

ASSESSING THE RIGHTS OF UNDOCUMENTED WORKERS: REJECTING FEDERAL PREEMPTION OF STATE LABOR PROTECTIONS

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“*I don’t think we need 5,000 more illiterate peasants in the state of Colorado.*”

—Doug Bruce, Colorado State Representative¹

I. INTRODUCTION

A wave of anti-immigrant sentiment is sweeping across the country. State Representative Douglas Bruce’s statement above is illustrative of the negative and flawed perception that some Americans have of immigrants and immigrant workers. Elected officials, vigilante groups like the Minuteman Project, and anti-immigrant groups, like the Federation for American Immigration Reform (“FAIR”), the Center for Immigration Studies (“CIS”), NumbersUSA, and the Social Contract Press, are leading anti-immigrant efforts across the United States.

Employers are also joining in the movement to push immigrants further into the shadows. Immigrant workers account for one in seven U.S. workers, one in five low-wage workers, and one in two new workers.² Most notably, two of every five low-wage immigrant workers are undocumented.³ Industries where immigrants are overrepresented are often known for the most frequent and blatant

1. Bob Mook, *Guest Worker Proposal Sparks Fiery Debate in Colorado House*, DENV. BUS. J., Apr. 22, 2008, <http://www.bizjournals.com/denver/stories/2008/04/21/daily9.html> (quoting Douglas Bruce’s disapproval of proposed Colorado House Bill 1325, which would require government agencies to implement a non-immigrant agricultural seasonal worker pilot program to expedite recruitment of foreign workers through the federal H-2A certification process).

2. See NAT’L CONF. ST. LEGISLATURES, *A Quick Look at U.S. Immigrants: Demographics, Workforce, and Asset-Building*, NAT’L CONF. ST. LEGISLATURES (2004), <http://www.ncsl.org/programs/immig/immigstatistics0604.htm>.

3. *Id.*

violations of labor laws and exploitation of this population.⁴ For example, in these industries where immigrants are found in the workforce, undocumented immigrants are often denied the right to unionize,⁵ do not receive overtime benefits, and are paid at rates far below the minimum wage.⁶ In fact, immigrants' hourly wages are lower on average than those of Americans, with nearly half of immigrants earning less than 200 percent of the minimum wage, compared to only one-third of American workers.⁷

In 2002, employers gained an additional weapon in their arsenal to exploit undocumented workers when the Supreme Court held, in *Hoffman Plastic Compounds, Inc. v. NLRB*,⁸ that the remedies under the National Labor Relations Act ("NLRA") were limited by the Immigration and Reform Control Act ("IRCA").⁹ This abrupt departure from prior precedent and congressional intent has severely compromised undocumented workers' rights. Some employers have been so emboldened by the decision that they are "'straighten[ing] out' the more vocal undocumented workers."¹⁰ Moreover, employers can use the decision as "a shield to defend against charges of illegality in the workplace brought by immigrant employees."¹¹

Fortunately, undocumented immigrants still have rights under

4. Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Modes for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 600 (2004) ("The industries in which immigrants are overrepresented are also known for frequent violations of hour, wage, and overtime payment laws. Department of Labor ("DOL") surveys have shown that in 2000, 100% of all poultry processing plants were noncompliant with federal wage and hour laws; in 2001 almost half of all garment-manufacturing businesses in New York City failed to comply with Fair Labor Standards Act ("FLSA") overtime provisions; and in 1999 agricultural employers engaged in cucumber, lettuce, and onion harvesting had unacceptably low levels of compliance with FLSA and other worker protections.").

5. See Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 45-47 (2008) (noting that employers threaten undocumented workers with deportation in retaliation for engaging in union organizing activities).

6. See URBAN INST., TRENDS IN THE LOW-WAGE IMMIGRANT LABOR FORCE, 2000-2005, 2 (2007), http://www.urban.org/UploadedPDF/411426_Low-Wage_Immigrant_Labor.pdf.

7. NAT'L CONF. ST. LEGISLATURES, *supra* note 2.

8. 535 U.S. 137 (2002).

9. 8 U.S.C. § 1324a(a)(1)(A) (2000).

10. See Rebecca Smith & Maria Blanco, *Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since Hoffman Plastic Compounds v. NLRB*, 8 BENDER'S IMMIGR. BULL. 890 (May 15, 2003).

11. Cunningham-Parmeter, *supra* note 5, at 29.

state labor laws. Despite employers' efforts to use *Hoffman* to undermine undocumented workers' rights under state law, the weight of authority has rejected this extension.¹² This article will provide an overview of the jurisprudence that has developed distinguishing state labor claims from the types of claims precluded by *Hoffman*.

Part II of this paper will describe the legislative and jurisprudential landscape of undocumented workers' rights. Part III will examine the reasons that courts have correctly declined to preempt state labor laws under either *Hoffman* or IRCA. Finally, Part IV will offer proposals for advocates to overcome the problems that *Hoffman* raises for undocumented immigrants who engage in litigation with employers.

II. BACKGROUND

Political pressures and anti-immigrant sentiment influence the legal landscape that informs this article. This section will examine Supreme Court precedent prior to the enactment of IRCA, which acknowledged the importance of protecting undocumented workers from exploitation. Next, it will analyze the impact of IRCA on undocumented workers' employment rights prior to *Hoffman*. Finally, it will evaluate the *Hoffman* decision and demonstrate how the court's reasoning is both factually inaccurate and an unprincipled departure from congressional intent.

A. Pre-IRCA

Prior to IRCA, Congress had never used its plenary power over immigration¹³ to regulate the employment of immigrants.¹⁴ The

12. See *infra* Part III.

13. See U.S. CONST. art. I, § 8; *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.").

14. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 499 (2004) ("Before 1986, employers could legally hire or employ persons who lacked work authorization from the Immigration and Naturalization Service . . .").

Immigration and Nationality Act (“INA”),¹⁵ which governed immigration prior to IRCA, outlined “the terms and conditions of admission to the country and the subsequent treatment of [immigrants] lawfully in the country,”¹⁶ but expressed only a “peripheral concern” regarding the employment of undocumented immigrants.¹⁷ INA did not make the employment relationship with an unauthorized worker illegal,¹⁸ so in *Sure-Tan, Inc. v. NLRB*,¹⁹ the Supreme Court held that undocumented workers were protected by the NLRA²⁰ from unfair labor practices and were eligible for most remedies.²¹ However, to avoid any conflict with the INA, the Court excluded reinstatement of undocumented immigrants as a remedy and deemed the immigrant workers “unavailable” for work during any period when they were not lawfully entitled to be present and employed in the United States.²²

The Court also invoked a powerful policy reason for including undocumented workers within the ambit of the NLRA. It reasoned that failing to protect such workers would create an underclass of workers without employment rights.²³ In turn, this class of workers would undercut wages, rights, and employment opportunities for *legal* residents and citizens.²⁴ The Court recognized that depriving undocumented workers of employment rights would have the counter-productive effect of incentivizing employers to hire more undocumented workers to the detriment of authorized workers.²⁵ This policy concern remained salient during and after the enactment of IRCA.

15. See Immigration & Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101 (2005)).

16. *De Canas*, 424 U.S. at 359.

17. *Id.* at 360.

18. *Sure-Tan v. NLRB*, 467 U.S. 883, 893 (1984).

19. *Id.* (employer of undocumented immigrants reported their immigration status to the Immigration and Naturalization Service in retaliation for immigrants’ union organizing activities).

20. *Id.* at 903.

21. *Id.*

22. *Id.*

23. *Id.* at 892; see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

24. *Sure-Tan*, 467 U.S. at 893.

25. *Id.*

B. IRCA

In 1986, Congress enacted IRCA, which amended the INA by making it unlawful to employ undocumented immigrants and created an elaborate employment verification system, under which employers must verify each employee's identification requirements.²⁶ However, Congress made clear that the best way to reduce unauthorized employment was to target employers—not to curtail the employment rights or remedies of undocumented workers. Therefore, IRCA imposes sanctions on *employers* that “knowingly” hire undocumented workers,²⁷ but does not impose sanctions on workers for engaging in authorized employment, unless they obtain employment through fraudulent documents.²⁸ In such cases, the knowing production or use, or facilitating of the production or use, of fraudulent, immigration-related documents is a criminal offense punishable by fine and/or imprisonment.²⁹

However, congressional reports demonstrate that no provision in IRCA is intended to

. . . limit the powers of *State* or Federal labor standards agencies such as the . . . Equal Employment Opportunity Commission . . . to remedy unfair practices committed against *undocumented employees* for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.³⁰

Thus, Congress recognized that reducing unauthorized employment is best achieved by deterring employers, rather than workers.

For over ten years, congressional intent to continue extending employment rights and remedies to undocumented workers under

26. See 8 U.S.C. §1324a(a)(1), (b)(1) (2000).

27. 8 U.S.C. §§1101, 1324a (2000).

28. See 8 U.S.C. § 1324c (2000).

29. See *id.*; 18 U.S.C. § 1546 (2000).

30. IMMIGRATION REFORM & CONTROL ACT, H.R. REP. NO. 99-682(II), at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5757, 5758 (emphasis added).

both federal and state laws controlled.³¹ Moreover, the NLRB's treatment of workplace violation claims consistently provided remedies for undocumented workers.³² For example, in *NLRB v. A.P.R.A. Fuel Oil Buyers Group*,³³ the Board determined that the remedies of reinstatement and back pay were available to undocumented workers, provided that the workers present verification of their employment eligibility within a reasonable time.³⁴ The Second Circuit affirmed the Board's remedial order noting that:

The lack of a back pay remedy would make undocumented workers an easy target for employers resisting union organization, and thus, frustrate the rights of lawful U.S. workers under the NLRA. An employer could intimidate United States citizens or other lawful residents by targeting undocumented workers for anti-union discharges. Or, alternatively, legal workers might be reluctant to organize in the first instance if the Board were unable to issue any remedy against illegal actions taken by employers against undocumented workers who support them³⁵

Until *Hoffman*, undocumented workers enjoyed the full panoply of rights afforded by federal employment and labor law protections. In *Hoffman*, the Supreme Court made a sharp departure from

31. For example, at the federal level, in 1996, the Equal Employment Opportunity Commission ("EEOC"), which enforces Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act, and the Americans with Disabilities Act, issued an enforcement guidance which concluded that "[u]nauthorized workers are entitled to back pay and appropriate damages on the same basis as other workers." See U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, EEOC NOTICE NO. 915.002 (Oct. 26, 1999), *rescinded by* U.S. EQUAL EMP. OPPORTUNITY COMM'N, RECISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, EEOC NOTICE NO. 915.002 (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (explaining that *Hoffman* requires the EEOC to reexamine its former position that back pay is available to undocumented workers filing workplace discrimination charges).

32. See, e.g., *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. 408 (1998), *aff'd*, *NLRB v. A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d 50 (2d Cir. 1997), *abrogated by Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150-52 (2002).

33. *Id.*

34. *A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d at 57.

35. *Id.* at 58.

congressional intent and severely undercut the employment rights of undocumented workers.

C. The *Hoffman* Decision

The story of *Hoffman Plastic Compounds, Inc. v. NLRB*³⁶ began when Jose Castro and other union organizers at Hoffman Plastic Compounds Inc. were laid off after supporting a union campaign and distributing union authorization cards to coworkers.³⁷ The workers filed a retaliation claim with the NLRB, which determined that Hoffman had violated section 8(a)(3) of the NLRA.³⁸ Although the NLRB originally ordered Hoffman to reinstate the employees with back pay,³⁹ it denied Castro reinstatement after discovering that he had submitted a fraudulent birth certificate, driver's license, and Social Security card to Hoffman at the time of hire.⁴⁰ However, the NLRB maintained the back pay award, finding that it would carry out the policies of the NLRA and IRCA by preserving the rights of undocumented workers while discouraging employers from hiring and exploiting them.⁴¹ The D.C. Circuit Court affirmed the order,⁴² but the Supreme Court reversed, holding that the NLRB did not have authority to award back pay because Castro had violated IRCA by working without authorization and tendering fraudulent identification documents.⁴³ The Court reasoned that awarding damages to unauthorized immigrants in labor disputes would "trivialize[] the immigration laws" and encourage unauthorized immigration.⁴⁴

The Supreme Court's flawed logic rests on the assumption that awarding back pay damages to undocumented immigrants will encourage unauthorized migration. However, studies of the factors

36. 535 U.S. 137 (2002).

37. *Id.* at 140.

38. National Labor Relations Act, 29 U.S.C. § 158(a)(3) (2000).

39. Back pay is payment for the time a worker was not working due to illegal firing. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 100-07 (1992).

40. *Hoffman*, 535 U.S. at 141.

41. *Hoffman Plastic Compounds, Inc. & Casimiro Arauz*, 326 N.L.R.B. 1060, 1061-62 (1998).

42. *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 650 (D.C. Cir. 2001).

43. *Hoffman*, 535 U.S. at 149.

44. *Id.*

drawing immigrants to the United States have concluded that a “desire to obtain employment, *not* a speculative hope of labor law remedies, drives illegal immigration.”⁴⁵ Specifically, a Pew Hispanic Center Study released in 2005 cited job availability in the United States and conditions in countries of origin as reasons for increased illegal immigration.⁴⁶ The availability of jobs in the United States does not depend on state labor laws and remedies available to undocumented immigrants; rather, it depends on the incentives an employer has to hire an unauthorized worker over a legal worker.⁴⁷ The Court has provided that incentive in *Hoffman* by allowing employers to fire an undocumented worker for union organizing with impunity.

In addition to resting on factually erroneous assumptions, the Court’s decision is an unprincipled shift away from congressional intent. As discussed in the previous section, Congress did not intend to strip undocumented workers of their employment rights and remedies when they enacted IRCA.⁴⁸ Like the Court in *Sure-Tan* and other pre-IRCA cases, Congress recognized that this course of action would create a perverse incentive for employers to hire undocumented workers and actually run counter to its goal of reducing unauthorized employment.⁴⁹ In *Hoffman*, the court flouts this clear intent by concluding that “allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions . . . as expressed in IRCA [and] would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”⁵⁰ As a result, the Court has given employers a

45. See JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 41(2005), available at <http://pewhispanic.org/files/reports/46.pdf>.

46. *Id.* at 36 (“The flows respond to economic conditions in Mexico more than to conditions in the U.S. with worsening conditions in Mexico leading to increased migration to the United States.”).

47. *Sure-Tan v. NLRB*, 467 U.S. 883, 893-94 (1984) (“If an employer realizes that there will be no advantage under the NLRA in preferring [undocumented immigrants] to legal resident workers, any incentive to hire such [undocumented immigrants] is correspondingly lessened.”).

48. See IMMIGRATION REFORM & CONTROL ACT, H.R. REP. NO. 99-682(II), at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5757, 5758.

49. See, e.g., *Sure-Tan*, 467 U.S. at 890.

50. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

license to terminate undocumented workers for union activities—something that will surely increase demand for these workers and undermine the policies of IRCA.⁵¹

Hoffman has resulted in confusion and uncertainty as “academics, lawyers, and judges have attempted to predict whether the decision will expand beyond the NLRA, diminishing other employment protections in the process.”⁵² Employers immediately began wielding the decision in courts, arguing for extensions of *Hoffman*’s application to other federal employment laws, and urging that those laws also had to yield to IRCA.⁵³ In *Zeng Liu v. Donna Karan International, Inc.*,⁵⁴ for example, the defendant employer argued that *Hoffman* precluded recovery of back pay under the federal Fair Labor Standards Act (FLSA), but the federal court refused to extend *Hoffman*.⁵⁵

In addition, employers have argued to extend *Hoffman* to limit state labor laws and remedies.⁵⁶ Fortunately, as the next section discusses, a consensus has developed that state labor laws have not been preempted by *Hoffman*.

III. HOFFMAN DOES NOT PREEMPT STATE LABOR LAWS

The *Hoffman* decision is alarming because it has spawned a movement that, “[t]aken to its extreme... argues that unauthorized immigrants have no employment rights at all.”⁵⁷ However, as this section discusses, the previous statement has proved partially

51. See, e.g., *Sure-Tan*, 467 U.S. at 890.

52. Cunningham-Parmeter, *supra* note 5, at 29.

53. See, e.g., *Zeng Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (holding that defendant employer’s argument that *Hoffman* applies to the federal Fair Labor Standards Act (“FLSA”), and thus bars recovery of back pay under FLSA, is wrong).

54. 207 F. Supp. 2d 191 (S.D.N.Y. 2002).

55. *Id.*

56. See *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68 (Ct. App. 2007) (holding that defendant’s argument, that *Hoffman*’s holding signals that IRCA preempts wage and hour claims, is unsupported).

57. REBECCA SMITH ET AL., NAT’L EMP. L. PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER HOFFMAN PLASTIC COMPOUNDS V. NLRB 1 (2003), available at http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf (summarizing the post-*Hoffman* expansion argument that “undocumented workers were thus completely precluded from employment rights and all corresponding remedies”).

untrue⁵⁸ because the weight of authority acknowledges that undocumented workers can continue to assert their rights under state labor laws, with the exception of the back pay remedy.⁵⁹

State labor laws grant substantial rights to undocumented workers. For example, under California law, a person's immigration status is irrelevant to the issue of liability for labor, employment, civil rights, and employee housing laws.⁶⁰ Moreover, a majority of state workers' compensation statutes across the country expressly include "aliens" under the definition of employees,⁶¹ or provide that

58. In addition, federal courts and agencies have declined to extend *Hoffman* beyond its facts. For example, the EEOC rescinded its 1996 enforcement guidance which declared that undocumented immigrant workers were entitled to remedies for workplace violations on the same basis as other workers. See *supra* note 31 and accompanying text. At the same time that the EEOC rescinded this 1996 conclusion, however, they also pronounced that *Hoffman* "in no way calls into question the settled principle that undocumented workers are covered by federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work." U.S. EQUAL EMP. OPPORTUNITY COMM'N, RESCISSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS, EEOC NOTICE NO. 915.002 (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>. Thus, while the EEOC agreed that post-termination back pay for work not performed was no longer an available remedy to discrimination claims brought by undocumented workers, it maintains that it is still illegal for employers to discriminate against them. The EEOC has vowed to "continue vigorously to pursue charges filed by any worker . . . including charges brought by undocumented workers," thereby indicating that discrimination protections (at the federal and arguably state level) do not "yield" to IRCA. *Id.*

59. See *e.g.*, *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 515 n.4 (Mich. Ct. App. 2003) ("The majority of other jurisdictions considering the issue have also determined that undocumented aliens are eligible for worker's compensation benefits."); *Farmer Bros. Coffee v. Workers' Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23, 28-29 (Ct. App. 2005); *Earth First Grading v. Gutierrez*, 606 S.E.2d 332, 334-35 (Ga. App. 2004); *Safeharbor Employer Servs., Inc., v. Velazquez*, 860 So.2d 984, 985-86 (Fla. App. 2003); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 & n.2 (Minn. 2003); *Reinforced Earth Co. v. W.C.A.B.*, 810 A.2d 99, 103 n.5 (Pa. 2002).

60. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1073 (9th Cir. 2004) ("[J]ust over five months after *Hoffman* was decided, California enacted a statute codifying identical provisions in three sections of its codes: 'All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.'"); CAL. CIV. CODE § 3339 (West 2009); CAL. LAB. CODE § 1171.5(a) (West 2009); CAL. GOV'T CODE § 7285(a) (West 2009).

61. See *Worker's Disability Compensation Act (WDCA)*, MICH. COMP. LAWS SERV. § 418.161(1)(1) (LexisNexis 2009); CAL. LAB. CODE § 3351 (West 2009); see also *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 515 n.4 (Mich. Ct. App. 2003) ("The majority of other jurisdictions considering the issue have also determined that undocumented aliens are eligible for worker's compensation benefits.").

undocumented status is irrelevant for liability purposes.⁶² Therefore, state labor protections can provide workers substantial safeguards when they assert their rights.

The most obvious way to distinguish *Hoffman* from state labor laws is that the case did not involve preemption, but rather, a conflict between competing *federal* laws,⁶³ making *Hoffman* dicta when applied to state labor laws.⁶⁴ Nevertheless, it is unsurprising that employers have invoked *Hoffman* when faced with state claims because of its sweeping statements concluding that awarding back pay to undocumented immigrants, “would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA” and would “condone prior violations of the immigration laws, and encourage future violations.”⁶⁵ Thus, when employers’ invoke *Hoffman*, they are making the argument that IRCA preempts state labor laws because enforcement of remedies under state labor laws would trivialize the federal IRCA. Fortunately, courts all over the country have rejected federal preemption challenges to their state’s labor laws.⁶⁶ After providing a brief overview of preemption principles, this section will examine some of these challenges.

A. General Preemption Principles

The preemption doctrine arises from the Supremacy Clause of the United States Constitution, which states: “. . . the Laws of the United States . . . shall be the supreme Law of the Land; and the

62. Mook, *supra* note 1; FLA. STAT. § 440.02(15)(a) (West 2009); N.C. GEN. STAT. § 97-2(2) (West 2009); *Sanchez*, 658 N.W.2d at 518 (“Because the WDCA is silent on the effect of a false representation, an award of benefits to plaintiffs is not precluded by their misrepresentations about their immigration status.”).

63. *Coma Corp. v. Kan. DOL*, 154 P.3d 1080, 1084 (Kan. 2007).

64. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 237 (2d Cir. 2006) (distinguishing conflict between federal and state law from the conflict in *Hoffman*, where the Supreme Court sought to reconcile two federal statutes to ensure that one did not trench on the other).

65. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

66. *E.g.*, *Farmer Bros. Coffee v. Workers’ Comp. Appeals Bd.*, 35 Cal. Rptr. 3d 23, 29 (Ct. App. 2005); *Earth First Grading v. Gutierrez*, 606 S.E.2d 332, 334-35 (Ga. App. 2004); *Safeharbor Employer Servs. Inc. v. Velazquez*, 860 So.2d 984, 985-86 (Fla. App. 2003); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 & f.2 (Minn. 2003); *Reinforced Earth Co. v. W.C.A.B.*, 810 A.2d 99, 103 n.5 (Pa. 2002).

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁶⁷ Preemption analysis looks primarily to the purpose and intent of Congress.⁶⁸ Two types of preemption exist: express and implied. Express preemption applies when Congress’ intent to supersede state law is “explicitly stated in the statute’s language.”⁶⁹ Implied preemption applies when a statute’s “structure and purpose” indicates Congress’ intent to supersede state law.⁷⁰ Two types of implied preemption exist: “field preemption,” which applies “if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it,”⁷¹ and “conflict preemption,” which applies when “a state statute is void to the extent that it actually conflicts with a valid federal statute.”⁷² A conflict exists “where compliance with both federal and state regulations is a physical impossibility . . . or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷³

Courts have imposed a presumption against federal preemption.⁷⁴ This presumption is particularly strong with respect to laws implicating states’ historic police powers, such as wage and hour laws, occupational health and safety, and workers’ compensation.⁷⁵ Since most state labor laws involve the use of the state’s historic police powers, Congress must speak clearly for these laws to be superseded by IRCA.⁷⁶ Congress has not spoken with the

67. U.S. CONST. art. VI, cl. 2.

68. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

69. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

70. See *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (quoting *Jones*, 430 U.S. at 525).

71. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1255 (N.Y. 2006) (citing *Cipollone*, 505 U.S. at 516).

72. *Id.* (citations omitted).

73. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Guice v. Charles Schwab & Co., Inc.*, 89 N.Y.2d 31, 39 (N.Y. 1996), *cert. denied*, 520 U.S. 1118 (1997).

74. *Balbuena*, 845 N.E.2d at 1255.

75. *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 68, 76 (Ct. App. 2007).

76. *Id.*

requisite clarity under any theory of preemption to inhibit application of state labor laws to undocumented workers.

B. IRCA Does Not Expressly Preempt State Labor Laws

IRCA expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”⁷⁷ This clause is consistent with the point made in Part II: that IRCA’s enforcement mechanism focuses on deterring *employers* from hiring undocumented workers, rather than penalizing the workers themselves by excluding them from the protection of state and federal labor laws.

Thus, while courts have noted Congress’ express statutory language to strike down state or local laws that impose sanctions on *employers*,⁷⁸ cases involving workers’ rights have easily withstood express preemption challenges. For example, in *Balbuena v. IDR Realty LLC*,⁷⁹ the New York Court of Appeals rejected the employers’ argument that IRCA expressly preempted an undocumented worker’s claim for lost wages when he was severely injured on the job.⁸⁰ The court noted that the express preemption clause in IRCA only precluded state or local laws that imposed “sanctions,” which are generally considered to be coercive.⁸¹ The court contrasted the punitive purpose of sanctions with the compensatory nature of civil damages remedies in personal injury cases, concluding that IRCA did not expressly preempt the plaintiffs’ lost wages claim.⁸² Similarly, in *Reyes v. Van Elk*,⁸³ a California appellate court held that IRCA did not expressly preempt the state’s prevailing wage laws because the specific preemption provision

77. 8 U.S.C. § 1324a(h)(2) (2000).

78. See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518-19 (M.D. Pa. 2007) (striking down a local ordinance that imposed sanctions on employers and landlords, because it violated IRCA’s clause which expressly preempts state laws imposing sanctions or regulating immigration).

79. 845 N.E.2d 1246 (N.Y. 2006).

80. *Id.* at 1255.

81. *Id.* at 1255-56.

82. *Id.* at 1256.

83. 56 Cal. Rptr. 3d 68 (Ct. App. 2007).

prohibiting sanctions was irrelevant to wage claims.⁸⁴ Therefore, IRCA does not expressly preempt state laws that confer rights and remedies on workers.

C. IRCA Does Not Occupy the Field of Labor Law

Clearly, IRCA occupies the field of *hiring* undocumented workers and preempts state and local attempts to regulate that field. In addition, courts have held that IRCA preempts state and local regulation of employers who hire unauthorized workers.⁸⁵ In *Lozano v. City of Hazleton*,⁸⁶ for example, a federal court in Pennsylvania struck down two local ordinances that penalized employers for hiring undocumented immigrants finding that IRCA “leaves no room for state regulation” in this area so “any additions added by local governments would [by the very definition of field preemption] be either in conflict with the law or a duplication of its terms.”⁸⁷ However, as the Second Circuit has pointed out, state tort and labor laws, occupy a field entirely different from the regulation of immigration which has been found to be preempted.⁸⁸

The party asserting preemption of state labor protections has the burden to establish Congress’ preemptive intent in the field at issue.⁸⁹ Many state and federal district courts considering the intersection between IRCA and state tort and labor laws after *Hoffman* have rejected IRCA preemption of state labor protections.⁹⁰ For example, in *Balbuena*, the court reasoned that the employer asserting preemption had not established Congress’s preemptive intent because “nothing in [IRCA] indicate[s] that Congress meant to affect state regulation of occupational health and safety, or the types of

84. *Id.* at 77.

85. *See* *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 523 (M.D. Pa. 2007).

86. *Id.*

87. *Id.*

88. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 240 (2d Cir. 2006).

89. *See, e.g., id.*

90. *See* *Cunningham-Parmeter*, *supra* note 5, at 35 (“Nearly every court to reach the issue of *Hoffman*’s relevance to wage and hour law has ruled that unauthorized immigrants may still assert claims for unpaid wages”). *But see* *Veliz v. Rental Serv. Corp. USA, Inc.*, 313 F. Supp. 2d 1317, 1335 (M.D. Fla. 2003) (holding that a personal injury claim predicated on lost wages must be dismissed as violating U.S. immigration laws).

damages that may be recovered in a civil action arising from those laws.”⁹¹ As one commentator points out, it would be absurd to construe IRCA as preempting the field of immigrant labor when it merely prohibits the hiring of undocumented immigrants, without imposing penalties on such individuals who accept employment in the United States.⁹² IRCA regulates immigration, not labor.⁹³

D. State Labor Laws Do Not Conflict With IRCA

While courts have summarily dismissed express and field preemption defenses, conflict preemption poses a more difficult question. After *Hoffman*, the conflict preemption question is whether the award of particular remedies to undocumented workers would “conflict with or otherwise erode the objectives of IRCA in a manner sufficient to surmount the strong presumption against preemption.”⁹⁴ Conflict preemption will only occur when complying with a state labor law is impossible without violating IRCA, or when a state labor law stands as an obstacle to the full execution of IRCA and the accomplishment of its goals.⁹⁵

1. Compliance With State Labor Laws Is Possible Without Violating IRCA

In most cases, it will not be impossible to comply with a state labor law without violating IRCA. For example, in *Madeira v. Affordable Housing Foundation, Inc.*,⁹⁶ the Second Circuit found that an employer could comply with New York’s workers’ compensation laws without violating IRCA because the duty of an employer to ensure workplace safety under state law is unrelated to its duty under IRCA to avoid hiring undocumented workers.⁹⁷ A similar line of reasoning would mandate employers to comply with state prevailing

91. *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1255, 1256 (N.Y. 2006).

92. Katrina C. Gonzales, Note, *Undocumented Immigrants and Workers’ Compensation: Rejecting Federal Preemption of the California Workers’ Compensation Act*, 41 U.C. DAVIS L. REV. 2001, 2021-23 (2008).

93. *Id.* at 2023.

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

95. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006).

96. *Id.* at 240.

97. *Id.* at 242.

wage and wage-and-hour laws.⁹⁸ The only obvious circumstance in which compliance with a state labor law would violate IRCA is when the state statutory scheme requires reinstatement of an undocumented worker because it would require an employer to “knowingly hire an unauthorized worker.”⁹⁹

2. *State Labor Laws Are Not a Direct Obstacle to IRCA*

It is well-settled that “the mere fact of ‘tension’ between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.”¹⁰⁰ Thus, it is unsurprising that, even after *Hoffman*, lower courts have overwhelmingly found that the mere fact that a worker is unauthorized is sufficient to limit his or her remedies under state labor laws.¹⁰¹ This section will examine how courts have distinguished *Hoffman* from state labor law cases. First, it will examine the general policy arguments in favor of equal application of state labor laws. Second, it will examine claims for work already performed, which has been distinguished from the future earnings back pay award in *Hoffman*. Third, it will examine claims for future earnings that have been distinguished from *Hoffman* because the state law injury is not mandated by IRCA and the employee did not cause the unauthorized employment relationship. Finally, it will examine a wrongful termination case

98. See *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (finding that the duty to pay plaintiff for work already performed does not conflict with IRCA and does not invoke *Hoffman*).

99. See *Madeira*, 469 F.3d at 242-43; see also *infra* Part III.D.2.iv (discussing a narrow interpretation of *Hoffman* and a situation where even reinstatement of an undocumented worker would not violate IRCA).

100. *Madeira*, 469 F.3d at 241.

101. See, e.g., *Gomez v. Falco*, 792 N.Y.S.2d 769, 769 (N.Y. App. Div. 2004) (state wage payments act applicable to undocumented immigrants); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 824 (Md. 2005) (undocumented worker is a “covered employee” under workers’ compensation act); *Cont’l PET Techs., Inc. v. Palacias*, 604 S.E.2d 627, 629 (Ga. 2004) (IRCA does not preempt state workers’ compensation act); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798, 799 (Okla. Ct. App. 2003) (workers’ compensation act does not exclude alien workers); *Safeharbor Employer Servs. I, Inc. v. Velazquez*, 860 So.2d 984, 985-86 (Fla. Ct. App. 2003) (worker’s status as illegal alien does not preclude receipt of workers compensation benefits); *Dowling v. Slotnik*, 712 A.2d 396, 405 (Conn. 1998) (workers’ compensation act protects undocumented workers).

that distinguished *Hoffman* because the employee's immigration status could have been resolved within a short time.

a. Uniform Application of State Labor Laws Serves the Interests of Both Federal and State Law

Unlike the conflict between two federal laws, which was at issue in *Hoffman*, federal preemption of state law implicates federalism concerns.¹⁰² To balance these concerns, there is a presumption against preemption, particularly when a state's police powers are at issue.¹⁰³ Thus, courts generally find that IRCA does not preempt state labor laws because such limitations would undermine the purposes of both the state labor laws, by undermining the protection of all workers, and IRCA, by incentivizing employers to hire undocumented workers.¹⁰⁴

For example, in *Balbuena v. IDR Realty LLC*,¹⁰⁵ the New York Court of Appeals reasoned that precluding an undocumented worker's recovery of lost earnings under state workers' compensation laws would undermine the workplace safety of all workers and incentivize employers to hire undocumented workers, thus contravening the purpose of IRCA to *limit* unauthorized employment.¹⁰⁶ Moreover, the court noted that "any conflict with IRCA's purposes that may arise from permitting an immigrant's lost wage claim to proceed to trial can be alleviated by permitting a jury to consider immigration status as one factor in its determination of the damages, if any, warranted under the Labor Law."¹⁰⁷

Similarly, in *Reyes v. Van Elk, Ltd.*,¹⁰⁸ a California appellate court held that IRCA did not preempt state prevailing wage laws because allowing employers to pay undocumented workers less than legal workers would reward an employer for knowingly hiring

102. *Madeira*, 469 F.3d at 237.

103. *Id.* at 241 ("The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power.").

104. *See infra* notes 105-11 and accompanying text.

105. 845 N.E.2d 1246 (N.Y. 2006).

106. *Id.* at 1257-58.

107. *Id.* at 1255.

108. 56 Cal. Rptr. 3d 68 (Ct. App. 2007).

undocumented workers and provide an incentive to hire more. Moreover, the court noted that enforcing prevailing wage laws does not condone unauthorized workers, but “make[s] . . . clear that employers should not be allowed to profit from employing undocumented workers and then exploiting them.”¹⁰⁹

In *Hoffman*, the NLRB asserted similar incentive arguments to uphold its back pay award against the employer; namely that its back pay order would reduce incentives to hire undocumented workers and discourage unfair labor practices generally.¹¹⁰ To reconcile this anomaly, lower courts have read *Hoffman* as not rejecting the incentive arguments, but as finding other factors more weighty in the conflict balance.¹¹¹ The next sections will describe some of these factors and how state labor laws have been distinguished.

b. Compensation for Work Performed

The type of compensation involved in *Hoffman* was post-termination back pay under the NLRA, which are lost wages that an employee never earned because he was fired illegally for participating in union activities.¹¹² Even before *Hoffman*, courts recognized the distinction between post-termination back pay for work that was not actually performed, and awards of unpaid wages for work that has been completed.¹¹³ Since *Hoffman*, there have been numerous decisions by courts all over the country which have reaffirmed this distinction and limited the application of *Hoffman*'s holding to cases where claims are made by undocumented workers

109. *Id.* at 78.

110. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 246 (2d Cir. 2006) (discussing *Hoffman*).

111. *Id.* (“Where, however, these *Hoffman Plastic* circumstances are not present—where the undocumented worker has committed no IRCA crime, where the employment relationship originates in the employer’s knowing violation of IRCA duties, and where the wrong being compensated is personal injury not authorized by IRCA under any circumstances—any alleged conflict, particularly between federal and state law, may not be so apparent.”)

112. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002).

113. *See Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1120-22 (7th Cir. 1992) (holding that undocumented workers are not entitled to the *prospective* remedy of backpay for “any period when they were not lawfully entitled to be present and employed in the United States”) (quoting *Sure-Tan v. NLRB*, 467 U.S. 883, 903 (1984)).

seeking back pay for work not yet performed.¹¹⁴ Courts have found in favor of undocumented workers seeking compensation for work already performed because to hold that they are not required to pay them at the same rates as legal workers for work actually performed, *incentivizes* employers to hire and exploit undocumented workers in the first instance—in direct contravention of the goals of IRCA.¹¹⁵ Any arguments that *Hoffman* precludes awards for wages already earned in claims by undocumented immigrants under state labor laws are highly unsupported.

c. Compensation for Unperformed Work

While *Hoffman* is easily distinguishable from cases involving damages for work already performed, it is more difficult to distinguish it from cases involving damages for future work. In both cases, the award presumes that the unlawful employment relationship would have continued.¹¹⁶ Yet, many courts have done so.¹¹⁷ These courts have distinguished *Hoffman* on two primary grounds: (1) the nature of the injury; and (2) responsibility for the creation of the unauthorized employment relationship.

114. See *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *Flores v. Albertsons, Inc.*, 2002 WL 1163623, at *5 (C.D. Cal. 2002); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 322 (D.N.J. 2005) (agreeing with Plaintiff employees that there is a distinction between back pay for unpaid wages for work not yet performed and work already performed); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1060-61 (N.D. Cal. 2002) (*Hoffman* does not hold that an undocumented employee is barred from recovering unpaid wages for work actually performed); *Garcia v. Pasquareto*, 812 N.Y.S.2d 216, 217 (App. Div. 2004) (courts construing *Hoffman* have held that it has no effect on claims for wages earned but not paid). See generally *Gomez v. Falco*, 792 N.Y.S.2d 769, 769 (N.Y. App. Div. 2004) (award for payment due and owed back pay not barred by federal immigration law); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-03 (W.D. Mich. 2005); *Hernandez-Cortez v. Hernandez*, 2003 WL 22519678, at *6 (D. Kan. 2003) (plaintiff correct in arguing that *Hoffman* does not prevent undocumented employees from recovering unpaid wages for work actually performed).

115. *Flores*, 233 F. Supp. 2d at 464.

116. *Madeira*, 469 F.3d at 244.

117. See *id.* at 228 (holding that injured undocumented worker could recover future earnings because no provision in IRCA expressly preempts state law providing such remedy); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1258 (N.Y. 2006) (finding no IRCA preemption of New York Scaffold Law where undocumented workers had not presented false documentation to obtain employment); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005) (holding that undocumented worker could recover future earnings in tort only if employer knew or should have known of worker's illegal status).

In *Hoffman*, the injury being compensated was required by IRCA.¹¹⁸ The employee was discharged for engaging in union activities, but IRCA required the discharge, albeit for a different reason.¹¹⁹ Lower courts have distinguished state labor laws because the compensated injury—underpayment of wages or personal injury—is not required by IRCA.¹²⁰ In other words, IRCA does not require employers to pay undocumented workers lower wages or suspend the application of state tort and occupational health and safety laws to undocumented workers. For example, in *Madeira v. Affordable Housing Foundation, Inc.*,¹²¹ the Second Circuit held that an undocumented worker injured at a construction site could receive lost earnings under state law because the “personal injury at issue . . . is not authorized by IRCA.”¹²²

Courts will also distinguish *Hoffman* in cases involving damages for unperformed work when the employer is responsible for the unauthorized employment relationship. In *Hoffman*, the unauthorized employment relationship arose out of a criminal IRCA violation of the worker: tendering false documentation. However, in cases where the employer violates IRCA by knowingly employing an undocumented worker and also violates a state labor law, courts have found in favor of the worker.¹²³

d. Wrongful Termination

The narrowest reading of *Hoffman* can be found in a recent Ninth Circuit case, which held that a foreign national discharged from his employment for an invalid visa could recover damages for

118. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) (“[I]f an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker’s undocumented status.”); *Madeira*, 469 F.3d at 244 (distinguishing this fact in *Hoffman*).

119. *Madeira*, 469 F.3d at 244.

120. *See, e.g., id.* at 244, 247.

121. *Id.*

122. *Id.* at 247.

123. *See id.* at 228 (holding that injured undocumented worker could recover future earnings because no provision in IRCA expressly preempts state law providing such remedy); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1258 (N.Y. 2006) (finding no IRCA preemption of New York Scaffold Law where undocumented workers had not presented false documentation to obtain employment).

violation of a state labor law that prohibited discharges without good cause.¹²⁴ In *Incalza v. Fendi North America, Inc.*,¹²⁵ the defendant discharged an Italian national, whose visa became invalid, even though it could have applied for a new visa, as it had done for another employee, or waited one month until the plaintiff got married to his fiancée, who was a U.S. citizen. A jury awarded damages on the plaintiffs' claim that defendant had fired him in contravention of a state law that prohibits termination without good cause. The Ninth Circuit upheld the award because the defendant could have lawfully taken an action other than discharge and have been in compliance with IRCA.

Specifically, the defendant could have granted the plaintiff's request for temporary, unpaid leave so that he could resolve his work authorization problems. This remedy would not conflict with IRCA because an individual is only employed if he or she "provides services or labor for an employer for remuneration."¹²⁶ A person on unpaid leave is not receiving remuneration and thus, is not in violation of the statute.¹²⁷

Thus, after *Incalza*, it is arguable that any remedy for a discharge that violates state law, survives *Hoffman* if the employee could have obtained legal status "within a short time."¹²⁸ Although this case involved a worker that entered the country legally and could have switched to a different visa that would have authorized his employment, the court notes that the same reasoning applies to employees whose status is disputed or uncertain.¹²⁹ Therefore, *Incalza* arguably may provide protection for a broader class of workers whose immigration status is in limbo, such as those that are in asylum, VAWA, or U-Visa proceedings,¹³⁰ and even a broader

124. *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1008 (9th Cir. 2007).

125. 479 F.3d 1005 (9th Cir. 2007).

126. *Id.* at 1011.

127. *Id.*

128. *See id.* at 1012.

129. *Id.*

130. Mayte Santacruz Benavidez, Comment, *Learning from the Recent Interpretation of INA Section 245(a): Factors to Consider when Interpreting Immigration Law*, 96 CAL. L. REV. 1603, 1625 (2008) (noting that undocumented battered women who self-petition to adjust their immigration status, are granted "deferred action" status until a visa becomes available thus rendering their legal status in the U.S. in limbo and at the mercy of the United States Citizenship

class of remedies, such as reinstatement for such workers.

As discussed above, *Hoffman* has been narrowly interpreted as applied to state labor laws. In short, *Hoffman* will only preclude state labor law remedies if the award is for future earnings that arise out of an injury that was required by IRCA (like discharge) and the worker tendered fraudulent documents to the employer and his/her status was not in dispute or remediable. Therefore, undocumented workers maintain significant protections under state labor laws.

IV. OVERCOMING *HOFFMAN*

Hoffman has been narrowly interpreted as applied to state labor laws, but workers are still experiencing its effects in many ways. After *Hoffman*, employers can use status as a tool of intimidation and oppression.¹³¹ Indeed, it has so emboldened employers that some have used the decision to “‘straighten out’ the more vocal undocumented workers.”¹³² In addition, it provides employers a powerful weapon during litigation because it arguably makes status a discoverable fact.¹³³ Commentators have proposed many solutions to these problems, a few of which are discussed below.

A. Limiting Discovery of Plaintiffs’ Immigration Status

In her Note, *Immigration Related Discovery After Hoffman Plastic Compounds, Inc. v. NLRB: Examining Defending Employers’ Knowledge of Immigration Status*, Megan Reynolds argues that *Hoffman* does not require courts to allow discovery of a plaintiff’s immigration status.¹³⁴ She grounds her argument on the

and Immigration Service); see also Jessica Farb, Comment, *The U Visa Unveiled: Immigrant Crime Victims Freed from Limbo*, 15 HUM. RTS. BR. 26, 27 (2007) (noting that undocumented victims of violent crimes who apply for U-visa immigration relief, are granted “interim relief” or “deferred action” status until a U-visa is issued or available).

131. See generally Smith & Blanco, *supra* note 10; see also Cunningham-Parmeter, *supra* note 5, at 45 (noting that undocumented workers who file lawsuits are intimidated by employers who seek their immigration status in discovery proceedings, are targeted by employers on the basis of their race, and are threatened by employers with deportation in retaliation for asserting workplace rights).

132. Smith & Blanco, *supra* note 10.

133. Cunningham-Parmeter, *supra* note 5, at 30.

134. Megan A. Reynolds, Comment, *Immigration Related Discovery After Hoffman Plastic Compounds, Inc. v. NLRB: Examining Defending Employers’ Knowledge of Immigration Status*, 2005 MICH. ST. L. REV. 1261,1263.

express definition of the employer's burden contained in the statutory language of IRCA which requires that the *employer* prove its good faith compliance with IRCA's employment verification provisions.¹³⁵ Reynolds urges that the relevance of that statutory burden is that it "should prompt courts to ask whether the employer has good cause to compel discovery, or alternatively, whether it is attempting to benefit from its own prior violations of IRCA, *i.e.* knowingly hiring an undocumented worker whose status it now wants to reveal in order to limit the remedies available to the plaintiff."¹³⁶

Reynolds proposes a two-step test that courts should adopt when assessing *Hoffman*'s application to a case. Rather than immediately granting an employer's request for discovery to the immigration status of an employee (providing them with the grounds on which to invoke *Hoffman*), first Reynolds proposes that courts assess whether the case involves a back pay award as defined by the NLRA.¹³⁷ If such an award is not implicated, Reynolds argues that immigration status is irrelevant, and *Hoffman* is inapplicable and should be rejected by courts when invoked as an affirmative defense by an employer.¹³⁸ If however, the initial inquiry reveals that a case involves a back pay award as defined by the NLRA and makes immigration status relevant, Reynolds argues the second inquiry requires an assessment of an employers compliance with IRCA.¹³⁹ She urges that courts, "should limit discovery [of an employees immigration status] if the employer fails to establish his good faith compliance with the IRCA employment verification procedures or if it cannot establish a good faith basis for putting complainant's immigration status into question once the suit is filed."¹⁴⁰

Attorneys working with clients should cite and push for the adoption of this rule given its implications on preemption issues. For example, an attorney with a client seeking a back pay award similar

135. *Id.*

136. *Id.*

137. *Id.* at 1286.

138. *Id.*

139. *Id.*

140. *Id.*

to that sought in *Hoffman*, would invoke this rule and argue under the second part of the test that an employer did not in good faith verify the employee's immigration status at the time of hiring, and does not have a good faith basis for putting immigration status at issue. Reynolds further argues that Federal Rule of Civil Procedure 26(g) incorporates the requirements of Rule 11 and permits a court to consider whether a discovery request was made for an improper purpose.¹⁴¹ Under the proposed rule, proof of an improper purpose or a failure to establish compliance with IRCA at the time of hiring would then estop an employer from inquiring into immigration status during litigation and the immigration status of an employee is never revealed.¹⁴² It follows that if the immigration status of the worker is unknown and thus irrelevant, the federal immigration laws (*i.e.* IRCA) are also irrelevant, and preemption issues never come into play. Without such a rule, employers will otherwise be permitted to ignore IRCA's requirements to verify immigration status at the time of hiring an employee, only to later raise IRCA and the employee's status as an issue to defend against valid claims.¹⁴³

B. Suspending Employment Verification Duties During Labor Disputes

In her Comment, *Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, Annie Decker proposes that Congress amend IRCA to provide a strong and clear rule suspending employers' verification duties during labor disputes.¹⁴⁴ She adds that, "[a]n additional time buffer around the actual labor dispute could be necessary to effectuate the goals of this amendment, a form of extended reprieve from verification duties so that employers could not just wait until a labor dispute ends to make the same retaliatory move."¹⁴⁵ She goes on to highlight the positive effects of such an amendment: (1) the prevention of "retaliatory

141. *Id.* at 1290.

142. *Id.* at 1285.

143. *Id.* at 1289.

144. Annie Decker, Comment, *Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, 115 *YALE L.J.* 2193 (2006).

145. *Id.* at 2198.

document requests that chill the enforcement of workplace rights;¹⁴⁶ (2) employers would not have to worry about sanctions during a dispute; (3) agencies could work together more smoothly and fulfill their enforcement functions more effectively; and (4) in the NLRB context, the amendment would make “it clear that verification actions during labor disputes were not ‘arguably proper.’”¹⁴⁷ Again, this proposal would make immigration status irrelevant, and thus render preemption issues a non-factor.

C. Legislation Rejecting State Preemption and Narrowing *Hoffman*’s Holding

After *Hoffman*, California enacted statutes that make immigration status irrelevant for the purposes of enforcing state labor, employment, civil rights, and employee housing law.¹⁴⁸ Congress should follow California’s lead and enact legislation codifying its intent that IRCA in no way preempts state labor laws. Statutory language expressly indicating that states and their agencies continue to have the power to fashion and provide workplace protections and remedies for undocumented immigrants, will settle the uncertainty that *Hoffman* has spawned.¹⁴⁹

Like the California statutes, the language of the legislation should specifically state that immigration status is irrelevant. The language should also emphasize the narrow application of *Hoffman*, and overturn and diminish its precedential value, which in any event is founded on flawed logic and faulty assumptions. If nothing else, the legislation should make it clear that undocumented immigrants are entitled to all remedies, except back pay, as defined in *Hoffman* under federal or state labor laws. Further, it should also provide a clear warning to undocumented immigrants and their attorneys that seeking an award of back pay as defined by the NLRA, might make

146. Reynolds, *supra* note 134, at 1299.

147. *Id.* (quoting Regal Recycling, Inc. v. Int’l Brotherhood of Teamsters, 329 N.L.R.B. 355, 356 (1999)).

148. *See supra* note 60 and accompanying text.

149. Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 255 (2d Cir. 2006) (Walker, J., concurring) (suggesting that “[i]t would be far better for the 535 members of Congress to express their [intent]” so as to diminish the conflict between New York’s workplace safety laws and federal immigration policy).

immigration status relevant and discoverable.

These proposals are a call to action for all immigrants' rights groups, attorneys, and advocates to argue for the adoption of the test discussed above, and to lobby for the statutory proposals.

V. CONCLUSION

Labor protections afforded by states are protective of the rights of undocumented immigrants in the workplace. As this note has laid out, neither the Supreme Court's holding in *Hoffman*, nor IRCA, preempt state labor protections. Yet immigrants and their attorneys are still experiencing its effects as it is wielded by employers to minimize the efforts of undocumented immigrants who have the courage to assert their rights.

At the end of the day, what is most important to remember is that for all the different legal and policy arguments that can be raised, there remains one very compelling human argument at the heart of this entire issue. The undocumented workers that state labor laws seek to protect are more than "illiterate peasants,"¹⁵⁰ they are someone's mother, father, sister, and brother. They are people who very likely did not want to leave their home country, but were driven out by hunger, poverty, lack of opportunities, and a desire for a better life. Claims for discriminatory and unfair labor practices and unpaid wages are very real and no less valid than a claim filed by a U.S. citizen or an immigrant lawfully authorized to work in the United States. They should not be treated as less valid because when we allow that to happen, we promote dehumanization and place the value of one class of people's claims above the value of another class of people with equally valid claims. This flies in the face of all the progress this country has made towards equality and civil rights. If we allow even one person to be subjected to an injustice, we are headed back in the wrong direction.

150. Mook, *supra* note 1.