *supra* note 46, at 51.

121. See, e.g., *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219 (2d Cir. 2006); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246 (N.Y. 2006); *Cano v. Mallory Mgmt.*, 760 N.Y.S.2d 816 (Sup. Ct. 2003).

122. See *supra* Part III.B.2.

123. Cunningham-Parmeter, *supra* note 46, at 52.

124. See generally *id.* (collecting cases).

125. No. 0300160A, 2004 WL 2075458 (Mass. Supp. Aug. 19, 2004); see also *Xinic v. Quick*, No. 2004-226030, 2005 WL 3789231 (Va. Cir. Ct. Nov. 14, 2005).

126. Cunningham-Parmeter, *supra* note 46, at 64-66.

127. *Id.* at 62-63 (noting that "some courts require a 'real' possibility of prosecution").

set, when injured workers are first considering whether to pursue legal or administrative relief. Even supporters of using this privilege in the immigration discovery context admit that “[e]xtensive litigation over invocations and inferences could undercut the privilege’s claimed efficiency and protective benefits.”¹²⁸ Therefore, like protective orders, invocation of the Fifth Amendment privilege against self-incrimination may not sufficiently protect injured undocumented workers interested in pursuing legal or administrative relief.

B. FEDERAL AND STATE RETALIATION CLAIMS: A BETTER TOOL FOR DISCOURAGING EMPLOYER INQUIRY INTO A WORKER’S IMMIGRATION STATUS FROM THE START

Although the aforementioned tools are relatively effective in stopping or limiting discovery into an employee’s immigration status, these tools are too reactive — they simply respond to an employer who has already demanded information about a worker’s immigration status. Workers must still deal with the stress and uncertainty caused by the possibility that they will be forced to divulge their immigration status. Moreover, protective orders and invocation of the privilege against self-incrimination may lengthen cases and make them more cumbersome for workers, due to the aforementioned reasons.

A better solution to stop discovery of a worker’s immigration status is more frequent use of retaliation claims, where claimants and their lawyers preemptively inform employers that any inquiry into immigration status at any point after injury will be considered harassment and retaliation in violation of the anti-retaliation provisions in federal and state laws. Using retaliation claims to discourage employers from prying into workers’ immigration status is particularly effective because retaliation claims under federal laws carry the threat of increased penalties. For example, the FLSA prohibits “any person” from “discriminat[ing]” against “any employee” because that employee has filed “*any* complaint” under or related to FLSA.¹²⁹ Penalties for violating

128. *Id.* at 75.

129. 29 U.S.C. § 215(a)(3) (2006) (emphasis added).

this FLSA prohibition include, among others, compensatory damages, imprisonment, steep fines, and attorney's fees.¹³⁰

In some cases, workers' rights advocates may also be able to bring retaliation claims under Title VII¹³¹ and similar state and local human rights laws for retaliation based on race, color, or national origin discrimination, irrespective of their ability to bring a FLSA claim.¹³² Such claims could be brought, for example, in cases where an employer decides to question one injured claimant-worker's immigration status (because of the employee's race, color, or national origin), but the employer does not question the immigration status of other, similarly situated workers who are not of the claimant's same race, color, or national origin. In such a case, the injured worker would essentially be alleging disparate treatment by the employer in the handling of workplace injury complaints and similar privileges of employment. Although bringing such Title VII claims undoubtedly require more work and very fact-intensive case development, retaliation claims under Title VII can be supremely effective because Title VII violations would trigger increased liability and penalties.¹³³

C. RETALIATION *PER SE* RULE — A MORE EFFECTIVE SOLUTION

In order to discourage employers from conducting intrusive discovery requests into a worker's immigration status, courts

130. 29 U.S.C.A. § 216 (West 2008), *declared unconstitutional in part* by *Alden v. Maine*, 527 U.S. 706 (1999) (holding that subsection 216(b) is unconstitutional when applied against nonconsenting states); *see also* *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (upholding FLSA retaliation claim for compensatory and punitive damages where employer reported employee to immigration authorities).

131. Title VII is a federal law which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. *See* 42 U.S.C. § 2000e-2(1) (2006) (making it unlawful for an employer to “discriminate against any individual with respect to his . . . conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”) (emphasis added).

132. *See, e.g.*, N.Y. EXEC. LAW § 296(a), (e) (McKinney 2010) (making it unlawful for an employer to discriminate against an individual “in terms, conditions or privileges of employment” because of the individual's “race . . . color, [or] national origin” or to “discharge, expel or otherwise discriminate against any person” because he or she has “filed a complaint” in any proceeding under the Human Rights Laws).

133. These increased penalties include damages, certain injunctive relief, and attorney's fees. *See* 42 U.S.C. § 2000e-5 (2006); *Questions & Answers: Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, EEOC, <http://www.eeoc.gov/policy/docs/qanda-undoc.html> (last visited Mar. 10, 2011).

should develop a retaliation *per se* rule that makes inquiry into immigration status, at any point after the injury or filing of a related complaint, *per se* harassment and retaliatory conduct in violation of federal, state, and local laws — like the FLSA. Such a *per se* rule would be a powerful tool in discouraging employers from asking about immigration status, as any inquiry into a worker's immigration status would automatically expose employers to increased liability from retaliation claims. Thus a retaliation *per se* rule would be a more proactive solution to the problem of employer retaliation and would better protect undocumented workers by reducing the likelihood that they will have to face the stress and uncertainty of defending against an immigration status discovery request.

A retaliation *per se* rule would automatically find employers guilty of retaliation upon a showing that the employer threatened to, attempted to, conspired to, or did investigate a worker's immigration status after the worker was injured on the job or in response to a worker's attempt to enforce his or her workplace rights. This rule should apply in all cases in which a worker is seeking to enforce his or her workplace rights, including employment rights under federal statutes such as the FLSA or federal civil rights laws like Title VII. Establishing such a *per se* rule on a broad scale would discourage employers from threatening or trying to investigate a worker's immigration status. This, in turn, should create one less obstacle to an employee's willingness to file a complaint or file suit to enforce workplace rights.

However, an exception should be made for employers who, through no affirmative act of their own, have received actual or constructive knowledge¹³⁴ that the worker in question is undocumented. Such an exception would be consistent with the IRCA, which requires that an employer re-verify an employee's status if

134. Constructive knowledge is defined as "knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(l) (2009). Constructive knowledge is "to be narrowly construed in the immigration context and requires positive information of a worker's undocumented status." *Aramark Facility Servs. v. Serv. Emps. Int'l Union, Local 1877*, 530 F.3d 817, 820–21 (9th Cir. 2008). An employee's foreign appearance or accent alone is not sufficient to qualify as constructive knowledge. 8 C.F.R. § 274a.1(l)(2). Likewise, receiving a social security "no-match" letter is not sufficient, in and of itself, to qualify as constructive knowledge. *Aramark Facility Servs.*, 530 F.3d at 826.

the employer has received actual or constructive knowledge that said employee is undocumented.¹³⁵ Before granting this exception to an employer, however, courts should closely scrutinize how the employer gained the actual or constructive knowledge of the worker's undocumented status in order to ensure that the employer played no role in obtaining such information. Only employers who have, through no affirmative act of their own, received actual or constructive knowledge of an employee's undocumented status should qualify for this limited exception to the *per se* rule.

Although this *per se* rule may seem extreme at first glance, it is a necessary and appropriate response to what is most likely retaliatory conduct by an employer. An employer who is truly determined to abide by the law by not hiring undocumented workers will have done a thorough examination of its employees' work authorization documents *before* hiring the worker. Employers have an affirmative duty to thoroughly check an individual's work authorization forms before hiring said individual.¹³⁶ Once a worker is hired, an employer typically has no authority to re-verify the worker's immigration status simply because he or she has filed a workers' compensation claim.¹³⁷ Thus, an employer who inquires into a worker's immigration status after the initial hiring stage typically has no legal basis for doing so.¹³⁸ An employer who suddenly expresses concern about a worker's immigration status once that worker has filed a complaint or has attempted to enforce his or her rights probably has an ulterior motive for the inquiry: harassment and retaliation. Critics of the current system have aptly noted that:

[e]mployers who hire large numbers of undocumented workers suddenly take an interest in compliance with immigration laws as soon as they are served with a complaint, or an

135. See 8 C.F.R. § 274a.2(b)(1)(vii) (2010); see also *Aramark Facility Servs.*, 530 F.3d at 820.

136. 8 U.S.C. § 1324a(b) (2006).

137. SMITH, *supra* note 9, at 23–24.

138. Employers usually can only re-verify a worker's status if 1) the document that the employee submitted at the time of hire had an expiration date stating when the work authorization would expire, or 2) when the employer receives information that the employee is undocumented. *Id.* at 23 (citing *New El Rey Sausage Co., Inc. v. INS*, 925 F.2d 1153, 1156–58 (9th Cir. 1991); 8 C.F.R. § 274a.2(b)(1)(vii)).

accident takes place. . . . Sometimes the employer will suddenly discover in its files a letter from the Social Security Administration indicating that the worker's social security number is not valid.¹³⁹

Furthermore, a retaliation *per se* rule is appropriate because the rule reflects the doctrinal development of the law. A *per se* rule would closely track the rationale that court after court has used to limit discovery into injured workers' immigration status.¹⁴⁰ As explained above, most courts that have considered this issue have determined that immigration status is irrelevant to a determination of employer liability for an employee's work-related injuries.¹⁴¹ Moreover, many courts have recognized the chilling effect that inquiry into a worker's immigration status has on the worker's willingness to enforce his or her workplace rights.¹⁴²

The one area where immigration status has generally been deemed relevant is at the damages or relief determination stage of a workers' compensation or tort claim, where the worker's ability to mitigate damages becomes an issue.¹⁴³ Yet, even in this context, the retaliation *per se* rule should apply — employers should not be able to discover a worker's immigration status, because it is not clear why immigration status is necessary to determine the amount of relief or benefits that a worker is entitled to. After all, it is not necessarily true that an undocumented worker will be unable to mitigate damages without breaking the law. For example, an undocumented immigrant can become self-employed within the United States without violating IRCA,¹⁴⁴ as

139. *Id.* at 16.

140. *See supra* notes 102–03 and accompanying text.

141. *See supra* Part III.B.1.

142. Most courts have also determined that an employee's immigration status is irrelevant for credibility purposes, thus rejecting an alternative argument that employers have used when seeking to discover an employee's immigration status. *See, e.g.,* EEOC v. First Wireless Grp., 225 F.R.D. 404 (E.D.N.Y. 2004) (discovery of immigration status prohibited because only marginally relevant to credibility); *Mischalski v. Ford Motor Co.*, 935 F. Supp. 203 (E.D.N.Y. 1996) (undocumented immigrant status is not probative of a witness's character for truthfulness).

143. *See supra* Part III.B.2.

144. It is currently not a crime simply to be unlawfully present in the United States. Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 372 (2008) (citing H.R. 4437,

employers who hire independent contractors are not subject to the IRCA provisions regarding employer sanctions.¹⁴⁵ Moreover, mere presence in the United States without valid immigration status is not a crime under IRCA.¹⁴⁶ As such, courts that have barred undocumented workers from compensatory damages based on the rationale that such workers cannot legally obtain employment within the United States are making a premature and inappropriate assumption about the undocumented worker's inability to mitigate damages.¹⁴⁷

Finally, there are strong policy reasons for supporting a *per se* rule. First, a *per se* rule would reduce the incentives that currently exist for employers to hire undocumented workers.¹⁴⁸ As Justice Breyer noted in his dissent in *Hoffman Plastic*, the current state of the law could rationally lead employers to believe that “they can violate the labor laws at least once with impunity.”¹⁴⁹ Subsequently, at least one court has observed that allowing discovery into a worker's immigration status has the “perverse effect of encouraging employers to hire undocumented workers so as to avoid accountability for unlawful workplace

109th Cong. §§ 201, 203 (2005) (proposing to make unlawful presence in the United States an “aggravated felony”).

145. SMITH, *supra* note 9, at 19. In fact, in many industries some employers intentionally misclassify their employees as independent contractors in order to circumvent compliance with labor laws. NERP ET AL., ICED OUT, *supra* note 21, at 9. Recent studies and reports have shown that “as many as 40 percent of construction industry employers misclassify their workers as independent contractors.” *Id.*

146. Unlawful presence in the U.S., in and of itself, is not a crime, although it is a deportable civil offense. *See* 8 C.F.R. § 287.3 (2007). *See also* U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW: RESPONSE TO THE U.N. HUMAN RIGHTS COUNCIL WORKING GROUP REPORT (Mar. 10, 2011), <http://www.state.gov/g/drl/upr/157986.htm> (“ . . . unlawful presence in the U.S. is not a crime . . . ”).

147. Furthermore, at least one court has recognized and criticized the legal fallacy of barring recovery for undocumented workers based on their inability to legally mitigate damages, by noting that such workers are probably able to obtain employment in the country quite easily. *See Gomez v. F&T Int'l (Flushing, N.Y.) LLC*, 842 N.Y.S.2d 298, 301 (Sup. Ct. 2007) (questioning the strength of the mitigation argument and noting that the construction industry — where the *Gomez* claimant was working when he was injured — is notorious for hiring undocumented workers without question and that the claimant could likely become re-employed in the construction industry quite easily).

148. *See supra* Part III.B.3.

149. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 154 (2002) (Breyer, J., dissenting).

practices.”¹⁵⁰ A retaliation *per se* rule reduces the likelihood that a worker’s legal status will be discovered, thus increasing the probability that a worker will enforce his or her rights and reducing one of the incentives for employers to hire undocumented workers: the employer’s belief that they can violate undocumented workers’ rights “at least once with impunity.” In the long term, such a *per se* rule should do much more to help immigration enforcement than to penalize individual undocumented employees.

Second, a *per se* rule would help maintain or improve labor standards and protections for all workers because it would reduce or eliminate the chilling effect that *Hoffman Plastic* has had on workers’ willingness to enforce their workplace rights. As noted by multiple scholars and courts, labor standards deteriorate for all workers when some workers fail to enforce their workplace rights or insist on adequate health and safety standards.¹⁵¹ A retaliation *per se* rule would create better protections for workers who seek to enforce existing labor and employment laws and regulations by ensuring that unscrupulous employers who try to retaliate against such workers through intrusive discovery requests are immediately “punished” in the form of increased liability. In this way, a *per se* rule can lead to greater enforcement of current labor and employment laws and regulations, and thus higher workplace standards for *all* employees.

150. ACLU WOMEN’S RIGHTS PROJECT & NAT’L EMP’T LAW CTR., *supra* note 96, at 22. *See, e.g.*, *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (recognizing that such inquiries would be counterproductive to government efforts to discourage employers from hiring undocumented workers); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 826 (Md. 2005) (noting that, if immigration status were discoverable, workers would be at the mercy of “unscrupulous employers who could . . . take advantage of this class of persons and engage in unsafe . . . practices with no fear of retribution”).

151. *See, e.g.*, NELP ET AL., ICED OUT, *supra* note 21, at 5 (noting that failure “to vigorously enforce . . . labor laws would lower labor standards for all workers in America”); Bernhardt et al., *supra* note 22, at 3, 5 (“When the floor of labor standards is driven down or dismantled altogether, all of us are affected, not just those at the very bottom. . . . In the U.S., employment and labor laws largely set [the] ‘floor’ of minimum standards”); *De Canas v. Bica*, 424 U.S. 351, 356–57 (1976) (“ . . . acceptance by illegal aliens of jobs on substandard terms as to . . . working conditions can seriously depress . . . working conditions of citizens and legally admitted aliens”); H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 1986 WL 31950 (“application of the NLRA [to undocumented workers] helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.”) (quoting *Sure-Tan, Inc. v. Nat’l Labor Relations Bd.*, 467 U.S. 883, 893 (1984)).

Third, there are strong public policy reasons for holding employers fully liable for the workplace injuries suffered by their employees. Our society has determined that an employer should generally be strictly liable for the work-related injuries of its employees through workers' compensation laws, which are no-fault schemes.¹⁵² The rationale behind this policy is to incentivize employers to maintain safe working conditions by imposing strict liability for any employee injuries incurred while on the job. Giving these employers a break, in the form of decreased liability, when the injured employee is undocumented undermines one of the central public policy rationales behind both workers' compensation law and tort litigation: deterrence. These strong public policy concerns trump the limited value that discovery of a worker's immigration status may have. In sum, the potential for abuse in immigration status discovery requests is so great that this factor militates against allowing any inquiry into immigration status. A retaliation *per se* rule both recognizes how unnecessary and irrelevant immigration status is to most workplace rights claims as well as how these discovery requests can easily be used to intimidate and retaliate against workers.

V. CONCLUSION

Although courts are split about the applicability of *Hoffman Plastic* to undocumented immigrants' workers' compensation and tort claims, most courts have interpreted *Hoffman Plastic* narrowly and allowed undocumented immigrants to recover for work-related injuries. Nevertheless, the *Hoffman Plastic* rationale has encouraged employers to argue that undocumented employees have extremely limited or no workplace rights and has also encouraged employers to demand information about injured workers' immigration status in an attempt to limit their liability. Consequently, *Hoffman Plastic* has indirectly affected the ability of undocumented workers to recover for work-related injuries by discouraging these workers from making any complaints or filing suit, for fear of retaliation and deportation.

Although protective orders and invocation of the Fifth Amendment have been useful tools in protecting workers from

152. See *supra* Part III.A.1.

discovery into their immigration status, stronger tools are needed to curb such a pervasive problem. This Note has argued for the creation of laws that make inquiry into a worker's immigration status, at any point after injury, *per se* harassment and retaliatory conduct in violation of the FLSA, Title VII, and other federal and state laws. However, even if such laws do not come to pass, advocates and lawyers can and should make greater use of current federal and state anti-retaliation laws to discourage employers from demanding information about an employee's immigration status.

If employers know that any inquiry into a worker's immigration status will be met with immediate, and almost certainly successful, retaliation claims, such employers will be much less likely to ask about a worker's immigration status. This, in turn, will motivate more workers to enforce their workplace rights, knowing that they are protected by such retaliation provisions. Such protection from retaliation will lead to greater enforcement of labor and workplace health and safety laws and regulations, improving working conditions for all workers, regardless of immigration status.