

BEYOND *HOFFMAN PLASTIC*: REFORMING NATIONAL
LABOR RELATIONS POLICY TO CONFORM TO THE
IMMIGRATION REFORM AND CONTROL ACT

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INTRODUCTION

The National Labor Relations Act (“NLRA”) purports to grant equal protection to all workers employed in America. Despite the fact that most undocumented workers fall under the broad definition of an employee under the Act,¹ the application of the law to such workers often leaves them without any effective means of protection against employer abuses. When an undocumented worker complains of wrongful employer conduct, the employee often faces retaliation such as a demotion, loss of employment, or the initiation of deportation proceedings. The remedies afforded to undocumented workers under current law for such wrongful conduct are limited, undermining incentives for the undocumented worker to expose employer abuses. The U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB* illustrates the problem.² Because undocumented workers cannot be lawfully employed in this country under the Immigration Reform and Control Act (“IRCA”), the Court foreclosed backpay as a remedy available to such workers.³

The dilemma underlying the employment of undocumented workers in the United States is that it always involves bad faith con-

1. The definition of an employee under the NLRA includes all workers except those employed under certain enumerated conditions. One exception includes “any individual employed as an agricultural laborer.” 29 U.S.C. § 152(3) (2000). As of 2002, there were 5.3 million undocumented workers in the urban labor force and 1.2 million undocumented workers in the agricultural labor force. Rebecca Smith et al., *Undocumented Workers: Preserving Rights and Remedies after Hoffman Plastic Compounds v. NLRB* at 1–2 (citing B. Lindsey Lowell & Roberto Suro, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks*) (Feb. 2003), available at <http://www.nelp.org/docUploads/wlghoff040303.pdf>. While a significant number of undocumented workers are therefore excluded from coverage under the Act, undocumented workers as a whole are not.

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

3. *Id.* at 140.

duct on the part of either the employer, the employee, or both.⁴ While unscrupulous employers often hire undocumented workers in order to exploit them for cheap labor, it is also true that many undocumented workers obtain employment by defrauding employers with the use of false documentation. Congress has determined that the desire for employment is the “magnet” that draws undocumented workers into the country.⁵ The IRCA was designed to counteract this force by eliminating employment opportunities for such workers.⁶ If the court were to grant undocumented workers access to legal remedies such as backpay, there would be a risk of undermining immigration policy by rewarding violations of the IRCA, granting quasi-legal status to illegal workers, and encouraging more undocumented workers to enter the workforce.⁷

Nevertheless, the lack of protection afforded to undocumented workers following the *Hoffman* decision merits attention for many reasons. By limiting remedies allowed to undocumented workers and thus limiting the punishment issued for wrongful conduct by an employer, the law indirectly encourages employer abuses and generates a greater incentive for employers to hire undocumented workers.⁸ Not only does this impair the interests of existing undocumented workers, but it contravenes immigration policy by drawing a larger number of undocumented workers into the country, taking jobs⁹ and depressing wages earned by legal workers.¹⁰

4. *Id.* at 148 (“Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of the IRCA’s enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.”).

5. H.R. Rep. No. 99-682, pt. 1 at 46 (1986).

6. *Id.* at 45–46 (“[This] bill establishes penalties for employers who knowingly hire undocumented aliens, thereby ending the magnet that lures them to this country.”).

7. See *Hoffman Plastic*, 535 U.S. at 149–51.

8. Absent the threat of backpay, it may prove to be in an employer’s financial interests to “look the other way” when reviewing undocumented applicants, because the benefits an employer can gain from the exploitation of such workers can outweigh the penalties incurred, especially the penalties incurred for a first time offense. *Id.* at 155 (Breyer, J., dissenting).

9. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) (stating that a “primary purpose in restricting immigration is to preserve jobs for American workers”).

10. A study conducted by the University of Illinois at Chicago found that the median hourly wage of an undocumented worker in Chicago is \$7.00, while the median hourly wage for a documented immigrant worker is \$9.00. Chirag Mehta et al., Center For Urban Economic Development, *Chicago’s Undocumented Immigrants: An Analysis of Wages, Working Conditions, and Economic Contributions* 1, 12 (Feb. 2002), available at http://www.uic.edu/cuppa/ucued/Publications/RECENT/undoc_full.pdf. The availability of workers willing to earn only \$7.00 per hour creates an incentive for employers to lower the hourly wages offered to legal workers.

The penalties imposed by the IRCA are too miniscule to have any serious deterring power, especially for first-time violations of the Act. Coupling these penalties with remedies imposed by the NLRB for labor violations, however, creates a more effective disincentive to the hiring of undocumented workers.¹¹ Unfortunately, following the *Hoffman* decision, it is clear that undocumented workers may not benefit from their violations of federal law through the issuance of remedies such as backpay and reinstatement. With backpay no longer available as a remedy to the National Labor Relations Board (“NLRB” or “Board”), employers are not adequately deterred from the hiring of undocumented workers. In order to effectuate a solution to this problem, the legislature should impose heightened penalties upon employers to make it against their financial interests to hire undocumented workers. This will allow the NLRB to conform to the mandates of the *Hoffman* decision without subverting the goals of the IRCA.

In addition, because the *Hoffman* decision was a narrow one, it failed to clarify the proper application of the law under several scenarios distinguishable from the one before the Court. In non-discharge situations, for example, when an undocumented employee is not fired but merely demoted, the NLRB has been left without any clear precedent to rely upon.¹² The NLRB has also found the application of *Hoffman* to be uncertain when an employer *knowingly* hires an undocumented worker.¹³ In order to resolve these situations and clarify the law as it relates to undocumented workers, the Board should apply the *Hoffman* court’s reasoning to a broader range of cases. Additionally, the NLRB has failed to alter its investigatory process following the *Hoffman* decision to discover a worker’s immigration status prior to seeking a backpay award.¹⁴ In order to comply with the *Hoffman* decision, the NLRB must investigate immigration status prior to settling claims or seeking remedies foreclosed by the Court.

With the *Hoffman* decision functioning as the Court’s final word on immigration policy, this Note explores how to best alter the law to serve this policy with regard to undocumented workers and their rights against employer misconduct. Part I of this Note briefly ana-

11. See *infra* note 168.

12. See *infra* Part III.B.

13. See *infra* Part III.A.

14. See *infra* Part III.C.

lyzes the history of the IRCA and the NLRA in order to shed light on the overall purposes and policy considerations of these congressional enactments. Part II reviews the landmark *Hoffman* decision and examines the majority and dissenting viewpoints of the case. The case law that the *Hoffman* court relied upon in making its decision is also examined. Part III looks at how the *Hoffman* decision affected the NLRB's internal policy, focusing on areas of the law where the Board believes *Hoffman* is not controlling, and seeking to explain why the Board should limit further remedies to undocumented workers in order to conform to the *Hoffman* court's interpretation of the IRCA. Finally, Part IV proposes amendments to the relevant statutes to solve the problems identified in the *Hoffman* dissent and bring the law in line with the underlying goals of the IRCA.

I. THE HISTORY OF THE RELEVANT LEGISLATION

A. *Immigration Reform and Control Act*

The Immigration Reform and Control Act was enacted in 1986 as an amendment to the Immigration and Nationality Act ("INA").¹⁵ Congress delegated the administration and enforcement of the IRCA to the Attorney General,¹⁶ who in turn assigned these responsibilities to the Immigration and Naturalization Services ("INS").¹⁷ On March 1, 2003, all of the functions of the INS were transferred to the new Department of Homeland Security ("DHS").¹⁸ The U.S. Citizenship and Immigration Services now retain most of the functions of the former INS.¹⁹ However, U.S. Immigration and Customs Enforcement ("USICE"), which is the "investigative arm" of the Border and Transportation Security Directorate, is now primarily responsible for the enforcement of the IRCA.²⁰

15. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

16. 8 U.S.C. § 1324a(e) (2000).

17. See 8 C.F.R. § 274a.9 (2003).

18. Authority of the Secretary of Homeland Security, 68 Fed. Reg. 10922 (Mar. 6, 2003). For further information on departmental transfers, see U.S. Citizenship and Immigration Services, *INS to DHS: Where Is It Now?*, <http://uscis.gov/graphics/othergov/roadmap.htm> (Mar. 19, 2004).

19. For a background on the goals and responsibilities of the USCIS, see U.S. Citizenship and Immigration Services, *This is USCIS*, <http://uscis.gov/graphics/aboutus/thisisimm/index.htm> (Nov. 19, 2003).

20. See U.S. Immigration and Customs Enforcement, *ICE About Organization*, <http://www.ice.gov/graphics/about/organization/index.htm> (Feb. 25, 2004).

The purpose of the IRCA is to curtail the employment of undocumented workers by eliminating employment as a factor that draws these workers into the country.²¹ Prior to the enactment of the IRCA, it was against the law for an undocumented worker to enter the country illegally, but it was not illegal for an employer to hire an undocumented worker, nor was it a separate crime for an undocumented worker to obtain employment in the United States.²² In response to growing concern about the problems created by the employment of undocumented workers, including the loss of jobs²³ and depression of wages earned by legal workers, the IRCA was designed to target employers and prohibit them from knowingly employing, recruiting, or referring illegal alien workers.²⁴

The IRCA imposes a mandatory employment verification system upon employers as a means of ascertaining a worker's legal right to employment.²⁵ The Act also made it illegal for an undocumented worker to undermine this employment verification system through the use of fraudulent documentation.²⁶ There are three categories of documents that may be used to prove employment authorization and identity.²⁷ Any suitable combination of these specified documents must be accepted as proof of work authorization when a reasonable examination of the documents reveals them to be authentic.²⁸ Due to concerns that the IRCA would cause employers to discriminate

21. H.R. Rep. No. 99-682, pt. 1 at 45-46. The legislature considers employment the primary factor that draws undocumented workers into the country. Often, however, illegal aliens may come to the U.S. for other reasons, such as political instability in their home countries, and seek employment as a secondary goal. See William J. Murphy, *Immigration Reform Without Control: The Need for an Integrated Immigration-Labor Policy*, 17 SUFFOLK TRANSNAT'L L. REV. 165, 177-78 (1994).

22. Prior to the enactment of the IRCA, the INA did not concern itself to any great extent with the employment of undocumented workers. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93 (1984).

23. See H.R. Rep. No. 99-682, pt. 1 at 47. The report indicates that in 1986 the unemployment rate was high, and the country was not in a position to absorb unemployed illegal aliens into the economy. The legislature believed that allowing undocumented workers to be employed would take jobs away from legal workers, especially minorities. *Id.*

24. 8 U.S.C. § 1324a(a)(1) (2000).

25. 8 U.S.C. § 1324a(b).

26. 8 U.S.C. § 1324c.

27. These categories include: (1) documents that provide evidence of both employment authorization and identity, such as a passport; (2) documents that provide evidence of employment authorization, such as a social security card; and (3) documents that provide evidence of identity, such as a driver's license. 8 U.S.C. § 1324a(b)(1)(B)-(D).

28. 8 U.S.C. § 1324a(b)(1)(A)(ii). A document must simply appear to be genuine on its face in order to fulfill this requirement. *Id.* Critics of the IRCA claim that this broad language creates a "loophole" in the Act that allows employers to escape liability for accepting fraudulent documents. Smith, *supra* note 1, 4.

against Hispanic-American citizens²⁹ and require extra documentation from such workers, the legislature precluded employers from requiring workers to produce documentation in excess of that expressly required under the Act.³⁰ Employers are found to be compliant with the guidelines of the employment verification system when they act in good faith to comply with these regulations.³¹

In addition to the establishment of the employment verification system, the IRCA created several forms of sanctions that may be imposed upon delinquent employers, including civil fines, cease and desist orders, and criminal penalties.³² For an initial offense, the Act calls for a civil penalty between \$250 and \$2,000 per undocumented worker hired.³³ After a second violation of the Act, an employer becomes subject to fines between \$2,000 and \$5,000.³⁴ Further violations incur heightened penalties between \$3,000 and \$10,000.³⁵ When an abusive pattern or practice of employment is discovered, the IRCA allows a civil action in federal court to be brought to obtain an injunction against this wrongful activity.³⁶ In this circumstance, the delinquent employer also becomes subject to criminal penalties, including fines up to \$3,000 for each undocumented worker and up to six months imprisonment.³⁷

These provisions are primarily enforced by USICE.³⁸ Under the regulations that the former INS operated under, the USICE has the authority to investigate employers entirely on its own initiative.³⁹

29. The concern was that employers, facing sanctions for the hiring of undocumented workers, would be less inclined to hire anyone who could possibly be such a worker. Therefore, legal Hispanic-American workers might be at risk of discrimination from overly-cautious employers. H.R. Rep. No. 99-682, pt. 1 at 68.

30. 8 U.S.C. § 1324a(b)(1)(A)(ii).

31. 8 U.S.C. § 1324a(b)(6)(A).

32. 8 U.S.C. § 1324a(e)(4)–(5); 8 U.S.C. § 1324a(f).

33. 8 U.S.C. § 1324a(e)(4)(A)(i).

34. 8 U.S.C. § 1324a(e)(4)(A)(ii).

35. 8 U.S.C. § 1324a(e)(4)(A)(iii).

36. 8 U.S.C. § 1324a(f)(2).

37. 8 U.S.C. § 1324a(f)(1).

38. See U.S. Immigration and Customs Enforcement, *Investigations—Human Rights Crimes*, http://www.ice.gov/graphics/enforce/invest/invest_hrc.htm (Mar. 17, 2004). However, the agency's "current enforcement strategy is to focus primarily on worksite enforcement investigations that involve alien smuggling, human rights abuses and other criminal violations." *Id.* Enforcement of the employer sanctions provisions of the IRCA has been steadily decreasing. Smith et al., *supra* note 1, at 5. USICE's administrative focus on more "serious" immigration-related crimes does nothing to resist this trend.

39. 8 C.F.R. § 274a.9(b) (2003). The Homeland Security Act provides that all references to the INS will now refer to the appropriate agency within the DHS. Authority of the Secretary of Homeland Security, 68 Fed. Reg. 10922 (Mar. 6, 2003).

However, the department must also accept written complaints from any person with knowledge of a potential violation of immigration laws.⁴⁰ If an investigation reveals that the IRCA has been violated, the USICE issues a notice of intent to fine the employer.⁴¹ This notice contains a statement of the charges against an employer, the statutes that have been violated, and the penalties that will be imposed.⁴² Employers have the right to contest the fines issued by the USICE and request a hearing before an Administrative Law Judge.⁴³ However, if this request is not made within thirty days of receipt of the notice of intent to fine, a final order will be issued by the USICE that cannot be appealed.⁴⁴

Notwithstanding the structural and symbolic changes since the formation of the Department of Homeland Security,⁴⁵ substantive immigration policy relating to undocumented workers has remained largely unchanged since the enactment of the IRCA.⁴⁶ The debate over immigration reform has been reopened, however, with President George W. Bush's election year proposal to grant undocumented workers temporary legal work status.⁴⁷ The program, administered by the Department of Homeland Security, would grant all workers illegally employed in the U.S. the chance to enlist and receive guaranteed wage and employment rights.⁴⁸ Employers who seek to hire workers from this temporary work program would have the daunting task of proving that they cannot find U.S. laborers to fill their job openings.⁴⁹ These workers would receive a temporary three-year work visa that would be renewable one time, but would then be required to return to their native countries once these visas expire.⁵⁰ The work

40. 8. C.F.R. § 274a.9(a).

41. 8. C.F.R. § 274a.9(d).

42. 8. C.F.R. § 274a.9(d)(1).

43. 8. C.F.R. § 274a.9(e).

44. 8. C.F.R. § 274a.9(f).

45. For a critique of the DHS reorganization schemes, see Jeffrey Manns, *Reorganization as a Substitute for Reform: The Abolition of the INS*, 112 YALE L.J. 145 (2002).

46. However, a few additional penalties for employer misconduct in document fraud were created by Congress in 1996, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

47. See Ted Barrett & Steve Turnham, *Bush Immigration Plan Could Pass Congress, Aides Predict*, <http://www.cnn.com/2004/ALLPOLITICS/01/07/immigration.congress/index.html> (Jan. 8, 2004).

48. John King et al., *Bush Calls for Changes on Illegal Workers*, <http://www.cnn.com/2004/ALLPOLITICS/01/07/bush.immigration/index.html> (Jan. 7, 2004).

49. *Id.*

50. *Id.* One of the major flaws in President Bush's plan is its failure to recognize that many undocumented workers have children who are American citizens. It is unlikely that any of the

visa would not carry with it any guarantee of actual citizenship; workers could apply for permanent U.S. residency, but will receive no preferential consideration over general applicants.⁵¹ Because the plan would only apply to workers who are already employed in the United States, however, it does not address the problems associated with the steady influx of undocumented workers that arrive in this country every day. The president's plan has been met with both criticism and praise, but analysts believe the proposal stands little chance of being passed by Congress.⁵²

B. *National Labor Relations Act*

The NLRA was passed by Congress in 1935 to regulate the labor-management relations of businesses engaged in interstate commerce.⁵³ The Act formed the NLRB in order to implement and enforce the rights guaranteed under the Act.⁵⁴ The NLRB is made up of two decision-making bodies: a five-member board responsible for issuing the agency's final determinations, and the General Counsel who runs the Board's field offices and is responsible for the initial investigation and prosecution of unfair labor practices.⁵⁵

The NLRA does not specifically exclude undocumented workers from the protections it grants.⁵⁶ The Supreme Court has consistently held that the legislature intended to grant protection to all workers employed in the country, including undocumented workers.⁵⁷ The purpose of the NLRA is to ensure that employees are given "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collec-

workers would want to return to their native countries and either leave their children behind, or take their children to a country in which the children have never lived.

51. *Id.*

52. Julia Malone, *House Subcommittee Gives Bush Immigration Plan Cold Shoulder*, COX NEWS SERVICE, Mar. 24, 2004.

53. 29 U.S.C. § 151 (2000).

54. 29 U.S.C. § 153 (2000).

55. 29 U.S.C. § 153(a)-(d); *see also* National Labor Relations Board, *About the NLRB*, <http://www.nlr.gov/nlr/about/> (Apr. 6, 2004) [hereinafter *About the NLRB*].

56. *See supra* note 1.

57. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (holding that the Board's interpretation of the NLRA was reasonable and supported by the terms of the NLRA). The Supreme Court in *Hoffman* affirmed the fact that undocumented workers are covered by the NLRA, but nevertheless restricted the remedies that they may receive. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140, 144 (2002).

tive bargaining or other mutual aid and protection. . . .”⁵⁸ The Act allows employees to petition for union representation and gives the NLRB the authority to carry out secret elections to certify the results.⁵⁹ The Act also outlines unfair labor practices⁶⁰ and gives the NLRB the authority to sanction violations of these practices through its arsenal of remedies.⁶¹ The Board may issue remedies such as reinstatement or backpay to make an employee whole for damages suffered,⁶² but it is restricted from issuing punitive damages.⁶³

Any allegations of unfair labor practices must be filed with the NLRB within six months of the occurrence.⁶⁴ If enough evidence of an unfair labor practice is presented to warrant a full investigation, the Board will assign an agent to interview witnesses and collect evidence related to the case.⁶⁵ Following this investigation, the Board will make a decision to either dismiss the charge or seek a settlement from the employer.⁶⁶ The Board estimates that ninety percent of all charges of unfair labor practice are settled at this point.⁶⁷ If the employer refuses to settle, however, the Board will file a formal complaint and the case will be brought to an Administrative Law Judge (“ALJ”) for a hearing on the merits.⁶⁸ At this stage, all the evidence

58. 29 U.S.C. § 157 (2000).

59. 29 U.S.C. § 159(c)(1) (2000).

60. The NLRA states in relevant part that an employer may not: (1) restrain employees in the exercise of rights guaranteed under 29 U.S.C. § 157; (2) “dominate or interfere with the formation or administration of any labor organization”; (3) condition hiring or continued employment upon any term of employment meant to discourage membership in any labor organization; (4) “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act]”; or (5) “refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158 (2000).

61. 29 U.S.C. § 160 (2000).

62. 29 U.S.C. § 160(c). The Board’s arsenal of remedies, however, is not limited to reinstatement and backpay. Congress gave the NLRB broad discretion to formulate remedies that will effectively enforce the NLRA, and the Board periodically alters its remedial scheme for this purpose. See Leonard R. Page, *NLRB Remedies: Where Are They Going?*, (University of Richmond School of Law, Austin Owen Symposium and Lecture, Apr. 10, 2000), available at <http://www.nlr.gov/nlr/press/releases/r2388.asp>.

63. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–13 (1940). The Supreme Court found that the NLRB’s remedies must “relate to the protection of . . . employees and the redress of their grievances, not to the redress of any supposed public injury. . . .” *Id.* at 11. Thus, the Board may not simply issue any penalties or fines that would ultimately serve the goals of the NLRA. It may only prescribe measures to remedy specific complaints by employees. *Id.* at 10–13.

64. 29 U.S.C. § 160(b); see also National Labor Relations Board, *The NLRB and YOU: Unfair Labor Practices*, http://www.nlr.gov/nlr/shared_files/brochures/engulp.asp/ (Apr. 8, 2004) [hereinafter *NLRB and YOU*].

65. See 29 U.S.C. § 161; see also *NLRB and YOU*, *supra* note 64.

66. *About the NLRB*, *supra* note 55; *NLRB and YOU*, *supra* note 64.

67. *About the NLRB*, *supra* note 55.

68. *About the NLRB*, *supra* note 55; *NLRB and YOU*, *supra* note 64.

that the Board collected in the investigatory process will be presented, and the ALJ will issue a written decision.⁶⁹ This decision may be appealed to the NLRB's five-member board to determine the agency's final stance on the matter.⁷⁰ The Board's final ruling may be appealed to the U.S. Court of Appeals and ultimately to the U.S. Supreme Court.⁷¹

II. THE *HOFFMAN PLASTIC* DECISION AND SIGNIFICANT PRIOR CASE LAW

The Supreme Court's recent decision in *Hoffman Plastic Compounds, Inc.* marked a decisive change in the treatment of remedies available to undocumented workers in the United States. In May of 1988, Jose Castro, an undocumented worker, used false papers to satisfy the IRCA's Documentation and Verification procedures and defrauded Hoffman Plastic into believing he was lawfully entitled to be employed in this country.⁷² In December of 1988, Castro became involved with a unionization campaign and began distributing authorization cards to other employees.⁷³ Shortly thereafter, Castro and four other employees engaged in union-organizing activities were fired.⁷⁴

The NLRB investigated this case in January of 1992 and determined that these four employees were unlawfully fired in an attempt to curtail unionization efforts at the company in clear violation of the NLRA.⁷⁵ The NLRB never looked into Castro's legal status as an employee in the United States because of an internal policy specifically excluding such questions from factoring into an investigation.⁷⁶ As a result, the NLRB ordered that Hoffman immediately stop its wrongful behavior and take no further action to curtail union organiz-

69. *About the NLRB*, *supra* note 55.

70. *Id.*

71. *Id.*

72. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

73. *Id.*

74. *Id.*

75. *Id.* The Board found that Hoffman Plastics violated Section 8(a)(3) of the NLRA, which prohibits an employer from discouraging membership in a labor union through its hiring practices. 29 U.S.C. § 158(a)(3) (2000).

76. *See* Arthur F. Rosenfeld, Office of the General Counsel Memorandum GC 02-06 (July 19, 2002) (writing that "[r]egions have no obligation to investigate an employee's immigration status unless a respondent affirmatively establishes the existence of a substantial immigration issue"), *available at* http://www.nlr.gov/nlr/shared_files/gcmemo/gcmemo/gc02-06.asp [hereinafter NLRB Memorandum GC 02-06].s

ing activities. Additionally, Hoffman was ordered to prominently post a detailed notice to all employees informing them of their wrongdoing and subsequent conformance.⁷⁷ Finally, the NLRB ordered Hoffman to offer reinstatement and backpay to all of the employees wrongfully discharged.⁷⁸ Hoffman agreed to abide by the NLRB's decision and implement these terms.⁷⁹

In June of 1993, however, the matter was brought before an ALJ for a compliance hearing.⁸⁰ In the course of this hearing, Castro testified for the first time that he was an undocumented worker who had never been legally admitted into the United States and was never granted authorization to work in this country.⁸¹ Castro admitted that he gained employment at Hoffman only after tendering the false birth certificate of a friend and passing it off as his own.⁸² This birth certificate was also used to fraudulently obtain a Social Security Card and California driver's license.⁸³

In light of this new information, the ALJ decided that the IRCA's prohibition against hiring undocumented workers, and prior case law, including *Sure-Tan, Inc. v. NLRB*, precluded Castro from receiving backpay and reinstatement.⁸⁴ *Sure-Tan* involved an employer that violated the NLRA by reporting a number of undocumented employees to the INS in retaliation for union-organizing activities.⁸⁵ Several of these workers voluntarily left the country to avoid being deported.⁸⁶ The NLRB found that *Sure-Tan's* actions amounted to a constructive discharge, and ordered the company to offer the discharged employees reinstatement and backpay despite their undocumented status.⁸⁷ The Court of Appeals in *Sure-Tan* ruled that backpay could not accrue during a period of time in which an employee is not lawfully available for work, and also modified the Board's order by requiring that the workers be legally present and

77. *Hoffman Plastic*, 535 U.S. at 140.

78. *Id.* at 140–41.

79. *Id.* at 141. A reinstatement offer was sent and should have stopped the tolling of backpay at the time of receipt. However, it was determined that the reinstatement offer tendered by Hoffman Plastics was not detailed enough to be valid. Thus, the backpay period continued to accrue beyond this point. *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1061 (1998).

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

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 887 (1984).

86. *Id.*

87. *Id.* at 888.

able to be employed in the country before being offered reinstatement.⁸⁸ The Supreme Court upheld these determinations.⁸⁹

Several years after the *Hoffman* compliance hearing was decided, the NLRB reversed the ALJ's denial of backpay as a result of a new departmental policy regarding undocumented workers.⁹⁰ Because the ALJ reached this decision prior to the NLRB's policy determinations in *A.P.R.A. Fuel Oil Buyers Group, Inc.*,⁹¹ the Board sought to review the *Hoffman* decision again.⁹² In *A.P.R.A. Fuel*, after reviewing the objectives of the IRCA and the NLRA, the Board concluded that the best way to reconcile the two Acts was to provide undocumented workers with exactly the same protections and remedies available to citizens legally authorized to work in this country.⁹³ The Board reasoned that if hiring undocumented workers does not afford employers any particular exploitative ability, such as the ability to pay decreased wages or fire an employee at will, the employer will have no incentive to hire an undocumented worker over a legally authorized worker.⁹⁴ Under these conditions, the threat of sanctions and the inability to take advantage of undocumented workers will leave employers with only disincentives to hire such workers.⁹⁵ In light of this new policy, the NLRB found that Castro was entitled to backpay plus interest.⁹⁶ The Board calculated the amount of backpay owed by taking into account the time period between when Hoffman illegally fired Castro to the time when they first learned Castro was undocumented, because at this point Hoffman would have been legally required to fire Castro in order to conform to IRCA guidelines.⁹⁷ Castro was awarded backpay for a four-and-a-half-year span that added up to \$66,951, plus interest.⁹⁸

88. *Id.* at 889.

89. *Id.* at 903. However, the Supreme Court rejected the decision of the Court of Appeals to grant a minimum six-month backpay award for the employees' lost wages. This award was deemed to be purely conjectural and exceeded the court's authority. *Id.* at 901, 903-04.

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

91. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995).

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

93. *A.P.R.A. Fuel*, 320 N.L.R.B. at 415; see *infra* notes 133-136 and accompanying text for a discussion of the *A.P.R.A. Fuel* case.

94. *A.P.R.A. Fuel*, 320 N.L.R.B. at 415.

95. See *id.* This is only the case, however, when an undocumented worker asserts his/her rights and risks bringing his/her immigration status to light. If an employer does not believe that such information will be uncovered, an incentive may still exist to hire undocumented workers.

96. *Hoffman Plastic*, 535 U.S. at 141-42.

97. See *id.*

98. *Id.*

Hoffman appealed this decision to the Court of Appeals but was denied review. Hoffman then petitioned for a writ of certiorari that was granted by the Supreme Court.⁹⁹ In a 5–4 decision, the Supreme Court reversed the Court of Appeals and rescinded the NLRB’s award of backpay.¹⁰⁰ In this opinion, written by Justice Rehnquist, the Court expounded the principle that the NLRB’s power to grant remedies for violations of the NLRA is not so broad as to allow it to contravene another law.¹⁰¹ The Court found that “the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives.”¹⁰²

The Court determined that when the remedial decisions of the NLRB run contrary to other federal laws, courts should not defer to the Board’s judgment.¹⁰³ By awarding backpay in this case, the NLRB effectively ignored Castro’s own wrongful conduct and sought to “award backpay to an illegal alien 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.”¹⁰⁴ The Court explained that it is not possible for an undocumented alien to attain employment in this country without a clear violation of the IRCA on the part of the employer, the employee, or both parties.¹⁰⁵ In this case, the wrongful conduct fell squarely upon Castro himself, who defrauded Hoffman into hiring him through the use of false identification. The court found that to award backpay despite such a violation of the IRCA would serve to reward the infringement of federal law.¹⁰⁶

The NLRB admitted that an undocumented worker loses the right to backpay once INS deportation proceedings have been initiated or when the worker has departed the country.¹⁰⁷ It follows from this that the only way an undocumented worker can receive backpay is if he remains in the country illegally.¹⁰⁸ The Court also noted the inability of undocumented workers to mitigate damages as a problem

99. *Id.*

100. *Id.* at 139.

101. *Id.*

102. *Id.* at 143 (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942)).

103. *Id.*

104. *Id.* at 148–49.

105. *Id.* at 148.

106. *Id.* at 150.

107. *Id.*

108. *Id.*

with awarding backpay to undocumented workers.¹⁰⁹ All employees seeking backpay as a remedy must attempt to mitigate their damages by seeking other employment.¹¹⁰ In the case of the undocumented worker, however, this is impossible. The undocumented worker cannot legally work, and thus cannot seek other employment without violating the IRCA a second time.¹¹¹ For all of these reasons, Chief Justice Rehnquist concluded that “allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”¹¹²

The Court noted that the employer does not escape punishment simply because backpay is not being paid. Hoffman was still ordered to cease its wrongful activity and post a prominent notice to employees explaining their rights and the company’s history of curtailing these rights.¹¹³ In addition, if it failed to comply with the Board’s orders, the company would face contempt proceedings.¹¹⁴ The Court expressed its belief that such sanctions are effective to secure national policy, and noted that even if such remedies are not sufficient, it is the province of Congress and not the courts to expand the NLRB’s power to create more effective remedies.¹¹⁵

In his dissenting opinion to the *Hoffman* decision, Justice Breyer attacked the policy-based arguments advanced by the majority and argued that the legislature did not intend for the IRCA to remove any remedial authority from the Board.¹¹⁶ Because the predominant purpose of the IRCA was to diminish the attractive forces that pull undocumented workers to seek employment in the United States, Breyer argued that awarding backpay actually supports immigration

109. *Id.* at 150–51.

110. *Id.* at 150.

111. *Id.* at 151.

112. *Id.*

113. *Id.* at 152.

114. *Id.*

115. *Id.*

116. *Id.* at 157 (Breyer, J., dissenting) (citing H.R. Rep. No. 99-682, pt. 1 at 58 (stating that it is “not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards. . .to remedy unfair practices committed against undocumented workers for exercising their rights. . .protected by existing law”)). The majority criticized Breyer’s use of “a single Committee Report from one House of a politically divided Congress.” *Id.* at 150 n.4.

policy.¹¹⁷ Justice Breyer did not believe that awarding backpay would play a large role in pulling undocumented workers into the United States, because at the time such workers illegally find their way into the country, they could not realistically be considering the possibility of future employer abuses and the legal remedies available to them.¹¹⁸ Withholding backpay, on the other hand, would increase the strength of the forces that draw undocumented workers into the country because it makes it more profitable for employers to hire and exploit these workers in ways not possible with legal employees.¹¹⁹ After the removal of backpay as a remedial tool available to the NLRB, the remaining remedies only impose future obligations upon employers and do not cover past conduct. Justice Breyer argued that these remaining remedies are insufficient to truly deter wrongful conduct by employers.¹²⁰ By only imposing future restrictions on employers and not requiring payment of backpay, an employer is able to retain substantial profits from their wrongful conduct.¹²¹ Under these conditions, Breyer noted that employers may be willing to take a chance on an unfair labor practice, secure in the knowledge that the worst thing that could happen for the initial offense is being required to cease and desist the activity.¹²²

III. ALTERING NLRB POLICIES IN ORDER TO CONFORM TO POLICY CONSIDERATIONS ADVANCED BY THE *HOFFMAN* COURT

The *Hoffman* decision dramatically changed the ways in which the NLRB may handle undocumented worker cases. The *Hoffman* decision was a narrow ruling, but the broad policy based arguments that the Court used in making its decision have created a number of questions that need to be clarified by the Board. This confusion extends farther than the NLRB, as both state and federal courts have been forced to contend with the issue of undocumented workers rights in areas completely unrelated to the labor violations in *Hoffman*, such as the rights of undocumented workers to collect damages in personal injury cases.¹²³ The NLRB has undertaken to construe the

117. *Id.* at 153.

118. *Id.* at 155.

119. *Id.*

120. *Id.* at 154.

121. *Id.* at 155–56.

122. *Id.* at 155–56.

123. See *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003) (finding that *Hoffman* does not preclude an undocumented worker from receiving compensation for lost

Hoffman decision as narrowly as possible and has generally not applied the reasoning of the Court to situations the Court did not have specific opportunity to review. Situations that the NLRB finds distinguishable from *Hoffman* include reinstatement when an employer knowingly hires an undocumented worker and backpay in non-discharge situations.¹²⁴ In addition, the Board sees their role as protecting all workers, whether documented or undocumented, and even after the *Hoffman* decision has refused to look into the immigration status of employees that file complaints with the Board.¹²⁵

A. *Backpay and Reinstatement Where an Employer Knowingly Hires an Undocumented Worker*

The *Hoffman* court was quite clear in its ruling that backpay is an impermissible remedy for undocumented workers when it is the employee's own wrongful violation of the IRCA that provides the occasion for employment.¹²⁶ The Board has also advised that backpay should not be sought when an employer knowingly hires an undocumented worker, despite the fact that *Hoffman* is "arguably" not controlling.¹²⁷ The General Counsel of the NLRB has stated that "the clear thrust of the majority opinion [in *Hoffman*] precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstance of their hire."¹²⁸

When an employer establishes that it did not know of an employee's undocumented status, the General Counsel has taken the *Hoffman* decision to preclude reinstatement as well.¹²⁹ Because the *Hoffman* court did not *directly* rule on the issue of reinstatement, however, the Board has not extended the Court's reasoning to prohibit reinstatement when an employer knowingly hires an undocu-

earning capacity because *Hoffman* only applies to NLRA actions, and because Texas law does not require immigration to factor into such matters); *Hernandez-Cortez v. Hernandez*, 2003 WL 22519678 at *5-6 (D. Kan. Nov. 4, 2003) (finding that *Hoffman* does not allow an undocumented worker to recover lost income based on projected future earnings).

124. NLRB Memorandum GC 02-06, *supra* note 76.

125. *Id.*

126. *Hoffman Plastic*, 535 U.S. at 151.

127. NLRB Memorandum GC 02-06, *supra* note 76.

128. *Id.*

129. "[W]here a respondent, as in *Hoffman*, establishes that it would not have hired or retained the discriminatee had it known of his or her undocumented status during the period of employment, Regions should refrain from seeking a reinstatement remedy." NLRB Memorandum GC 02-06, *supra* note 76.

mented worker.¹³⁰ The Board argues that in such circumstances reinstatement is conditioned upon satisfaction of the IRCA guidelines, and is thus exempt from the *Hoffman* Court's concerns about conflicting with the Act.¹³¹ In such circumstances, the Board falls back on case law decided before *Hoffman*, such as *A.P.R.A. Fuel Oil Buyers Group*.¹³²

In *A.P.R.A. Fuel*, an employer knowingly hired several undocumented workers but later fired them for union activities.¹³³ The Board ordered that these workers be offered reinstatement and backpay.¹³⁴ Because undocumented workers cannot be employed in the country without violating the IRCA, this reinstatement was conditioned upon satisfaction of the IRCA document and verification procedure within a reasonable period of time.¹³⁵ The Board ordered backpay to be awarded until the point of reinstatement or until a reasonable period of time had passed without the employees satisfying the IRCA document requirements for employment.¹³⁶

The NLRB's reliance upon *A.P.R.A. Fuel* is faulty, however, because the policy considerations advanced by the *Hoffman* decision make it unlikely that *A.P.R.A. Fuel* would be upheld today. One of the effects of the *Hoffman* decision was the expansion of focus to examine wrongdoing on the part of the undocumented employee as well as the employer.¹³⁷ The *Hoffman* decision made it clear that violations of the IRCA on the part of an employee were not to be rewarded.¹³⁸ Because the *Hoffman* decision underscored the idea that two wrongs do not make a right, the NLRB is incorrect to focus on an employer's misconduct and use this as a reason to reward the employee.

Awarding reinstatement, even when an employer knowingly hires an undocumented worker, ignores the Supreme Court's concern about rewarding employment "obtained in the first instance by criminal fraud."¹³⁹ By offering reinstatement, even conditional

130. *Id.*

131. *Id.*

132. *Id.*

133. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408, 408 (1995).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143, 148–09 (2002).

138. *Id.*

139. *Id.* at 149.

reinstatement contingent upon becoming lawfully entitled to employment, the Board would be rewarding an employee's initial violation of the IRCA and granting legitimacy to employment gained through unlawful means. Intentional employer misconduct is more culpable than unintentionally hiring an undocumented worker and, perhaps, should warrant more serious sanctions. However, in light of the policy considerations advanced by the *Hoffman* court, the circumstances of an employee's hire should have no effect on the remedies that an employee receives as compensation for an employer's wrongdoing. Thus, the Board should prohibit conditional reinstatement as a remedy available to undocumented workers under the NLRA.

B. Backpay in Non-Discharge Situations

The NLRB has found that the *Hoffman* decision does not preclude the availability of backpay in non-discharge situations.¹⁴⁰ A non-discharge situation arises when an undocumented worker has not been fired but remains employed subject to unlawful working conditions.¹⁴¹ Common examples of this include being unlawfully paid a lower wage than what is owed or being discriminatorily demoted to a lower paying position for engaging in union activities.¹⁴² The *Hoffman* decision restricts remedies available to undocumented workers for work not actually performed,¹⁴³ but the Board argues that backpay is proper in non-discharge situations where the employee is receiving payment for work that was performed but was simply not compensated properly.¹⁴⁴ Another problem the *Hoffman* court identified with the awarding of backpay was the inability of an employee to mitigate damages without again violating the IRCA.¹⁴⁵ By contrast, in a non-discharge situation the employee has no requirement to mitigate damages because the job was never actually lost.¹⁴⁶ Federal case law supports the Board's interpretation of *Hoffman* as allowing compensation for work actually performed.¹⁴⁷

140. NLRB Memorandum GC 02-06, *supra* note 76.

141. *Id.*

142. *Id.*

143. *Hoffman Plastic*, 535 U.S. at 149.

144. NLRB Memorandum GC 02-06, *supra* note 76.

145. *Hoffman Plastic*, 535 U.S. at 150-01.

146. NLRB Memorandum GC 02-06, *supra* note 76.

147. See *Flores v. Albertsons, Inc.*, 2002 WL 1163623 at *5 (C.D. Cal. Apr. 9, 2002) (finding that *Hoffman* does not apply to claims for unpaid wages for work actually performed); *Singh v. Jutla & C.D. & R.'s Oil, Inc.*, 214 F. Supp. 2d 1056, 1061 (2002) (finding that *Hoffman*'s restric-

Nevertheless, the Board is barred from granting backpay in such circumstances because such an award would be punitive and not remedial.¹⁴⁸ The court in *Del Rey Tortilleria, Inc. v. NLRB* found that

[a]n alien who had no right to be present in this country at all, and consequently had no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he had no entitlement. . . . [T]he award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to those individuals who have suffered harm.¹⁴⁹

Because it foreclosed backpay based on policy considerations raised by the IRCA, the Supreme Court in *Hoffman* declined to address the issue of whether backpay in such circumstances amounts to a punitive damage award.¹⁵⁰ Until this issue is resolved, the Board should not seek backpay for work performed, because this would overstep its remedial powers.

When the employee has been demoted into a lower paying position, the question exists as to whether backpay would qualify as work performed, and thus be distinguishable from the policy considerations in *Hoffman*. The NLRB has issued a general memorandum requiring such cases to be submitted to the Board's Department of Advice.¹⁵¹ The problem here lies in the fact that the worker is being paid the proper wage for the position he or she actually held, and awarding backpay for a higher paying position that the worker did not actually hold is similar to awarding backpay in a discharge situation.¹⁵² In both cases, the worker would be receiving compensation for work that was never actually performed.

In *Hernandez-Cortez v. Hernandez*, the District Court for the District of Kansas disallowed projected future earnings to an undocumented worker because it invoked the *Hoffman* Court's concern about rewarding work not performed.¹⁵³ This case involved an illegal immigrant who was involved in a car crash and suffered critical injuries.¹⁵⁴ The undocumented worker brought suit to recover for lost

tion on backpay was a specific exclusion and did not extend to the collection of unpaid wages for work performed).

148. See *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992); see *supra* note 63 for an explanation of why the NLRB is restricted from issuing punitive remedies.

149. *Del Rey Tortilleria*, 976 F.2d at 1119 (quoting *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (Beezer, J., dissenting in part)).

150. See *Hoffman Plastic*, 535 U.S. at 152 n.6.

151. NLRB Memorandum GC 02-06, *supra* note 76.

152. *Id.*

153. *Hernandez-Cortez v. Hernandez*, 2003 WL 22519678 at *6 (D. Kan. Nov. 4, 2003).

154. *Id.* at *3-4.

income based on anticipated future earnings in the United States.¹⁵⁵ The court found that while the *Hoffman* decision does not preclude recovery for work performed, it does bar recovery for projected earnings by an illegal immigrant.¹⁵⁶

Hernandez-Cortez is distinguishable from the type of situation the NLRB is likely to encounter, because the damages an employee seeks through the NLRB for a wrongful demotion are for past work, rather than a projection of future earnings contingent upon remaining in the country illegally. Also, the ability to perform the labor for which the employee seeks compensation is unilaterally taken away by the employer. The fact remains, however, that the employee has not actually performed the work for the higher paying position. Because actual performance of the labor seems to be the defining criteria by which undocumented workers can collect damages, the Board should preclude the awarding of backpay for non-discharge situations that involve speculative damages. Of course, the decision in *Del Rey Tortilleria* may also serve as a bar to awarding backpay for work not performed.¹⁵⁷

C. *The NLRB's Duty to Investigate Immigration Issues*

The NLRB has determined that the *Hoffman* decision does not shift to them the burden of conducting immigration investigations to determine a worker's legal right to be employed in the country.¹⁵⁸ Under current policy, all employees are presumed to be lawfully entitled to work, and even the direct allegation of undocumented status is not enough to warrant a *sua sponte* investigation on the part of the NLRB.¹⁵⁹ Rather, until the party making the allegation presents evidence establishing a "substantial immigration issue," the Board will not investigate any allegations made against a claimant.¹⁶⁰ The current NLRB policy is akin to a "don't ask, don't tell" type of situation and appears to be designed with the protection of undocumented workers

155. *Id.* at *5.

156. *Id.* at *7.

157. See *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992).

158. NLRB Memorandum GC 02-06, *supra* note 76.

159. *Id.*

160. *Id.* Exactly what constitutes a "substantial immigration issue" is not clear. However, an employer must establish "that it knows or has reason to know that a discriminatee is undocumented." An employer's allegation alone is not sufficient. *Id.*

in mind. The NLRB espouses the IRCA's protection against employer harassment as justification for their position.¹⁶¹

Because the NLRB is presumably investigating the claim as a whole, however, it is in the best position to discover questions of immigration status. By refusing to inquire into the status of undocumented workers and leaving such a determination to be discovered at the compliance stage of a case, the Board has created several problems. One such problem stems from the capacity of the NLRB to petition an employer as an advocate of the employee and seek a settlement award.¹⁶² Over ninety percent of NLRB cases are settled rather than brought before an ALJ.¹⁶³ It is only when a case is brought before an ALJ that questions of immigration status come into play. By settling a case involving an undocumented worker, the Board is in effect subverting the decision of the Supreme Court in *Hoffman* and rewarding undocumented employees for violations of the IRCA.

If the *Hoffman* decision is to be taken as representative of the policy required by the IRCA, then the Board should not be permitted to reward an undocumented worker through settlement anything that the worker would not be entitled to receive through actual litigation. Allowing the Board to settle undocumented workers' claims before the workers' immigration status comes to light is in direct conflict with the *Hoffman* decision and its interpretation of the IRCA.

In addition to these concerns, the Board creates inefficiencies in the legal process and over-burdens an already overloaded system by failing to discover an employee's immigration status in a timely fashion to help filter out cases that it cannot remedy. The Board could use the investigatory powers that the legislature granted the agency¹⁶⁴ and identify immigration problems as early as possible to streamline the process and rule out remedies forbidden by the IRCA. Nevertheless, the NLRB fails to discover this immigration information until an employer refuses to comply with its order and the case is brought to an ALJ. Time and effort is wasted pursuing remedies that will be entirely unavailable because they have been barred by the Supreme Court.

Concerns may arise that charging the NLRB with the responsibility of determining immigration status is too much of a burden to place on the agency, and that such immigration investigations go

161. *Id.*

162. *See supra* text accompanying note 66.

163. *See supra* text accompanying note 67.

164. 29 U.S.C. § 161 (2000).

beyond the agency's purpose as defined by the NLRA. There is a difference, however, between actively investigating an employee's immigration status and simply including immigration related questions among the many details that are asked of a claimant during the course of an investigation. The NLRB should not be charged by the legislature to actively investigate the immigration status of claimants, but it should be required to employ good faith to uncover such information where it may be reasonably brought forward in the course of conduct. This means that the NLRB should question employees on their immigration status and collect information such as alien registration and social security numbers. When possible, this information should be cross-referenced with the Department of Homeland Security. In some cases, cross referencing such information will prove unnecessary as the question itself will induce an admission of illegal status.

IV. PROPOSED LEGISLATIVE AMENDMENTS TO RECTIFY PROBLEMS CREATED BY THE *HOFFMAN* DECISION

As the Supreme Court stated in the *Hoffman* decision, it is up to the legislature to amend current statutes to solve any remedial problems created by the Court's decision.¹⁶⁵ The principal problem created by the *Hoffman* court's decision is the lack of a strong deterrent against wrongful employer conduct.¹⁶⁶ As Justice Breyer argued in his dissent to the *Hoffman* decision, employers would be more likely to risk violations of the NLRA and IRCA knowing that their only sanctions will come in the form of a cease and desist order and a requirement to post notice of their infraction to all new employees.¹⁶⁷ While the IRCA does impose criminal penalties upon employers for repeated violations, the civil penalties imposed by the Act are too insignificant to serve as an effective deterrent.¹⁶⁸ Despite such penalties, employers can still profit from egregious violations of labor laws.

It is clear that to counteract the benefits that employers receive from hiring undocumented workers, there must be a closely

165. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002).

166. *Id.* at 155-56.

167. *Id.*

168. *See Id.* at 154 (Breyer, J., dissenting) (finding that without the threat of being forced to issue backpay to an employee, employers may be prone to violate the IRCA). In addition to the low penalty fees, lack of enforcement and loopholes in the wording of the Act are factors that make the IRCA alone insufficient to prohibit the exploitation of undocumented workers. Smith et al., *supra* note 1, at 4-5.

corresponding detriment imposed upon them. Although the NLRB may be in the best position to discover employer abuses and issue penalties, the NLRB is restricted from imposing punitive remedies.¹⁶⁹ Thus, the remedial power of the NLRB should be delegated in such situations to the USICE. While the penalties imposed by the NLRA are geared towards making the undocumented employee whole for the damages suffered through unfair labor practices, the penalties imposed by the USICE may be punitive in nature and may be directed at penalizing employers to ensure industry compliance with the IRCA. This will address the concerns raised by the dissent in *Hoffman* and allow the NLRB to withhold remedies to undocumented workers without tipping the scales of the IRCA and encouraging employer abuses.

The most direct way to counteract the profits an employer gains from the illegal employment of undocumented workers is to impose strong financial penalties for this wrongful conduct. For legal employees, such financial penalties are imposed when an employer is required to pay remedies such as backpay. Because traditional remedies are barred for undocumented workers, however, the USICE should fine the employer in the same amount as the remedies that would be owed to the employee. In the *Hoffman* case, for example, the employer would be fined in the amount of \$66,951, plus interest; the same amount as the backpay Castro was owed for his wrongful discharge.¹⁷⁰

While this form of sanction creates the same deterrent power as actually awarding backpay to an undocumented worker, it still allows an employer to profit from the employment of undocumented workers in certain circumstances. A better solution is to fine the employer an amount equal to the benefit it received from the illegal employment of the undocumented worker. This differs from the previous approach, which simply mirrored the award an undocumented employee would have gotten before the *Hoffman* decision, because the remedies issued to the employee are meant to make the employee whole. It is possible, however, for an employer to benefit from an undocumented worker's labor in ways that do not entitle the employee to recover damages. For instance, if an employer deprives undocumented workers of safety training that it would have given to legal employees, it saves money through its wrongful conduct. If no

169. See *supra* note 63.

170. *Hoffman Plastic*, 535 U.S. at 142.

undocumented worker is actually harmed as a result of this, an employee might be entitled to an injunction against this practice, but could not recover damages directly proportional to the employer's benefit. In order to ensure that the employer is not left with any residual profit from its illegal activity, it should be fined in an amount equal to any and all benefits incurred through this illegal activity.

An even better sanction would focus not on the employee's detriment or the employer's benefit, but on making the economy whole for the damage caused to it by the employer's wrongdoing. Oftentimes, industry-wide wages are depressed by the hiring of undocumented workers who are paid lower wages than legal employees.¹⁷¹ Ensuring that this does not take place is one of the principal purposes of the IRCA.¹⁷² To determine the amount of the damage an employer causes to industry through its violation of the IRCA, the USICE would need to look into the employer's illegal activity and determine how this affected other employees in the company as well as other companies in the industry. Fining an employer for the harm it caused the industry is a comprehensive sanction that takes into consideration the totality of the employer's wrongdoing. This solution would serve as a strongest financial deterrent to the hiring of undocumented workers.

Public interest would be served by allowing the USICE to retain the income generated by these financial penalties and budget it towards programs designed to ensure future compliance with the IRCA. This income could also be spent rather fittingly on monitoring the employer and ensuring compliance with the Board's injunction against future unfair labor practices, as well as launching intensive investigations of delinquent employers to uncover additional violations of the law.

CONCLUSION

If the Supreme Court's decision in *Hoffman* is to be representative of the nation's immigration goals, the NLRB must apply the Court's reasoning to a number of scenarios that were not directly ruled upon by the Court. Specific instances where the NLRB must change its policy are in the issuance of reinstatement where an employer knowingly hires an undocumented worker and backpay in

171. See *supra* note 10.

172. See *supra* note 9.

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non-discharge situations. In addition, the Board must alter its policy of refusing to investigate the immigration status of employees who file claims with the Board. This procedure leads to settlements that run contrary to immigration policy and creates inefficiencies in the legal system. Finally, it is clear that as a result of the *Hoffman* decision, employers will have a greater incentive to hire undocumented workers. To counteract this, the legislature must penalize employers in new ways designed to counteract the NLRB's inability to sanction employers through corrective remedies such as backpay. The legislature should grant the USICE the ability to sanction employers in amounts equal or greater than the backpay the employer would have been required to pay prior to the *Hoffman* decision.