

**The Needle and the Damage Done:  
How *Hoffman Plastics* Promotes Sweatshops and Illegal Immigration  
And What To Do About It**

## I. INTRODUCTION

Sweatshop labor is the dirty secret underlying much of the clothing that is manufactured and purchased in the United States. While the onset of several scandals involving celebrity clothing lines drew sweatshop labor into public scrutiny a few years ago, few people realize that sweatshop labor is a daily fact of life within the domestic garment industry.

Horrific abuses were brought to light when garment workers in El Monte, California were discovered chained to their machines by employers who forced them to work in abhorrent conditions. While few cases involve the egregious, slavery-like situation found in El Monte, sweatshops continue to be an ongoing problem within the garment industry in Los Angeles.

Developments within federal law will make it even more difficult to combat the existence and proliferation of sweatshops. In a misguided effort to minimize illegal entry into the United States, the Supreme Court has injected immigration law into statutory schemes that previously protected both documented and undocumented workers from sweatshop conditions and employer abuse. This recent jurisprudence, as exemplified by the *Hoffman Plastics*<sup>1</sup> decision, also will make it more difficult for workers to form unions to fight egregious workplace conditions.

In issuing these decisions, the Supreme Court has flatly disregarded Congressional history and statutory language indicating that employment law protections apply to all workers in the United States. Moreover, the Court ironically has created incentives that will encourage unscrupulous employers to hire undocumented workers

---

<sup>1</sup> *Hoffman Plastics Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002).

because the employers know they can violate statutory rights of undocumented workers with virtual impunity.

This paper will argue that *Hoffman Plastics* was wrongly decided. Perhaps more importantly, however, this paper will argue that the *Hoffman Plastics* decision reveals a more fundamental problem in American labor law, as embodied in the National Labor Relations Act (“NLRA” or “Act”). Specifically, because the Act was designed to compensate wronged employees but not to punish employers guilty of labor law violations, the Act lacks the “teeth” necessary to deter employer misconduct.

This paper recommends that the Act be amended both to clarify the scope of its protections and to ensure that sufficient remedies exist to punish wrongdoers and deter violations. Part II provides a factual background describing the garment industry as an example of the employment conditions in which undocumented aliens work. It explains how the garment industry relies upon the exploitation of undocumented workers and extensive labor code violations to ensure maximum profit for manufacturers and retailers. Part III provides a description of pertinent statutory schemes governing labor and immigration in the United States, focusing upon the Immigration Reform and Control Act, the National Labor Relations Act, and the Fair Labor Standards Act. It also analyzes recent federal case law and explains how these decisions have undermined both labor and immigration policies.

Part IV explains why *Hoffman Plastics* was wrongly decided. It examines the likely impact of *Hoffman Plastics* on both employment conditions and illegal immigration. It concludes by arguing that the NLRA must be amended to provide sufficient remedies in order to serve both immigration and employment policy goals. It

also outlines additional steps that will better enable effective prosecution of unscrupulous employers.

## **II. FACTUAL BACKGROUND – SWEATSHOPS, RAMPANT LABOR LAW VIOLATIONS, AND UNIONIZATION**

### **A. Undocumented Workers in California**

Illegal immigration is a fact of life in California. Every year, thousands of immigrants cross the border and enter the United States without permission. As of January, 2000, over seven million undocumented immigrants were living in the United States;<sup>2</sup> approximately forty percent live in California.<sup>3</sup>

Congress has attempted to deter illegal immigration by enacting immigration laws that seek to limit and deter the entry of immigrants. Yet, because immigration is shaped by economic forces beyond the government's control, such laws have been largely ineffective.

One of the primary reasons behind illegal immigration is the disparity of wealth between the United States and countries south of its border. Life in the immigrant's country of origin may have been difficult, dangerous, or without economic opportunities. Grinding poverty may motivate individuals to seek employment opportunities elsewhere. As a result, Congress's attempts to eliminate illegal immigration have, at best, reduced the volume without eliminating the flow of immigrants entering without permission.<sup>4</sup>

---

<sup>2</sup> See [http://www.immigration.gov/graphics/shared/aboutus/statistics/III\\_Report\\_1211.pdf](http://www.immigration.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf) (last visited August 20, 2003).

<sup>3</sup> See, e.g., <http://www.bcis.gov/graphics/publicaffairs/newsrels/illegal.htm>

<sup>4</sup> See, e.g., *Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1439-40 (April, 1983).

As many unauthorized immigrants flee poverty to enter the United States, it is no surprise that they often hope to secure employment after entry.<sup>5</sup> In fact, numerous industries that depend upon their low-wage, low-skilled labor draw them here.<sup>6</sup> Although an exact determination is difficult, it is estimated that about 30.9 percent of the labor force in Los Angeles lacks work authorization.<sup>7</sup>

Many undocumented immigrants find jobs in Los Angeles sweatshops, toiling for the garment industry. In fact, the United States Department of Labor (“DOL”) suggests that immigrants comprise over 85% of Los Angeles' garment workers.<sup>8</sup>

## **B. Sweatshops**

The word "sweatshop" was first used in the 19th century. The term originally described a system by which middlemen "sweated" profit from workers, who were paid minimal wages in exchange for long hours and unsanitary conditions.<sup>9</sup>

---

<sup>5</sup> Some argue that the undocumented workforce in California creates an underground economy, without which the California economy could not thrive. Undocumented workers pick the food Californians eat, tend to gardens of California residents, bus their dishes and cook their food in restaurants, wash their cars, care for their children, and clean their houses. Moreover, undocumented workers perform these services for very little money. Opponents of illegal immigration claim that undocumented workers take jobs away from American citizens. Others, however, point out that no American citizen would be willing to do these jobs, given the horrible conditions and low wages. Of course, if a readily available, easily exploited undocumented workforce did not exist, perhaps employers would be forced to pay higher wages and improve working conditions so that American citizens would be willing to take these low-skilled jobs. This debate, while interesting and important, is outside the scope of this paper. Suffice to say that an undocumented workforce exists, and until the dire economic circumstances in other parts of the world improve, illegal immigration is likely to continue.

<sup>6</sup> Linda S. Bosniak, *Exclusion And Membership: The Dual Identity Of The Undocumented Worker Under United States Law* 1988 Wis. L. Rev. 955, 990-92 (November, 1988/December, 1988).

<sup>7</sup> NOTE: *Piece by Piece: Garment Workers, Livable Wages, and Economic Development in Los Angeles County*, 7 Tex. Hisp. J.L. & Pol'y 147, 156 (Fall, 2001).

<sup>8</sup> *Id.*

<sup>9</sup> <http://www.sweatshopwatch.org/swatch/industry/.org/swatch/industry/>

Today, the United States General Accounting Office (“GAO”) defines a sweatshop as “an employer that violates more than one federal or state labor, industrial homework, occupational safety and health, workers’ compensation, or industry registration law.”<sup>10</sup> Colloquially, the term sweatshop is often used to describe a workplace where employees earn low wages, enjoy few or no benefits, suffer from unsafe working conditions, and face unfair or arbitrary discipline.<sup>11</sup>

### **C. The Garment Industry**

Most garment factories in the United States qualify as sweatshops. According to the United States Department of Labor (“DOL”), more than half of the 22,000 garment factories in the United States violate minimum wage and overtime laws, and 75% of these factories violate safety and health laws.<sup>12</sup> The DOL conducted a survey in Southern California and found that two-thirds of the garment factories inspected qualified as sweatshops based upon their failure to comply with federal minimum wage and overtime laws.<sup>13</sup> Many factory owners had paid workers less than half the federal minimum wage.<sup>14</sup> In total, the sweatshops surveyed owed \$900,000 in back wages to 1,400 workers.<sup>15</sup>

---

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> <http://www.dol.gov/esa/media/press/whd/sfwh112.htm>.

<sup>13</sup> *Id.* Most domestic garment factories are located in Los Angeles, the city on which this paper will focus. *See Piece by Piece, supra* note 7 at 149. Domestic sweatshops, however, are not limited to California. In fact, sweatshops exist wherever the desperation of a large undocumented immigrant community encourages the payment of sub-standard wages. *See* Leo L. Lam, *Designer Duty: Extending Liability To Manufacturers For Violations Of Labor Standards In Garment Industry Sweatshops*, 141 U. Pa. L. Rev. 623, 633-34 (December, 1992).

<sup>14</sup> <http://www.dol.gov/esa/media/press/whd/sfwh112.htm>

<sup>15</sup> *Id.* To conduct the study, the DOL investigated 67 garment shops that were randomly chosen from a list of factories registered with the California Labor Commissioner. The

Of course, workers face additional injustices in these factories that are not reflected in the dollar amounts owed. For example, many sweatshop workers risk their lives as they toil between 60 and 80 hours per week in factories with blocked fire exits, poor lighting, and inadequate ventilation.<sup>16</sup> Working conditions are often unsanitary, and factories are crowded, hot, cramped, and filled with flammable materials and hazardous wiring.<sup>17</sup> Furthermore, workers are denied dignity as they endure constant surveillance and arbitrary discipline.<sup>18</sup> In order to maintain a submissive workforce, management will verbally or physically abuse their employees and threaten to terminate workers or report them to the INS if they complain.<sup>19</sup>

A shocking example of sweatshop exploitation was discovered in August 1995, when over 70 immigrant garment workers were found working behind barbed wire and under armed guard in El Monte, California.<sup>20</sup> The garment workers had toiled up to nineteen hours a day, seven days per week, for little or no pay.<sup>21</sup> Workers had been held against their will for up to seventeen years.<sup>22</sup> As they were forced to sew clothes for

---

survey does not include inspections unregistered shops, in which even more egregious violations likely occur. *Id.*

<sup>16</sup> [www.sweatshopwatch.org/swatch/industry/.org](http://www.sweatshopwatch.org/swatch/industry/.org) – the garment industry

<sup>17</sup> Lam, *supra* note 13 at 633-34; Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 Loy. U. Chi. L.J. 291, 297 (Winter, 2003).

<sup>18</sup> *Id.*

<sup>19</sup> [www.sweatshopwatch.org/swatch/industry/.org](http://www.sweatshopwatch.org/swatch/industry/.org) – the garment industry; Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation.*, 103 Yale L.J. 2179, 2182-86 (May 1994) .

<sup>20</sup> First Amended Complaint, *Bureerong v. Uvawas*, No. 95-5958 (C.D. Cal., filed Oct. 25, 1995) (Collins, J.) (“Bureerong Complaint”). Patrick Lee & George White, *INS Got Tip on Sweatshop 3 Years Ago*, L.A. Times, Aug. 4, 1995 at A1.

<sup>21</sup> *Bureerong Complaint supra* note 20.

<sup>22</sup> *Id.*

famous retailers and manufacturers,<sup>23</sup> they slaved in over-crowded, unsafe conditions. Rats crawled over them as they ate, slept, worked, and lived in the factory, which was surrounded by razor wire.<sup>24</sup> They were required to purchase food and other daily necessities from their employers, who charged them four to five times the market price.<sup>25</sup> Because the workers could not make unmonitored phone calls or write uncensored letters,<sup>26</sup> no one outside the factory knew of their misery until one of the workers escaped through an air duct.<sup>27</sup>

The El Monte case presents an extreme example of the horrors of sweatshop abuse. A less egregious, perhaps more common example of a Los Angeles sweatshop is described in a 2001 suit filed against the Apex factory, which manufactured clothing for Bebe, Inc.<sup>28</sup> Immigrant workers filed claims against Apex and Bebe for unpaid minimum wage and overtime pay.<sup>29</sup> The workers typically worked 10-12 hours a day, six days a week. The manager of the factory admitted under oath that he routinely altered the piece

---

<sup>23</sup> The clothes were sold by some of the biggest retail stores in America, including Mervyn's, Miller's Outpost, Montgomery Ward, May Co., Nordstrom, Sears, and Target. Notes from interviews with attorneys representing workers, on file with author. The law firm for which I worked represented the workers as co-counsel with the Asian Pacific American Legal Center.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> After the August raid, eight operators of the sweatshop were arrested and charged with involuntary servitude, kidnapping, conspiracy, smuggling, and harboring of the workers. In February 1996, they pled guilty to criminal charges of involuntary servitude and conspiracy. Ultimately, the workers were victorious in their civil suit, and they received a sizeable settlement worth several million dollars.

<sup>27</sup> Patrick Lee & George White, *INS Got Tip on Sweatshop 3 Years Ago*, L.A. Times, Aug. 4, 1995 at A1.

<sup>28</sup> First Amended Complaint, *Zhao v. Bebe Stores, Inc., et al.*, No. CV 01-10950 (C.D. Cal.) (Fees, J.)(hereinafter "Bebe Complaint").

<sup>29</sup> *Id.*

sheets and time cards of the workers.<sup>30</sup> These alterations resulted in the workers receiving no overtime pay.<sup>31</sup> In addition, the factory managers routinely harassed and berated the workers.<sup>32</sup> When some of the workers stood up to the managers, they were terminated and blackballed from seeking further employment in the garment industry.<sup>33</sup>

It is no coincidence that many of the workers willing to toil under these horrible conditions are immigrants who lack work authorization. In a 1988 GAO report, which characterized the garment industry as a "sweatshop industry," the government attributed the proliferation of sweatshops, in part, to the utilization of a vulnerable and easily-exploited immigrant workforce.<sup>34</sup> Because undocumented immigrants with limited skills and language barriers find few appealing options, their desperation forces them to accept low-paying, grueling, entry level jobs that documented workers would shun.

At the same time, factory operators often prefer to hire undocumented immigrants because their vulnerability necessitates a tolerance for abuse that documented workers would be unwilling to withstand.<sup>35</sup> This abuse continues without repercussion in part because many unauthorized garment workers decline to file claims against their employers for fear of deportation.<sup>36</sup> Employers exploit this fear, knowing that few if any

---

<sup>30</sup> Deposition transcript of Edmund Chan, on file with the author.

<sup>31</sup> *Id.*

<sup>32</sup> Bebe Complaint, *supra* note 28.

<sup>33</sup> *Id.*

<sup>34</sup> Foo, *supra* note 19 at 2186. The GAO also indicated that lack of adequate enforcement of labor laws and inadequate penalties for violations also enabled to perpetuation of sweatshops. *Id.* These factors will be addressed later in this paper.

<sup>35</sup> *Id.*

<sup>36</sup> Their fear is certainly warranted. Upon their discovery, the El Monte workers were hardly treated with compassion. Rather, they were rounded up and placed in federal penitentiaries. Only exhaustive efforts from public interest attorneys and tremendous public outcry prevented their deportation. Notes from interviews with attorneys, on file with author.

workers would deport labor code violations. As a result, employers can lower wages, extend work hours, disregard health and safety regulations, and suppress unionizing efforts with near impunity.

#### **D. How the Garment Industry Encourages the Existence of Sweatshops**

The structure of the garment industry encourages the creation and proliferation of sweatshops. The industry is commonly described as a pyramid, with each level formed by a different step of garment production. A retailer exists at the top of the pyramid. Manufacturers, which design, sell, and supply clothes under their own labels to retailers occupy the tier immediately below.

Subcontractor factories occupy the next step of the pyramid. Most manufacturers outsource actual production to such factories, where the garments are sewn, trimmed, and pressed.<sup>37</sup> The factories are often small and may not be tied to specific sites or facilities. They may relocate often, sometimes re-opening in a new factory under a different name.

Manufacturers contract production to factories in order to shift various costs and business risks to the factories and thereby maximize profits.<sup>38</sup> For example, by outsourcing production, manufacturers can decrease overhead because they do not need to secure or maintain a factory or sewing machines. Further, they reduce labor costs because they are not required to hire or fire seamstresses, based upon their particular needs at any given moment.<sup>39</sup> And, they can attempt to shield themselves from liability

---

<sup>37</sup> Lung, *supra* note 17 at 300.

<sup>38</sup> *Id.* at 300-01.

<sup>39</sup> *Piece by piece*, *supra* note 7 at n.40

for labor code violations by claiming that they do not employ the garment workers who sew and finish their products.<sup>40</sup>

Factory managers hire and supervise the garment workers that sew and assemble the garments according to the manufacturer's specifications and timetable.<sup>41</sup> Garment workers are at the bottom of the pyramid: they are the most numerous, the least paid, and the most badly treated. Their tasks are repetitive and physically exhausting, yet require no job training or education. For these reasons, workers are considered fungible and may be hired or fired based upon the vagaries of the industry.

Most garment workers are paid according to the piecework system. Rather than an hourly wage, a pieceworker is paid for each garment he or she sews. As a result, wages vary depending upon how fast a seamstress works. Subcontractors often require seamstresses to complete work at home in order to avoid paying overtime wages required by law.<sup>42</sup>

Needless to say, profits are not distributed equally throughout the pyramid. The top layers of the pyramid enjoy the lion's share of the profits, with profit share decreasing each step down the pyramid. For example, a retailer typically enjoys a 100 percent markup on each garment. Accordingly, for a garment that costs the consumer \$100, the retailer will earn \$50, the manufacturer will earn \$30, the contractor will earn \$15, and

---

<sup>40</sup> Developments in the joint employer doctrine, explained below, may eventually curtail their ability to shield themselves from liability for labor code violations.

<sup>41</sup> Lung, *supra* note 17. at 300.

<sup>42</sup> *Id.*

the remaining \$5 will be divided among all factory workers who sewed, assembled, finished, and pressed the garment.<sup>43</sup>

In Los Angeles, over 4000 subcontractors vie for contracts.<sup>44</sup> This creates excessive competition between factories, which when combined with consolidation at the top of the pyramid, grants manufacturers the buying power to dictate the terms of their orders to factories.<sup>45</sup> If a factory cannot complete an order at the manufacturer's price, the manufacturer will simply take the order to another factory that can meet its demands.<sup>46</sup> Driven by such conditions, factories underbid their competitors and are willing to accept whatever price the manufacturer dictates in order to secure contracts. If factories cannot compete, they go out of business, and the manufacturer simply hires new factories to replace them.<sup>47</sup> To stay in business at the prices dictated by manufacturers, factory managers must force employees to work longer hours at lower wages, denying them the minimum wages and overtime payments required by law.<sup>48</sup>

Factory managers undoubtedly take comfort from the fact that they are unlikely to be prosecuted for even flagrant violations of the law. Government inspections are infrequent. For example, in California, there is only a twenty or twenty-five percent chance that any garment shop will be subjected to random inspection.<sup>49</sup>

Private lawsuits are even less common. Many workers fear termination, deportation, or unemployment and are thus hesitant to report workplace violations. The

---

<sup>43</sup> *Piece by piece*, *supra* note 7 at 160.

<sup>44</sup> Foo, *supra* note 179 at 2186.

<sup>45</sup> Lung, *supra* note 17 at 300-01.

<sup>46</sup> [www.sweatshopwatch.org/swatch/industry/.org](http://www.sweatshopwatch.org/swatch/industry/.org)

<sup>47</sup> Foo, *supra* note 19 at 2187; Lam, *supra* note 13.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

few who are prosecuted may avoid paying fines by filing bankruptcy or temporarily going out of business, only to reopen under new names and continue to abuse workers.<sup>50</sup> Under these circumstances, some factories accept the resulting small risk of prosecution as an acceptable cost of doing business.

### **E. The Unfulfilled Promise of Unionization**

For over one hundred years, unions have attempted to organize garment workers in hope of improving their working conditions and wages. For example, in the early 1900s, the ILGWU, the leading union representing workers producing women's clothing, organized a four-month strike to pressure the Triangle Shirt Company to increase wages and decrease hours. The ILGWU was able to negotiate a compromise with over three hundred manufacturers, thereby securing the power and influence of the union.<sup>51</sup> Later, the ILGWU, with assistance from the Amalgamated Clothing Workers of America ("ACWA"), unionized over two-thirds of the garment industry and negotiated a forty-four hour workweek and a fixed salary for workers.<sup>52</sup>

More recently, in 1976, the ACWA merged with the Textile Workers Union of America to form the Amalgamated Clothing and Textile Workers Union ("ACTWU"). The ACTWU merged with the ILGWU in 1995 to form the Union of Needletrades,

---

<sup>50</sup>In fact, the average life span of a garment factory is only thirteen months. *Id.*

<sup>51</sup>Holly R. Winefsky and Julie A. Tenney, *Preserving The Garment Industry Proviso: Protecting Acceptable Working Conditions Within The Apparel And Accessories Industries*, 31 Hofstra L. Rev. 587, 604 (Winter, 2000).

<sup>52</sup>*Id.* at 604-05

Industrial and Textile Employees ("UNITE").<sup>53</sup> UNITE currently represents over 250,000 garment workers in the United States, Canada, and Puerto Rico.<sup>54</sup>

Despite such progress, most garment factories are non-union.<sup>55</sup> In particular, unions and advocacy groups that have tried to organize garment workers in Los Angeles have met with limited success. As of 1998, less than ten percent of Los Angeles garment workers were members of UNITE.<sup>56</sup>

Unionization is difficult in Los Angeles because factories frequently change locations and remain dispersed throughout a large geographical area.<sup>57</sup> In addition, the large percentage of undocumented workers in Los Angeles complicates unionization. Many such workers believe that the risks of attempting unionize outweigh the benefits or likelihood of success.<sup>58</sup> They may feel desperate to keep their jobs and reject any action taken against their employer's interests because it would increase the likelihood of their termination.<sup>59</sup> Due to their undocumented status, they may also fear deportation.<sup>60</sup>

Although unions once viewed immigrants to threaten job security for American workers, organized labor has changed its view and treatment of undocumented workers.

---

<sup>53</sup> *Id.*; Laura Ho, Catherine Powell, and Leti Volpp, *(Dis)Assembling Rights Of Women Workers Along The Global Assembly Line: Human Rights And The Garment Industry*, 31 Harv. C.R.-C.L. L. Rev. 383 (Summer, 1996).

<sup>54</sup> Winefsky and Tenney, *supra* note 51; Ho, Powell, and Volpp, *supra* note 53.

<sup>55</sup> Winefsky and Tenney, *supra* note 51 at 637.

<sup>56</sup> *Piece by piece*, *supra* note 7 at 166.

<sup>57</sup> *Id.*

<sup>58</sup> Bosniak, *supra* note 6 at 993-97.

<sup>59</sup> Winefsky and Tenney, *supra* note 51 at 637-40.

<sup>60</sup> *Id.*

Most unions now advocate unity among workers, regardless of immigration status.<sup>61</sup>

Some unions have even prioritized the recruitment of undocumented workers and have hired immigrant and bilingual organizers, printed materials in the workers' native languages, and sponsored classes on citizenship and immigrants' rights.<sup>62</sup>

### III. LEGAL BACKGROUND

Undocumented workers occupy a unique position at the juncture of immigration law and labor law. As explained by Professor Linda Bosniak, on the one hand, they are not legally authorized to be present and working in the United States. On the other hand, they are protected by American labor laws and have the same rights as other workers to bargain collectively, earn minimum wage and overtime pay, and enjoy safe working conditions.<sup>63</sup>

The Supreme Court has attempted to resolve this tension in a way that prioritizes immigration concerns over labor law issues. Although the Court maintains that undocumented workers are employees with specific rights, they have denied them the remedies that make such rights meaningful. In so doing, they paint undocumented workers with the brush of illegality, nullifying legal protections due to the workers' own prior illegal conduct in crossing the border and working without permission. Yet in

---

<sup>61</sup> Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 Harv. C.R.-C.L. L. Rev. 345, 399 (Summer, 2001).

<sup>62</sup> Bosniak, *supra* note 6 at 995. Some unions have even taken special steps to protect workers from deportation. For example, some unions have introduced "INS clauses," into collective bargaining agreements that require employers to notify the union if the INS arrives at a factory so that the union can protect its members. Some contracts require employers, "to the extent permitted by law," to deny INS agents access to the factory or to worker employment records. Some contracts even require employers to reinstate employees who miss work to attend an INS proceeding and authorize unions to provide legal assistance in advance of an INS raid. *Id.*

<sup>63</sup> *Id.*

denying remedies and eviscerating statutory protections for undocumented workers, the court has undermined employment conditions for all workers.

The next section provides a brief description of select immigration and labor laws.

## **A. Relevant Statutory Schemes**

### **1. Employment Law**

#### **a. The NLRA**

Congress created the NLRA<sup>64</sup> in 1935 to curb unfair labor practices, protect workers' rights of association, and support organized unionization and the collective bargaining process.<sup>65</sup> The NLRA applies to "any employee" in the United States.<sup>66</sup> It is well-settled that under this broad statutory definition, undocumented workers are protected by the NLRA.<sup>67</sup>

The NLRA authorized the creation of the National Labor Relations Board ("NLRB" or "Board") to enforce orders against practices that violated the NLRA. While the NLRB may exercise broad discretion in creating and enforcing remedies, it is

---

<sup>64</sup> 29 U.S.C. §§ 151-69.

<sup>65</sup> 29 U.S.C. § 157; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182-85 (1941).

<sup>66</sup> 29 U.S.C. § 152(3). The full definition is as follows: "The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act (45 U.S.C. 151 et seq.), as amended from time to time, or by any other person who is not an employer as herein defined."

<sup>67</sup> See, e.g., *Sure-Tan* at 891-92.

specifically authorized to require reinstatement with backpay and to issue cease and desist orders. Each of these remedies will be briefly addressed in turn below.

Reinstatement occurs when a striking or terminated employee is allowed to return to work. Reinstatement is not an absolute right. Rather, the NLRB has the authority to assess, on a case by case basis, whether reinstatement is appropriate. Generally, reinstatement is not appropriate when termination or refusal to hire was “for cause.” Along these lines, the NLRB may deny reinstatement to an employee who engaged in illegal activity prior to or in connection with his or her unlawful termination.<sup>68</sup> For example, the Board may decline to award reinstatement to an employee who illegally entered or gained employment in the United States. The NLRB may require that an employee prove that he or she is legally entitled to work in the United States prior to reinstatement.<sup>69</sup>

An award of backpay often accompanies reinstatement.<sup>70</sup> Backpay represents wages for hours not worked due to an illegal termination. Calculation of backpay is generally based on the wages that the employeewould have earned from the time of the illegal termination until either reinstatement or the securing of alternate employment.<sup>71</sup> The NLRB may also issue a “cease and desist” order, which requires an employer to stop unlawful conduct or face contempt charges.

---

<sup>68</sup> 29 U.S.C. § 160(c).

<sup>69</sup> *A.P.R.A. Fuel Oil*, 134 F.3d at 57.

<sup>70</sup> *See, e.g.*, 29 U.S.C. § 160(c).

<sup>71</sup> *APRA Fuel Oil*, 134 F.3d at 57.

## **b. The FLSA**

Congress enacted the Fair Labor Standards Act (“FLSA”)<sup>72</sup> in 1938 to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>73</sup> The FLSA dictates minimum wages, minimum age for employment, health and safety standards, and overtime requirements.<sup>74</sup> The FLSA applies to all employees, including undocumented workers.<sup>75</sup>

Employees may file claims against employers who violate provisions of the FLSA to recover unpaid wages, backpay, liquidated damages, punitive damages, and attorney’s fees and costs.<sup>76</sup> Employers who violate the FLSA may also face criminal penalties.<sup>77</sup>

In addition to protecting employees, the FLSA aims to protect law-abiding, reputable employers who, prior to the FLSA, operated at a competitive disadvantage with sweatshops. In fact, the FLSA defines substandard labor conditions to constitute “an unfair method of competition in commerce.”<sup>78</sup>

## **B. Immigration Law**

It is well-established that the United States has the authority to forbid aliens from crossing its borders. Although no constitutional provision expressly grants Congress the power to exclude aliens from the United States, federal courts have recognized the

---

<sup>72</sup> 29 USC §§ 201-219.

<sup>73</sup> *Id.* at § 202(a).

<sup>74</sup> *Id.* at §§ 201-19.

<sup>75</sup> *See, e.g., Patel v. Quality Inn South*, 846 F.2d 700, 705 (11<sup>th</sup> Cir, 1988); *Contreras*, 25 F. Supp 2d at 1059-60.

<sup>76</sup> *See* §§ 126(a), (b)

<sup>77</sup> *Id.* at § 216(a).

<sup>78</sup> *See Bosniak, supra* note 6 at 1003-04.

implicit existence of such authority as part of Congress’s plenary power to control its borders.<sup>79</sup>

For over one hundred years, Congress has limited immigration into the United States by authorizing the Immigration and Naturalization Service (“INS”) to deny aliens permission to enter into the United States and to deport those who have entered the country without permission.<sup>80</sup> The Immigration and Nationality Act (“INA”)<sup>81</sup> addresses the terms and conditions of admission into the United States.<sup>82</sup> The INA prohibits unauthorized entry and penalizes aliens who enter the United States without permission.<sup>83</sup>

Initially, the INA did not address employment or include any provisions governing the legality or treatment of undocumented workers. This approach shifted when certain members of Congress decided that the best way to deter illegal entry was to eliminate the ability of unauthorized immigrants to seek employment after crossing the border. They believed that sanctioning employers who hired undocumented aliens would reduce the number of jobs available to them, thereby eliminating the incentive for illegal entry.<sup>84</sup>

Thus, in an effort to further curtail the illegal entry and subsequent employment of unauthorized aliens, in 1986 Congress passed sweeping legislation known as the Immigration Reform and Control Act (“IRCA”), which was incorporated as amendments

---

<sup>79</sup> Bosniak, *supra* note 6 at 967-68.

<sup>80</sup> 8 USC §§ 1225-27 (1994). This power is now exercised by the Bureau of Citizenship and Immigration Services.

<sup>81</sup> 8 U.S.C. §§ 1101-1537 (2002).

<sup>82</sup> *See, e.g., Sure-Tan*, 467 U.S. at 892.

<sup>83</sup> Bosniak, *supra* note 6 at 987

<sup>84</sup> Bosniak, *supra* note 6 at 956-57.

into the INA.<sup>85</sup> Although the IRCA allowed undocumented immigrants who had resided continuously in the country since 1982 to normalize their status through an amnesty program,<sup>86</sup> a comprehensive scheme of employer sanctions comprises the bulk of the IRCA.

For the first time in American history, Congress attempted to deter the employment of undocumented workers by punishing those who hire them.<sup>87</sup> The IRCA requires employers to seek verification of immigration or naturalization status prior to hiring employees. It also requires employers to keep records of workers' immigration status, and it imposes fines on employers who knowingly hire or recruit undocumented workers.<sup>88</sup> An employer who demonstrates a pattern and practice of hiring undocumented workers can be sentenced to a six-month prison term. The law also creates criminal penalties for immigrants who work without authorization, and it requires employers to terminate employees upon learning of their undocumented status.<sup>89</sup>

In making it illegal for employers to hire undocumented workers, Congress linked immigration law to the workplace and authorized – in fact, required -- employers to police the workplace for unauthorized aliens. Despite such provisions, Congress did not amend labor laws to diminish their scope or exclude undocumented workers from their protections.<sup>90</sup> In fact, even a cursory consideration of Congressional history reveals the opposite: Congress did not intend for the IRCA to limit employment laws or remedies in

---

<sup>85</sup> *Id.* at 1008.

<sup>86</sup> The inclusion of legalization provisions represented a political compromise after several years of heated debate. *Id.* at 1009.

<sup>87</sup> 8 U.S.C. § 1324a.

<sup>88</sup> *Id.*

<sup>89</sup> Undocumented workers that attempt to use fraudulent documents in the employment verification system are subject to fines of up to \$3000 and criminal prosecution.

<sup>90</sup> 134 F.3d at 55-56

any way. Instead, Congress remained determined to preserve protections and remedies for allworkers , regardless of status, to ensure that no incentive existed to prefer undocumented workers.<sup>91</sup> This dual purpose highlights the tension between the Congressional goal of supporting broad labor rights with the perceived need to restrict immigration.<sup>92</sup>

For a variety of reasons, the IRCA has not succeeded in deterring the employment of undocumented workers.<sup>93</sup> Professor Linda Bosniak has presented a compelling argument showing that at its core, the IRCA was ill-conceived and represents a grave misunderstanding and underestimation of the circumstances which drive immigrants to seek illegal employment in the first place. As noted by Professor Bosniak, among others, the IRCA fails to account for the social, economic and political conditions that ensure a constant flow of undocumented workers into this country.<sup>94</sup>

Moreover, in addition to failing to deter illegal immigration, the IRCA does not sufficiently deter employer misconduct because the standard for liability is too high. As a result, wrongdoers are rarely held accountable. Employers are only sanctioned if they knew their employee lacked authorization. Good faith compliance with the verification process supplies an affirmative defense that eviscerates any liability. An employer must only show the documents supplied by a prospective employee were “reasonable on their face” in order to avoid liability.<sup>95</sup> Employers know that they can hire workers presenting

---

<sup>91</sup>*Id.*

<sup>92</sup>Nessel, *supra* note 61.

<sup>93</sup> The IRCA has created a thriving market, however, for the manufacture and sale of fraudulent documents to those who have entered without permission. Foo, *supra* note 19 at 2183.

<sup>94</sup> See, e.g., Bosniak, *supra* note 6 at 1018; Nessel, *supra* note 61 at 357.

<sup>95</sup> Bosniak, *supra* note 6 at n.246.

fraudulent documentation and avoid sanctions by claiming that they held a good faith belief in the documents' authenticity.<sup>96</sup>

Sanctions are imposed far too infrequently to deter violations. The funding for federal agencies responsible for enforcing the IRCA<sup>97</sup> has been inadequate and poorly allocated.<sup>98</sup> Employers know that enforcement of the IRCA is sporadic at best, and the prospect of any penalty must be discounted by the likelihood of actually being caught and prosecuted.

For these reasons, statutory penalties are simply insufficient when compared with the benefits of hiring undocumented workers. Some employers prefer to hire undocumented workers because their rights need not be respected. Undocumented workers are increasingly vulnerable as they are subject to criminal penalties and deportation. As a result, the need to remain under the radar deters undocumented workers from complaining about their working conditions or demanding that employers respect their rights. Moreover, reliance on undocumented workers, who can be easily exploited, gives unscrupulous employers a competitive advantage. For these reasons, unscrupulous employers are often willing to pay fines as part of the costs of doing business.<sup>99</sup>

Ironically, by criminalizing the employment of unauthorized immigrants, the IRCA has made their employment more desirable. As a result, wage levels and working

---

<sup>96</sup> Foo, *supra* note 19.

<sup>97</sup> Initially, these agencies were the Immigration and Naturalization Service (INS) and the Department of Labor (DOL). Recently, the INS was supplanted by the Bureau of Customs and Border Protection.

<sup>98</sup> See Bosniak, *supra* note 6 at 1013.

<sup>99</sup> *Id.*

conditions within the garment industry have diminished as workers become more vulnerable to employer abuse.<sup>100</sup>

The next section will explain how recent case law nullifies statutory labor rights for undocumented workers by depriving them of remedies for legal violations.

### **C. Pertinent Case law**

Recent decisions have injected the IRCA into labor law adjudication. In recognizing that undocumented workers are “employees” under labor law statutes, the Supreme Court has acknowledged that labor laws were intended to protect undocumented workers. Yet in denying remedies to undocumented workers, the Court has nullified any protection Congress offered them. These decisions ultimately will undermine labor conditions for all workers, regardless of their immigration status.

The next section will assess recent federal cases, starting with the 1984 Supreme Court decision in *Sure-Tan, Inc. v. NLRB*,<sup>101</sup> to reveal how the Court’s decision to prioritize immigration law over labor law undermines the policy goals of the IRCA, the NLRA, and the FLSA.

#### **1. Sure-Tan**

In 1984, the Supreme Court decided *Sure-Tan, Inc. v. NLRB*, thus beginning the Court’s pattern of curtailing employment rights in an attempt to serve immigration goals.<sup>102</sup> Sure-Tan had violated the NLRA by asking the INS to investigate workers’

---

<sup>100</sup> David Bacon, *The Political Economy Of Undocumented Immigration In The U.S.*, available at [www.sweatshopwatch.org/swatch/industry/.org](http://www.sweatshopwatch.org/swatch/industry/.org).

<sup>101</sup> 467 U.S. 883 (1984).

<sup>102</sup> *Id.*

immigration statuses after they had voted in favor unionization.<sup>103</sup> Upon discovering that the employees had entered the United States illegally, the INS apprehended them and immediately placed them on a bus bound for Mexico.<sup>104</sup>

The union filed a claim with the NLRB, indicating that Sure-Tan had violated the NLRA by reporting the employees to the INS solely because they supported unionization.<sup>105</sup> The NLRB resolved the claim in favor of the union and issued an order requiring reinstatement. It also ordered Sure-Tan to cease and desist violating the NLRA.<sup>106</sup> The Board deferred determination of backpay for a subsequent compliance hearing.<sup>107</sup>

Sure-Tan appealed the order to the Seventh Circuit, which modified the NLRB order.<sup>108</sup> Noting that the former employees were already in Mexico, the Seventh Circuit required reinstatement “only if the discriminatees [were] legally present and legally free to be employed in this country when they offer[ed] themselves for reinstatement.”<sup>109</sup> The court further stated that because backpay awards traditionally were tolled for any period during which the employee was unavailable for work, the employees would be denied backpay for any period during which they were not lawfully present and entitled to work in the United States.<sup>110</sup> Noting that tolling could eviscerate any backpay award or

---

<sup>103</sup> *Id.* at 887.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 887-88.

<sup>106</sup> *Id.* at 888-89.

<sup>107</sup> 246 N.L.R.B. 788 (1979).

<sup>108</sup> *NLRB v. Sure-Tan*, 672 F.2d 592, 603-06 (7<sup>th</sup> Cir. 1982).

<sup>109</sup> *Id.* at 606.

<sup>110</sup> *Id.*, citing *NLRB v. Hickory’s Best, Inc.*, 267 NLRB 1274, 1277 (1983)(employees are unavailable for work and therefore not entitled to backpay when they are out of the country.)

remedy, however, the court adopted a conjectural, six-month period, based upon which it awarded backpay.<sup>111</sup>

On appeal, the Supreme Court acknowledged that undocumented workers qualify as employees and were therefore protected by the NLRA.<sup>112</sup> It also recognized that extending NLRA coverage to undocumented workers was consistent with the Act’s goal of protecting the collective-bargaining process.<sup>113</sup> The Court reasoned that because the INA evidenced only a peripheral concern with the employment of undocumented workers, applying the NLRA to undocumented workers would not conflict with the INA.<sup>114</sup> In complete contrast to its later analysis in *Hoffman Plastics*, the Court acknowledged that applying the NLRA to undocumented workers would serve immigration policy by diminishing any incentive to hire them, thereby reducing the pull for aliens to enter the country illegally in search of employment.<sup>115</sup>

Nonetheless, while the Court agreed with the Seventh Circuit that the receipt of backpay and reinstatement must be conditioned upon the immigrants’ lawful re-entry, it flatly rejected the adoption of a conjectural six-month period because it was not narrowly tailored to the “actual, compensable injury suffered by the discharged employees.”<sup>116</sup> The Court acknowledged that its ruling could nullify the remedies available under the NLRA, but it stated that a solution must be sought in Congress rather than in the courts.<sup>117</sup> In sum, the Court in *Sure-Tan* recognized important immigration and labor

---

<sup>111</sup> *Id.*

<sup>112</sup> 467 U.S. at 891-92.

<sup>113</sup> *Id.* at 892.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 894.

<sup>116</sup> 467 U.S. at 900-01.

<sup>117</sup> *Id.* at 903-05.

policy reasons for protecting undocumented workers under the NLRA. At the same time, it declined to award backpay or reinstatement to workers who had been deported because doing so would have encouraged illegal re-entry into the United States.

Notably, the IRCA did not exist at the time the Supreme Court decided *Sure-Tan*. Instead, the Court interpreted the INA, a statutory scheme that addressed the terms and conditions under which immigrants could enter the United States, but that did not separately address whether or not immigrants without documents could seek employment.<sup>118</sup> Subsequent decisions by the lower courts reveal that *Sure-Tan* did not provide much clarity regarding what remedies were available to undocumented workers, particularly after the passage of the IRCA.

## **2. Post *Sure-Tan* Confusion**

### **a. Pre-IRCA: *Felbro***

Two years after *Sure-Tan* and several years before the passage of the IRCA, the Ninth Circuit decided *Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro)*.<sup>119</sup> The circuit court interpreted *Sure-Tan*'s denial of remedies to turn on whether the worker had already left the country, thereby requiring illegal re-entry to receive backpay. It held that because the employee in the case before them had not yet left the United States, he was entitled to receive backpay, despite his undocumented status. The court emphasized that a denial of backpay for employees who had not departed the country was inconsistent with the NLRA. It further noted that nothing in

---

<sup>118</sup> *Sure-Tan*, 467 U.S. at 892.

<sup>119</sup> 795 F.2d 705 (9<sup>th</sup> Cir. 1986).

*Sure-Tan* indicated that the Court was overruling a well-established line of precedent disregarding an employee’s legal status in awarding backpay.<sup>120</sup>

**b. Post - IRCA Divergence**

Despite intervening passage of the IRCA, in 1997, the Second Circuit adopted a similar approach in *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*<sup>121</sup> An employer knowingly hired undocumented workers, but it terminated them in violation of the NLRA after they signed union authorization cards.<sup>122</sup> The NLRB awarded backpay and ordered the employer to reinstate the employees, provided the employees could demonstrate legal authorization to work.<sup>123</sup>

On appeal, the Second Circuit upheld the Board’s order, emphasizing that the most effective way to further the immigration policies of the IRCA was to provide the protections and remedies of the NLRA to both documented and undocumented workers.<sup>124</sup> Otherwise, the court noted, unscrupulous employers would have an incentive to “play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity.”<sup>125</sup> The court distinguished *Sure-Tan* by noting that the employees at issue had not left the country prior to the award.<sup>126</sup>

---

<sup>120</sup> *Id.* at 717, 722. Cases decided after passage of the IRCA continued to award backpay to undocumented workers who had not left the country after illegal termination. *See, e.g., NLRB v. Kolkka*, 170 F.3d 937 (9<sup>th</sup> Cir. 1999).

<sup>121</sup> 134 F.3d 50 (2d Cir., 1997).

<sup>122</sup> *Id.* at 52.

<sup>123</sup> *Id.* at 53.

<sup>124</sup> *Id.* at 55-57, 59.

<sup>125</sup> *Id.* at 56-57.

<sup>126</sup> *Id.* at 55.

In *Del Rey Tortilleria, Inc., v. NLRB*,<sup>127</sup> however, the Seventh Circuit adopted a completely different approach, interpreting *Sure-Tan* to preclude backpay for any period during which an employee lacked work authorization. Del Rey Tortilleria had terminated two employees for exercising their union rights. The union filed a claim with the NLRB, and the Board awarded backpay and ordered reinstatement.<sup>128</sup>

On appeal, however, the Seventh Circuit held that an employee who lacked work authorization was unavailable for work and therefore not entitled to backpay.<sup>129</sup> It further stated that an undocumented worker could not be cognizably harmed by termination unless the employee was legally entitled to work in the United States.<sup>130</sup>

### **3. Hoffman Plastics**

In *Hoffman Plastics*, the Supreme Court clarified that undocumented workers were not entitled to backpay after being terminated in violation of the NLRA. In so doing, the Court adopted a line of reasoning that directly conflicted with the articulated policy reasons underlying its decision in *Sure-Tan*.

Hoffman Plastics hired Jose Castro to work at its factory after reviewing fraudulent documents indicating that Castro was lawfully entitled to work in the United States.<sup>131</sup> It terminated Castro several months later because of his involvement in a union organizing campaign.<sup>132</sup> Castro filed a claim against Hoffman Plastics with the NLRB .

---

<sup>127</sup> 976 F.2d 1115 (7<sup>th</sup> Cir. 1992).

<sup>128</sup> *Id.* at 1117.

<sup>129</sup> *Id.* at 1120.

<sup>130</sup> *Id.* at 1119.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

Unaware that Castro lacked work authorization, the NLRB ordered Hoffman Plastics to reinstate Castro and award him backpay.<sup>133</sup>

At a subsequent compliance hearing before an administrative judge, Castro admitted that he had supplied a friend's birth certificate in order to secure employment and that he was not authorized to be present or to work in the United States.<sup>134</sup> Based on these admissions, the ALJ denied Castro reinstatement and backpay.<sup>135</sup>

On appeal, the NLRB reversed the ALJ's decision and awarded Castro backpay from the time of illegal termination until the time when Hoffman Plastics learned of his undocumented status.<sup>136</sup> The NLRB emphasized that the most effective way to further the immigration policies embodied in the IRCA was not to differentiate between documented and undocumented workers in providing remedies for NLRA violations.<sup>137</sup>

Hoffman Plastics filed a petition for review with the United States Court of Appeals for the Circuit of Columbia, but both the original panel and a subsequent *en banc* panel rejected Hoffman Plastic's argument that undocumented workers were prohibited from receiving backpay, regardless of whether they had left the country after termination.<sup>138</sup>

The Supreme Court granted certiorari. In a 5-4 decision, Judge Rehnquist authored an Opinion reversing the D.C. Circuit's decision and holding that the IRCA precluded awarding backpay to an undocumented alien. In finding that undocumented workers could not recover backpay, regardless of whether they had left the country, the

---

<sup>133</sup> *Id.* at 140-41.

<sup>134</sup> *Id.* at 141.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*; 237 F.2d 639 (2001).

Supreme Court extended the holding of *Sure-Tan* and effectively overruled less expansive interpretations of the IRCA as exemplified by the *Felbro* and *A.P.R.A.* decisions.

The Court noted that when it decided *Sure-Tan*, immigration law had expressed only a “peripheral concern” with the employment of undocumented workers and did not criminalize employment after illegal entry.<sup>139</sup> The IRCA altered the statutory landscape by explicitly prohibiting the employment of undocumented workers, requiring employers to discharge workers upon discovery of their undocumented status, and enacting criminal penalties for those who relied upon fraudulent documents to gain employment.<sup>140</sup>

The Court noted that it had consistently set aside attempts to award reinstatement or backpay to employees “found guilty of serious illegal conduct in connection with their employment.”<sup>141</sup> The Court stated that allowing the NLRB to award backpay to illegal aliens would trivialize immigration violations and undermine federal immigration policy. Further, any mitigation of damages would require Castro to further violate the IRCA by seeking illegal employment.<sup>142</sup> Therefore, the Court concluded that the NLRB lacked the authority to award the remedy of backpay.<sup>143</sup> The Court added that the NLRB was not without remedies, as it could still issue a cease and desist order under which Hoffman Plastics could be cited for contempt for failure to comply.<sup>144</sup>

Justice Breyer authored a dissenting opinion, which was joined by Justices Stevens, Souter, and Ginsburg. He countered that that all relevant federal agencies,

---

<sup>139</sup> *Id.* at 144-45

<sup>140</sup> *Id.* at 146-48.

<sup>141</sup> 535 U.S. at 142-43.

<sup>142</sup> *Id.* at 150-51.

<sup>143</sup> *Id.* at 149-50.

<sup>144</sup> *Id.* at 152.

including the Department of Justice, had indicated that awarding backpay to an undocumented worker would not undermine immigration policy. Justice Breyer emphasized that the Court's opinion would allow unscrupulous employers to violate the NLRA at least once with impunity.<sup>145</sup> Moreover, Justice Breyer noted that the Court's ruling would do little to deter illegal immigration, and that perversely, it could encourage employers to hire undocumented workers.<sup>146</sup>

#### **IV. WHY HOFFMAN PLASTICS IS WRONG, WHAT IT WILL CHANGE, HOW IT CAN BE FIXED**

##### **A. Why Hoffman Plastics Was Wrongly-Decided**

Regardless of how one feels about the unauthorized entry of aliens, the decision in *Hoffman Plastics* is problematic because it is likely to undermine the policies it professes to support. As explained at length below, *Hoffman Plastics* will encourage unscrupulous employers to hire undocumented workers, thereby creating more opportunities and encouraging further illegal immigration.

This perverse result would perhaps be less troubling if the opinion in *Hoffman Plastics* was dictated by relevant statutes, congressional history, or Supreme Court precedent. Yet, the outcome in *Hoffman Plastics* was not pre-ordained, and the reasoning utilized by the majority is by no means self-evident. Indeed, the D.C. Circuit, hardly the most liberal court in the nation, came to exactly the opposite holding.

The Court's decision is somewhat logical, if overly technical and divorced from contextual realities. If an employee is not authorized to work in the United States, he or

---

<sup>145</sup> *Id.* at 153-54 (Breyer, J., dissenting).

<sup>146</sup> *Id.* at 155-56.

she technically cannot be considered available for work. If he or she technically is not available for work, then he or she cannot receive backpay.

Nonetheless, in applying the above reasoning, the Court unnecessarily injected the goals of immigration law into a statutory scheme designed to remedy labor code violations. Although the Court emphasized that the NLRB could not enforce the NLRA to the IRCA's detriment, it authorized the converse. The NLRB is now required by the Court to enforce immigration law – which it clearly is not qualified or statutorily authorized to do.

This decision to favor the IRCA over the NLRA was not supported by general principles of statutory construction or interpretation. The Court essentially inferred a decision by Congress to amend the NLRA to preclude the award of remedies to undocumented workers. Although a tension in federal policies exists insofar as Congress seeks to both protect worker rights and deter the employment of undocumented workers, nothing in the IRCA implicitly or explicitly amended or repealed the NLRA or any other labor law.<sup>147</sup> Under basic principles of statutory interpretation, amendments by implication are disfavored. Only when Congressional intent is clear should a later act amend or repeal provisions of an earlier act.<sup>148</sup>

Moreover, Congressional history reveals that in passing the IRCA and making the employment of undocumented workers illegal, Congress specifically intended not to limit the NLRA. Instead, Congress emphasized that the continued protection of undocumented workers under the NLRA was fully consistent with the goals of the IRCA. It also recognized that the wages and employment conditions of lawful residents would be

---

<sup>147</sup> *Id.* at 646.

<sup>148</sup> 846 F.2d at 704.

adversely affected if undocumented workers provided job competition but were not subject to the same terms of employment.<sup>149</sup>

Furthermore, the House Judiciary Committee Report provided:

[N]o provision of the IRCA should be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope for the term “employee” in Section 2(3) of the NLRA, as amended, or the rights and protections [therein].<sup>150</sup>

And, the House Education and Labor Committee Report had stated that no provision of the IRCA should limit the powers of state or federal labor standards agencies, such as the NLRB, to remedy unfair practices committed against undocumented workers, because to do so would undermine efforts to limit the hiring of undocumented employees.<sup>151</sup>

Based upon the above, the NLRB’s decision to award backpay reconciled the goals of employment and immigration law in a way that complied with Congressional intent and statutory language. Because its reconciliation of competing statutory schemes was reasonable, the NLRB’s decision to award backpay was entitled to deference and should have been affirmed.<sup>152</sup>

---

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *See, e.g., NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9<sup>th</sup> Cir. 1994)(reasonable interpretations of other statutes by agency are entitled to deference).

## **B. What *Hoffman Plastics* Will -- and Will Not -- Change**

### **1. The One Free Pass Problem**

Just like the IRCA that it aims to support, *Hoffman Plastics* is unlikely to deter or even affect illegal immigration.<sup>153</sup> Individuals fleeing desperate economic conditions in their countries of origin are not likely to factor American employment laws into their decision to migrate. Nor are they are likely to ponder the consequences of illegal termination should they attempt to unionize prior to seeking employment.

Along these lines, labor laws do not create incentives– rather, it is the jobs themselves that encourage illegal immigration.<sup>154</sup> *Hoffman Plastics* will do nothing to diminish employment opportunities for undocumented workers. In fact, the opposite is true: unscrupulous employers who do not wish to comply with labor laws have an incentive to hire undocumented workers. They can employ undocumented workers, violate their rights, and terminate them – or report them to the INS in retaliation<sup>155</sup> – if they complain or seek to unionize.

Although this is illegal, an undocumented worker has no remedy should it occur. Removing the ability to award reinstatement or backpay leaves the NLRB with almost nothing in its remedial arsenal where undocumented workers are concerned. The only remaining remedy is the issuance of a cease and desist order. Under a cease and desist order, an employer is ordered not to violate certain statutory provisions. If the employer

---

<sup>153</sup> Lung, *supra* note 17 at 308.

<sup>154</sup> 846 F.2d at 704-05.

<sup>155</sup> The risk of deportation is enhanced by *Hoffman Plastics* to the extent that the decision makes the employee's immigration status relevant and discoverable. As a result, *Hoffman Plastics* will simply further marginalize undocumented workers and place them outside the scope of legal protections to which they have a statutory right.

violates the order, he or she is subject to sanctions and contempt. As such, a cease and desist order is forward-looking; it does not address or remedy past violations.

In practice, this will amount to “one free pass.” Employers can violate the labor law where undocumented workers are concerned until the Board rules against them and issues a cease and desist order. Upon that ruling, there still will be no meaningful sanctions issued. Instead, the Board will simply instruct the employer not to violate the law in the future or face contempt, assuming anyone bothers to report subsequent violations to the court.

The one free pass problem is particularly troubling in the context of the garment industry, where factories close and re-open under new names with frequency. Unscrupulous factory owners could simply close upon the issuance of a cease and desist order, terminate all workers, and re-open under a new name in a new facility with no cease and desist order hanging over its head. Theoretically, this cycle could continue indefinitely, particularly given the unlikelihood that any employer will be prosecuted for labor code violations in the first place.

Furthermore, in nullifying remedies, the Court has undermined any incentive on the part of undocumented workers to report NLRA violations in the first place. A credible fear of deportation or termination creates a formidable deterrent for undocumented workers under any circumstances. When undocumented workers learn that employers will face no consequences, it is even less likely that they will report violations. The combined effect is that undocumented workers who attempt to unionize or report violations face deportation, but their law-violating employers will get off with a slap on the wrist.

## 2. Attempts to Unionize Will Be Undermined For All Workers

Based on the above, *Hoffman Plastics* provides employers with a mechanism for thwarting union organizing with mass firings and relative impunity. The decision, which was purportedly aimed at making undocumented labor less common, will instead result in increased exploitation as undocumented labor becomes less expensive to employ.

The detrimental effects of *Hoffman Plastics* will not be limited to undocumented workers. Instead, the ruling effectively jeopardizes working conditions for legal employees by encouraging the existence of an underground economy, in which undocumented workers compete for jobs with documented workers. Documented workers compete at a disadvantage because they are more expensive to employ, given that they can unionize and their labor rights must be respected.

Furthermore, the legal distinction between documented and undocumented workers will hinder attempts by workers to organize and engage in collective bargaining, thereby threatening the rights of all workers. For unionization and collective bargaining to be effective, employees must be able to band together to demand better working conditions. Any action that divides and conquers by creating legal distinctions undermines such efforts.

By deterring unionization of undocumented workers, *Hoffman Plastics* has eroded unity and damaged workers' ability to effectively organize.<sup>156</sup> Any lack of participation by undocumented workers in the collective bargaining process will have a negative effect for all workers. Employers who do not want a unionized factory are more likely to hire

---

<sup>156</sup> See, e.g., *Sure-Tan*, 467 U.S. at 891-92 (undocumented workers must qualify as employees under the Act based upon statutory definition of "employee").

undocumented workers, who are less likely to unionize. If undocumented employees do attempt to unionize, employers can simply fire them, knowing that they will not be forced to pay backpay or any other penalty.<sup>157</sup>

In the garment industry, attempts to quash unionization by hiring undocumented workers are easily foreseeable. The subcontracting system already enables evasion of unionization. Manufacturers generally contract with small, mobile, nonunion factories that are difficult for union organizers to locate or monitor.<sup>158</sup> Individual employees are less likely to organize among themselves without outside union representatives, given that they could lose their jobs without repercussions for the employer.

The absence of unionization will likely enable further deterioration of working conditions in many factories, particularly in the garment industry, where skirting labor codes may be a prerequisite to profitability. Unions have been effective in ensuring that garment factories comply with basic labor codes.<sup>159</sup> Without the help of unions, it will be more difficult for factory workers to secure minimum wages, overtime, or safe working conditions.<sup>160</sup>

The absence of unions also will make it more difficult for undocumented workers to report and prosecute labor code violations. There are many benefits to pursuing

---

<sup>157</sup> 237 F.2d at 647.

<sup>158</sup> Lam, *supra* note 13 at 637-38.

<sup>159</sup> In recent years, wages have declined in all but unionized factories. For example, ACTWU, UNITE, and ILGWU have issued codes of conducts that protect the right of free association and require strict compliance with labor laws regulating safety, hours, wages. Factories are monitored periodically to ensure compliance. See Winefsky and Tenney, *supra* note 52; Ho, Powell, and Volpp, *supra* note 53 at 637.

<sup>160</sup> Sean A. Andrade, *Biting the Hand that Feeds You: How Federal Law has Permitted Employers to Violate the Basic Rights of Farmworkers and how this has Begun to Impact Other Industries*, 4 U. Pa. J. Lab. & Emp. L. 601, 606-09.

grievances through the union. Workers may participate in a grievance-arbitration procedure at no cost. Union assistance helps the employee to overcome an unequal balance of power, resources, and experience.<sup>161</sup> Union members may be provided with the assistance of a union representative or lawyer, who will conduct discovery on the member's behalf. Arbitration is relatively prompt and arbitrators enjoy broad discretion in crafting appropriate remedies.<sup>162</sup> This avenue is foreclosed to those who effectively are unable to form or join unions for fear of termination without recourse.

### **3. Expansion of Hoffman Plastics Could Further Eviscerate Employment Protections**

Provisions for backpay are included in the NLRA, the FLSA, and Title VII. Even if the courts continue to recognize that undocumented workers are, by definition, employees under protective employment statutes, *Hoffman Plastics* creates precedent for denying undocumented workers the remedy of backpay that is traditionally available for the violation of these statutes. Efforts to deny undocumented workers remedies for various labor code violations have been occurring ever since *Sun-Tan*.<sup>163</sup> Recently,

---

<sup>161</sup> Clyde Summers, *Effective Remedies For Employment Rights: Preliminary Guidelines And Proposals*, 141 U. Pa. L. Rev. 457.

<sup>162</sup> *Id.* at 523-24; 527. The availability of the union grievance procedure is, by no means, a panacea. The process may be highly politicized, and many arbitrators are perceived to hold pro-employer leanings. The employee loses control of his case, and an employee with a less than stellar case may find his case dismissed without hearing, as occurs in two-thirds of cases. Nonetheless, union grievance and arbitration procedures provide employees with another option for seeking redress. *Id.* at 475-77.

<sup>163</sup> For example, in *Egbuna v. Time Life Libraries*, 153 F.3d 184 (4<sup>th</sup> Cir. 1998), the plaintiff, an undocumented worker, claimed that his former employer had violated Title VII of the Civil Rights Act of 1994, 42 U.S.C. 2000e-3, by refusing to rehire him in retaliation for his participation in another employee's discrimination suit. 153 F.3d at 185. The court held that the plaintiff could not demonstrate he was a victim of discrimination because he did not possess documentation authorizing him to work in the United States. It further held that due to the IRCA, the plaintiff was not entitled to the

defendants have once again attempted to expand *Hoffman Plastics* to areas unrelated to the NLRA.<sup>164</sup>

Moreover, under *Hoffman Plastics*, a court could affirmatively require any employee to prove his immigration status before he is entitled to reinstatement or backpay.<sup>165</sup> Any employee who does not seek reinstatement and backpay in his or her complaint will effectively admit that he or she lacks documentation. This Catch-22 could further deter undocumented workers from pursuing claims against their employers for NLRA, FLSA or Title VII violations.

### **C. How It Can Be Fixed**

The sections above have demonstrated that the intersection of labor and employment laws have resulted in confusion due to seemingly inconsistent goals. On the one hand, Congress aims to protect the rights of all workers, regardless of immigration status. On the other hand, Congress seeks to deter the employment of undocumented workers. The Supreme Court has attempted to reconcile these conflicting policy goals in a way that leaves employment rights without remedies, and allows if not encourages employers to violate the rights of undocumented workers with impunity.

The section above also explains how in *Hoffman Plastics*, the Court ignored Congressional history to find that although undocumented workers are employees under the NLRA, they nonetheless can be allowed no meaningful remedy should employers

---

remedy of backpay or reinstatement unless he could prove that he was authorized to work in the United States at the time of the employer's refusal to rehire him.

<sup>164</sup> For example, in *De La Rosa v. Northern Harvest Furniture*, 210 F.R.D. 237 (2002), defendants argued that they were entitled to discovery of documents relating to plaintiffs' immigration status because the plaintiffs had filed claims alleging that defendants had violated Title VII and the FLSA.

<sup>165</sup> Summers, *supra* note 160.

violate their rights. It may appear that a simple solution to this predicament could be provided if Congress were to amend the NLRA to explicitly provide its protections to all workers, regardless of immigration status. This would effectively overrule the result in *Hoffman Plastics*.

Yet, although such an action would benefit employees, it ultimately would be insufficient. A review of *Hoffman Plastics* ultimately begs the question of whether backpay provides a sufficient penalty to any employee, regardless of documentation status. The next section explains that even if undocumented workers were to receive backpay, such a remedy still would be insufficient to deter employer wrongdoing, particularly when employers have a lot to lose with unionization. As a result, more extensive action by Congress is required in order to ensure that workers are protected from labor code violations.

This paper recommends that Congress specifically amend the NLRA to include employer penalties sufficient to deter violations of the Act. It further recommends steps to ensure that wrongdoers are caught and prosecuted. Specifically, this paper suggests that additional resources should be allocated to NLRA enforcement, and that undocumented whistleblowers with valid claims should receive amnesty or deferred action status. Alternatively, Congress should preclude from deportation hearings the introduction of evidence gathered through labor law disputes. Such steps would encourage undocumented workers to file complaints regarding employer wrongdoing by removing the threat of consequential deportation.

## 1. Congress Must Increase NLRA Penalties

The NLRA authorizes remedial orders but does not authorize the Board to “punish” wrongdoers. This limitation leaves the Board with little enforcement authority, regardless of whether the employee is authorized to work in the United States. The situation is, of course, much worse when an undocumented worker’s rights have been violated, given that he or she cannot receive backpay or reinstatement.

Yet, even an award of backpay does not sufficiently deter misconduct. An award of backpay restores “the situation, as nearly as possible, to that which would have obtained, but for the illegal discrimination.”<sup>166</sup> The goal of backpay is to make the employee whole, not to punish the employer.<sup>167</sup> Employees are required to seek other work while they pursue their claim, and any amount earned after illegal termination is off-set against the amount an employer is obliged to pay. This mitigation requirement, when combined with the unlikelihood of being caught and prosecuted, further undermines any deterrence.<sup>168</sup>

Similarly, reinstatement is not an effective deterrent. Employees are required to mitigate by seeking other employment; those who have successfully secured alternate employment often are not interested in the remedy. Even those without alternate employment may hesitate to return to a hostile employer that illegally fired them for fear of further retaliation.<sup>169</sup> In fact, NLRB statistics reveal that of 16,000 employees, less than a quarter are reinstated.<sup>170</sup>

---

<sup>166</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

<sup>167</sup> H.R. Rep. No. 637, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 30 (1977).

<sup>168</sup> *Id.* at 1790.

<sup>169</sup> *Id.* at 1791-92.

<sup>170</sup> Summers, *supra* note 160 at 478.

Finally, cease and desist orders simply tell the employer not to violate the law; they do nothing to penalize the employer, even for egregious misconduct. Nor do they deter misconduct due to the one free pass problem.

In short, there is every reason for shops seeking to avoid unionization to risk NLRA penalties in order to disrupt a campaign's momentum. By the time employees terminated for favoring unionization are reinstated, organizing momentum is lost, and unionization often has been defeated.<sup>171</sup> Current remedies do nothing to dissuade employers from terminating employees seeking to unionize, and paying the paltry penalties under the Act – assuming they are ever prosecuted. Thus, while it is necessary for undocumented workers to receive the same remedies as documented workers, current remedies provided are simply insufficient to serve their intended purposes.

Although the purported goal of NLRA remedies is not the punishment of employers, it is unclear why employers should not be penalized for illegal acts. The current remedies under the NLRA do not sufficiently focus on the wrongdoing of the employer. Any remedy should contain a level of penalty sufficient to deter employer wrongdoing, even when the likelihood of prosecution is factored into the calculus. Deterring wrongdoing in the first place will also prevent unscrupulous employers from gaining an unfair advantage over law-abiding competitors .

Some unions have recognized the insufficiency of current remedies and have proposed alternatives, particularly where undocumented workers are concerned. For example, because a nominal backpay award has not sufficiently deterred unlawful conduct, the ILGWU has proposed that damages be calculated based upon actual rather

---

<sup>171</sup> Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1788-89 (June, 1983).

than legal availability. The ILGWU would shift the burden of immigration status to the employer as an affirmative defense. If the employer raises immigration status, the ILGWU recommends that the NLRB provide alternate remedies, such as backpay up to the time when the employer establishes that the employee would have been terminated for nondiscriminatory reasons.<sup>172</sup>

This proposal is interesting, yet ultimately, it does not go far enough to deter misconduct. It still relies upon backpay to provide the gauge of damages, which is insufficient even when the worker can collect it. The proposal still allows the workers' immigration statuses to remain relevant and subject to discovery. Furthermore, it is not realistic to assess backpay based upon the likelihood of a legitimate termination; in theory, a worker could collect backpay for the rest of his or her working life.

A better approach would create meaningful remedies where the workers' status is simply irrelevant. If Congress were to create additional, effective remedies sufficient to punish employers found guilty of wrongdoing, the perceived IRCA problem presented by reliance upon backpay – and the resulting inquiry into immigration status – could be avoided. Employees harmed by an employer's illegal, tortious conduct would be entitled to damages, regardless of immigration status.

In general, the theory underlying a claim provides guidance for what type of remedy is available.<sup>173</sup> If a claim is based upon a contract theory, a successful plaintiff generally is entitled to compensatory and consequential damages. A plaintiff whose claim sounds in tort law, however, often is entitled to significantly greater damages, including punitive damages in certain cases. Wrongful termination claims generally

---

<sup>172</sup> Nessel, *supra* note 61 at 369

<sup>173</sup> Summers, *supra* note 160 at 462.

sound in tort law. Notably, undocumented aliens are permitted to recover tort damages for wrongful termination.<sup>174</sup>

This paper suggests that the NLRB should be authorized to award statutory damages similar to those allowed for violations of the FLSA. The FLSA authorizes statutory damages of up to \$10,000 per violation.<sup>175</sup> It also allows a successful claimant to recovery liquidated damages, as well as attorney fees and costs. There is no reason why a claimant under the NLRA should not be eligible for similar damages.

This paper further recommends that the NLRA be amended to allow the award of punitive damages. Given that undocumented aliens are entitled to sue for tort damages,<sup>176</sup> there is no policy reason why tort remedies couldn't be effectively incorporated into labor codes such as the NLRA. Such penalties would be more likely sufficient to deter wrongdoing. Punitive damages would be particularly appropriate in cases where the employer conduct is egregious, or where the employer is a chronic violator. In the context of the garment industry, punitive damages could drive domestic sweatshops out of business. This could reduce the number of unscrupulous subcontractors willing to perpetuate sweatshop conditions. Reputable businesses would no longer be forced to compete at a disadvantage. Manufacturers would be forced to absorb the cost of legally compliant production.

Such a proposal assumes that the codes will actually be enforced. As it stands, however, the likelihood that a sweatshop will be caught and prosecuted for labor code

---

<sup>174</sup> Bosniak, *supra* note 6.

<sup>175</sup> 29 U.S.C. 216.

<sup>176</sup> Bosniak, *supra* note 6.

violations is relatively small.<sup>177</sup> The next section explores some measures that could better ensure that wrongdoers will be caught and prosecuted, thereby resulting in effective deterrence.

## **2. Effective Deterrence Requires a Greater Likelihood of Prosecution**

There are at least two ways to ensure that wrongdoers are more likely brought to justice. One way would be to increase government enforcement. Currently, sweatshop operators know that there is very little chance that they will be caught or prosecuted. The DOL is dramatically understaffed. Due to the dearth of investigators, there is only a twenty percent chance that the DOL will catch a violator.<sup>178</sup> Once the violator is caught, the DOL rarely follows up to ensure that sweatshops comply with labor laws. This failure results in repeat violations for at least one out of three violators. An obvious step would be to increase resources to the DOL so that they can investigate and prosecute sweatshops. Yet, due to politics and government budget cuts, this is unlikely to occur.<sup>179</sup>

A better approach would be to encourage workers to file private complaints against sweatshop employers. Currently, although employees may sue their employers directly, they rarely do so. Many employees do not know their rights. This is a circumstance that education through unionization could improve. Yet, even employees who know their rights may hesitate to file claims because they are afraid of losing their jobs without recourse. Ensuring that labor codes provide remedies for all employees would help solve this problem.

---

<sup>177</sup> See, e.g., Summers, *supra* note 160 at 463-64.

<sup>178</sup> *Id.* at 495.

<sup>179</sup> *Id.*

Of course, undocumented workers risk deportation as well as termination in filing lawsuits.<sup>180</sup> Although in theory, employers are forbidden from reporting employees to the INS in retaliation for exercising collective bargaining rights, this paper has already described how the absence of effective remedies makes such protection meaningless, particularly if the INS is able to act on unlawful tips.<sup>181</sup> There is little to stop the INS from introducing evidence in deportation proceedings obtained due to the employer's breach of the NLRA.<sup>182</sup>

Undocumented workers therefore need better protection. One approach could be to protect discovery of immigration status, to the extent it remains relevant, with a court order. Another option would be to provide amnesty or deferred action status to whistleblowers. The INS could exercise its discretion to provide temporary work authorization to undocumented workers who have filed credible claims of workplace violations.<sup>183</sup> Such steps would help law enforcement officials pursue actions against sweatshops, since prosecutors would depend upon the testimony of the workers.<sup>184</sup>

Alternatively, as suggested by Professor Lori Nessel, Congress could adopt a rule for deportation proceedings suppressing the use of evidence obtained through the violation of the NLRA. This would be similar to the "fruit of the poison tree" exclusion

---

<sup>180</sup> This fear would be particularly legitimate if their immigration status is relevant in employment claims. As described above, a shift to a tort-based remedy would make the employee's immigration status irrelevant.

<sup>181</sup> Nessel, *supra* note 61 at 379.

<sup>182</sup> *See, e.g., Montero v. INS*, 124 F.3d 381 (2d. Cir., 1997) (INA allows deportation of aliens based upon information provided to INS by employer trying to quash union activities).

<sup>183</sup> Nessel, *supra* note 61 at 386-87.

<sup>184</sup> *Id.*

relied on in Fourth Amendment jurisprudence.<sup>185</sup> The INS would be prohibited from relying on information provided in violation of the NLRA or other labor codes.<sup>186</sup>

### **3. Increase manufacturer liability**

The above steps will increase the odds that employers who violate labor laws will face appropriate consequences. Yet further reforms are needed to ensure that all who are responsible for sweatshop conditions are held liable.

Manufacturers benefit from sweatshop labor, and as described above, they dictate the prices that garment workers are paid for their labor. Manufacturers must be brought within the fold of liability by recognizing that they truly are joint employers of the workers who toil for them and create garments for their benefit and profit. They can no longer be permitted to hide behind the fiction of a contractor relationship, thereby relieving themselves of responsibility for the violations that they create.<sup>187</sup>

## **V. CONCLUSION**

As described above, the current law, as dictated by *Hoffman Plastics*, allows employers to violate the NLRA with impunity when the rights of undocumented workers are involved. In an effort to deter illegal immigration, the Supreme Court has deprived the NLRB of remedies necessary to effectuate Congressional goals. At the same time, the Court's ruling will encourage unscrupulous employers to hire undocumented workers, thereby undermining the policies that the Court intends to support.

---

<sup>185</sup> Although the Court has ruled that Fourth Amendment protections do not apply to civil deportation proceedings, Congress could still pass an evidentiary rule barring use of improperly obtained evidence.

<sup>186</sup> Nessel, *supra* note 61 at 377-78.

<sup>187</sup> For an extensive discussion of the joint employer doctrine and how it applies to the garment industry, see Lam, *supra* note 13; Lung, *supra* note 17; Foo, *supra* note 19.

A better approach would make NLRA remedies independent from a worker's immigration status. This would ensure that both undocumented and documented workers have a reason to report labor law violations. These remedies must be sufficient to punish unscrupulous employers and deter future wrongdoing. As it stands, limitation of remedies to backpay and possible reinstatement are insufficient. It is necessary to create additional statutory remedies to punish wrongdoers.

At the same time, remedies are meaningless unless employers are actually prosecuted for wrongdoing. Steps must be taken to ensure that workers report violations and sweatshop operators are actually prosecuted. Providing amnesty or deferred action status to undocumented immigrants who report violations will provide necessary measure of protection so that whistleblowers are not deported in exchange for ensuring that our labor codes are respected. In addition, the DOL must be sufficiently staffed to create a likelihood of prosecution. Finally, it is necessary to hold manufacturers responsible as joint employers so that they no longer create situations that require dependence on sweatshop labor.

The Needle and the Damage Done: ..... 1

How *Hoffman Plastics* Promotes Sweatshops and Illegal Immigration ..... 1

And What To Do About It ..... 1

I. INTRODUCTION ..... 2

II. FACTUAL BACKGROUND – SWEATSHOPS, RAMPANT LABOR LAW VIOLATIONS, AND UNIONIZATION..... 4

    A. Undocumented Workers in California ..... 4

    B. Sweatshops..... 5

    C. The Garment Industry ..... 6

    D. How the Garment Industry Encourages the Existence of Sweatshops ..... 10

    E. The Unfulfilled Promise of Unionization ..... 13

III. LEGAL BACKGROUND ..... 15

    A. Relevant Statutory Schemes ..... 16

        1. Employment Law ..... 16

            a. The NLRA..... 16

            b. The FLSA..... 18

    B. Immigration Law ..... 18

    C. Pertinent Case law..... 23

        1. *Sure-Tan*..... 23

        2. Post *Sure-Tan* Confusion ..... 26

            a. Pre-IRCA: *Felbro*..... 26

            b. Post - IRCA Divergence ..... 27

        3. *Hoffman Plastics* ..... 28

IV. WHY HOFFMAN PLASTICS IS WRONG, WHAT IT WILL CHANGE, HOW IT CAN BE FIXED ..... 31

    A. Why *Hoffman Plastics* Was Wrongly-Decided ..... 31

    B. What *Hoffman Plastics* Will -- and Will Not -- Change..... 34

        1. The One Free Pass Problem..... 34

        2. Attempts to Unionize Will Be Undermined For All Workers ..... 36

        3. Expansion of *Hoffman Plastics* Could Further Eviscerate Employment Protections..... 38

    C. How It Can Be Fixed ..... 39

        1. Congress Must Increase NLRA Penalties..... 41

        2. Effective Deterrence Requires a Greater Likelihood of Prosecution..... 45

        3. Increase manufacturer liability ..... 47

V. CONCLUSION..... 47