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WORKERS' COMPENSATION SECTIONS
2017 WORKERS' COMPENSATION MIDWINTER SEMINAR AND CONFERENCE
Phoenix, AZ, Saturday, March 18, 2017

PANEL: "NO TENGO DOCUMENTOS":
PRACTICAL HURDLES AND CONSIDERATIONS
IN PURSUING AND DEFENDING UNDOCUMENTED WORKER CLAIMS

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FOREIGN AND UNDOCUMENTED WORKERS: ELIGIBILITY, LAW ADDRESSING RETURN TO WORK, AND RELATED ISSUES

Revised May 26, 2017

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I. Introduction

A. General Rules

Courts in many states have had to address the issue of whether undocumented workers are entitled to workers' compensation benefits.[1] On only one occasion has an appellate court, applying the common law, decided that an undocumented worker is not an employee for workers' compensation purposes. In that case, the Virginia Supreme Court held that, because an undocumented worker is considered to occupy an illegal status, he or she cannot engage in a valid contract of employment. Thus, such a worker could not be an "employee" for purposes of the Virginia Act.[2] On a different occasion, another state court enforced a provision of the workers' compensation law that, by reasonable inference, excluded undocumented workers.[3] That statute, enacted by the Wyoming legislature, is fairly unique. In contrast, the majority of state courts that have addressed the issue have found undocumented workers to be entitled to benefits.[4] The United States Supreme Court has never reviewed the issue, and on at least two occasions, declined to do so.[5]

In recent years, a number of state legislatures have considered proposed legislation that would bar undocumented workers from receiving workers' compensation benefits.[6] In August 2013, Ohio Senator Bill Seitz introduced Senate Bill 176 (SB 176), which proposed to bar illegal aliens from recovering benefits, except where the alien shows by clear and convincing evidence

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[1] A *tour de force* of the current state of the law regarding undocumented workers and their rights to workers' compensation, by Roanoke, VA lawyer Paul Holdsworth, may be found at *America's (Not so) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers*, 48 UNIVERSITY OF RICHMOND LAW REVIEW 1369 (2014). An essay with multi-jurisdiction references may be found at Dorothy Haibek, Michelle Park, Rachael Dizard & Karen Mainieri, *Emerging from the Jungle: New Jersey Workers' Compensation and Workers Without Lawful Immigration Status*, 37 SETON HALL LEGISLATIVE JOURNAL 261 (2013).

[2] Granados v. Windson Development, 509 S.E.2d 290 (Va. 1999).

[3] Felix v. State, 986 P.2d 161 (Wyo. 1999). For the statutory language, see Appendix.

[4] See the Appendix to this article (fifty-state/D.C./LHWCA table).

[5] On February 28, 2011, the U.S. Supreme Court denied *certiorari* in the 2010 Louisiana case *Rodriguez v. Integrity Contracting et al*., 38 So. 3d 511 (La. Ct. App. 2010), *cert. denied*, 131 S. Ct. 1572 (U.S. 2011). Some years before, the Connecticut Supreme Court held that federal immigration law did not preempt state workers' compensation law, and the employer appealed. The Supreme Court, however, denied *certiorari* in that case as well. *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998), *cert. denied*, 119 S. Ct. 542 (U.S. 1998).

[6] States with past bills include Georgia, New Hampshire, and South Carolina. For a review, see Roberto Ceniceros, *States May Bar Comp for Illegal Immigrants*, BUSINESS INSURANCE (Jan. 31, 2011) (noting, among other things, that proposed New Hampshire bill "would limit work comp benefits to medical expenses and 'remedial payments' when an illegal immigrant is injured on the job. It also would require employers or insurers to pay for workers comp benefits if they knew, or should have known, that an injured worker resided in the country illegally."). This story is available at http://www.businessinsurance.com/article/20110130/ISSUE01/301309979. (Last visited Jan. 16, 2017).

that the employer knew of such status at the time of hire.[7] Notably, the bill also proposed to strip Ohio courts of jurisdiction with regard to work injury claims for "damages," presumably seeking to foreclose an argument that if no workers' compensation right exists, then an illegal alien's *civil action* for damages would lie. In any event, the plaintiff's unauthorized status was, in the bill, conceptualized as according to the worker an *assumption of risk* of injury on his or her part, thereby working a complete bar to recovery. The only exception was harm to the undocumented worker caused by the employer's intentional act.[8] Ultimately, the bill died in committee.[9]

Just one year later, in 2014, North Carolina state Senator Thom Goolsby amended House Bill 369 in an attempt to disallow workers' compensation benefits for those "not lawfully employable in the United States and [those who] knowingly made a false representation to the employer as to his or her legal work status." The bill was subsequently removed from the Senate's calendar and stalled in committee.

As will be seen, however, most legislatures seem uninterested in passing such laws, as to do so would expose employers to potential tort liability. This is so because undocumented workers are not barred from filing civil negligence suits, and the complete retraction of workers' compensation rights would at once eliminate employer immunity. In fact, after the Virginia court ruled that undocumented workers had no right to workers' compensation, the legislature, at the request of *employers*, amended its Act to allow for the same.[10]

The majority rule, in any event, is that undocumented workers are employees for workers' compensation purposes. These courts, notably, have unanimously held that federal immigration law, specifically IRCA of 1986,[11] does not preempt the operation of state workers' compensations laws.

States vary, however, on whether such workers are entitled to all forms of disability and vocational rehabilitation benefits. For example, under the D.C. Act, undocumented status does not bar receipt of TTD benefits. Under the Pennsylvania Act, however, as soon as the worker regains some level of ability to work, even at modified duty, TTD is to be suspended.

Indeed, the law among states varies on the issue of such workers' entitlement to Temporary Partial Disability (TPD), Permanent Partial Disability (PPD), and vocational rehabilitation benefits (VR). A number of state courts have restricted partial disability benefits

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[7] Jesse Hathaway, *Ohio Law Would Prevent Workers' Comp Payments to Illegal Aliens* (August 2013), available at http://mediatrackers.org/ohio/2013/08/23/ohio-senate-bill-would-prevent-workers-comp-payments-to-illegal-aliens. (Last visited Jan. 24, 2017).

[8] *See* 2013-2014 S. B. 176, http://archives.legislature.state.oh.us/BillText130/130_SB_176_I_Y.html. (Last visited Jan. 24, 2017).

[9] LEGISCAN, *OH SB176*, https://legiscan.com/OH/bill/SB176/2013. (Last visited Jan. 24, 2017).

[10] VA. CODE ANN. § 65.2-101 ("employee" includes one engaged in illegal employment). *See* Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 N.Y.U. REVIEW OF LAW & SOCIAL CHANGE 299 (2006).

[11] 8 U.S.C. §§ 1101-1537.

on the grounds that the analysis of entitlement to such monies usually turns, at least in part, on the availability of the worker to perform modified work. Because IRCA prohibits employers from knowingly employing undocumented workers, these courts have been unable to conceive of undocumented workers as being entitled to such benefits. A few courts, however, have found ways around employers' disqualification arguments and have awarded benefits.

Many state workers' compensation laws also restrict death benefits payable to non-resident *dependents*, individuals who normally become entitled to benefits in the event of a worker's death. These restrictions, which have been common for decades, limit benefits whether the deceased worker was properly documented or not.

The majority rule may seem solicitous of undocumented workers and unfair to employers. As discussed below, however, most courts and policy analysts do not believe this to be true, and most employers are probably pleased that they enjoy the protection of the exclusive remedy in undocumented worker cases. In any event, the perceived solicitous nature of the majority rule is not limited to workers' compensation and its familiar liberal construction. As one writer has noted, arguments in a *number* of contexts, by employers, that undocumented workers have acted illegally, and thus should in effect be *punished*, have "backfired": "Frequently, courts have given undocumented workers the full protection of the workplace laws (e.g., wage and hour rules, antidiscrimination laws, and workplace safety rules) because any other approach would make hiring undocumented workers a bargain – that is, relatively cheaper than hiring documented workers.…"[12]

B. Scope of the Problem

The significant presence of undocumented workers laboring in the U.S. economy makes workers' compensation entitlement a critical issue. The total illegal immigrant population in the U.S. is estimated at 11.1 million, with eight million comprising the civilian workforce.[13] 2.35 million[14] undocumented immigrants are believed to reside in California alone, with 1.7 million of those laboring in that state's economy.[15] Many of these workers labor in hazardous

[12] Thomas A. Doyle, *Competing Concerns in Employment Litigation: How Courts Are Managing Discovery of an Employee's Immigration Status*, 28 ABA JOURNAL OF LABOR & EMPLOYMENT LAW 405, 412 (Spring 2013).

[13] Jens M. Krogstad, Jeffrey S. Passel & D'Vera Cohn, *5 facts about illegal immigration in the U.S.* (November 2016), available at http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/. (Last visited Jan. 24, 2017).

[14] *See* PEWRESEARCHCENTER, Hispanic Trends, *Unauthorized immigrant population trends for states, birth countries and regions* (November 2016), available at http://www.pewhispanic.org/interactives/unauthorized-trends/. (Last visited Jan. 24, 2017).

[15] Jeffrey S. Passel & D'Vera Cohn, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession* (November 2016), available at http://www.pewhispanic.org/interactives/unauthorized-trends/. (Last visited Jan. 24, 2017).

employments and in agriculture.[16] Others perform "day labor." As discussed below, many work-related injuries and deaths suffered by such workers go uncompensated.

The workers' compensation eligibility issue is not settled by state court rulings over entitlement status. This is so because of the tension between state laws and federal immigration policy. In this regard, workers' compensation law is provided for and administered by states, but federal law has jurisdiction over immigration. Federal law, specifically IRCA, prohibits employers from knowingly employing undocumented workers. Thus, even in jurisdictions where courts have long awarded benefits to undocumented workers, many injured workers are ignorant of their rights and/or are afraid to report their injuries and receive the appropriate medical care and benefits.

Those workers who understand that they are entitled to benefits, meanwhile, are often fearful that, if they report their injuries, they will expose themselves to prosecution and deportment. Some employers, further, refuse to comply with the law and are said to look the other way when an undocumented worker applies for work and presents doctored paperwork. Some of these employers may have workers' compensation insurance, but many others have compounded this lack of responsibility by failing to insure. Another approach of unscrupulous employers is to fraudulently set up undocumented workers as "independent contractors," or retain unreliable subcontractors who themselves employ undocumented workers.

One rational reaction to this perceived problem is that undocumented workers bring their plight upon themselves by entering the country – or remaining here – illicitly. Thus having violated the law, they should have no expectation, upon being injured, that a governmental social insurance program, like workers' compensation, will respond obligingly. To this position several overriding responses exist[17]:

1. ***Humanitarian purpose of workers' compensation laws.*** First, an enlightened society treats all of its inhabitants humanely, and when a worker experiences an accident, suffering injury and disability, society should respond accordingly and come to the aid of the worker and his or her dependents. This is so regardless of whether the injured worker is documented or not.

It is a myth that allowing workers' compensation will lure undocumented workers to the U.S., as they would find attractive the promise of insurance in the event of a serious work

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[16] Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 DRAKE JOURNAL OF AGRICULTURAL LAW 263 (2008) (noting that "agriculture is the second most dangerous occupation in the United States according to occupational fatality rates.").

[17] *See also* Mark Noonan, *Raising Debate Beyond the Borders* (March 3, 2011), available at http://www.workingimmigrants.com/2011/03/the_immorality_of_denying_work.html. (Last visited Jan. 26, 2017). Noonan, an insurance broker, asserts in this article, "There are more than 8 million undocumented workers and, whether the employer is aware of their illegal status or not, the injured worker deserves to be covered by workers' compensation benefits. Legally and morally, it is the right thing to do. … As we celebrate the 100th anniversary of workers' compensation, let's not forget the intent – providing injured workers with benefits to assist them as they recover, while freeing the employer from the threat of litigation, thus allowing both sides to achieve a positive result…. I've never seen anything to suggest that someone should be excluded from receiving medical and indemnity benefits because of their citizenship status. It's inappropriate and, in my opinion, discriminatory."

injury.[18] Studies show that workers are in fact motivated by the hope of work and wealth, not no-fault accident insurance, in their quest to illegally enter the country.[19]

2. ***Cost internalization purpose of workers' compensation laws.*** Second, a critical purpose of workers' compensation is to include, by way of insurance premiums, the costs of industrial injuries and deaths in the price of goods manufactured and services provided. To deny benefits to a significant portion of the injured worker population, and to thereby fail to account for the corresponding losses, causes a disruption in this cost internalization model.

3. ***Promotion of safety purpose of workers' compensation laws.*** Third, if employers know they will not be liable for workers' compensation when an undocumented worker suffers an injury, they will be less likely to enforce safety rules.

The safety concern is one often invoked in court opinions, but the issue is pervasive in general discussions about immigrant labor. Studies show that immigrant workers suffer a disproportionately high rate of work-related fatalities. The Latino immigrants interviewed for one recent study generated four themes. First, many immigrants felt that they were overworked, had a fear of being reported to the authorities, had an anxiety of losing their jobs and, finally, were uncertain as to their employment rights. All of these are issues that may lead undocumented workers to encounter injury at work, because of lack of attention to safety; and a failure to pursue rights *after* an injury occurs.[20]

4. ***Insurance windfall.*** Fourth, many employers have actually purchased a policy of workers' compensation, the premium cost of which *took account* of the undocumented worker's employment. Thus, to deny benefits on undocumented worker status would result in a windfall to the insurance carrier.[21]

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[18] *See* Abel Verdon Constr. v. Rivera, 348 S.W.3d 749 (Ct. App. 2010) (court rejects idea that allowing benefits will encourage undocumented workers to migrate to Kentucky "in order to take advantage" of such benefits; "In fact, the opposite is more likely. Were we to find [that the Kentucky Act] is preempted by IRCA, we might well be adding incentive to the hiring of illegal aliens, and then taking away the incentive … to maintain a safe workplace…."

[19] Paul Holdsworth, *America's (Not so) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers*, 48 UNIVERSITY OF RICHMOND LAW REVIEW 1369 (2014).

[20] Roger Rabb, *How Undocumented Status Impacts the Working Conditions and Safety of Latino Immigrants*, in WORKERS' COMPENSATION: EMERGING ISSUES ANALYSIS, p.159 (Thomas A. Robinson & Robin E. Kobayashi, eds., Matthew Bender 2015).

[21] Peter Rousmaniere, *Paralyzed by "Third Rail" Issues*, RISK & INSURANCE (January 1, 2006) ("[S]ome employers, having accepted an undocumented worker's fake papers, may be carrying her or him as an employee, and therefore already paying the workers' comp premiums."). *See also* Pamela Cohen & Frank Fennerty, *Recent Attempts to Exclude Undocumented Workers from Workers' Compensation Coverage: What's Really at Issue?*, 43 IAIABC JOURNAL p.61 (Fall 2006) ("Assuming for the moment that the employer hires in good faith and [in] the belief that they have complied with IRCA, then their wages are reported for premium calculation purposes and the insurer has been compensated for assumption of the risk of injury.").

In Nevada, the courts have held that an undocumented worker is considered an employee, and he or she is entitled to benefits. However, the employee, even if catastrophically injured, is not entitled to vocational rehabilitation benefits. One critic has observed that, with this freedom from liability, the carrier saves "up to

5. ***Cost-shifting.*** Fifth, in the present day, other safety-net programs, such as Medicaid and welfare, exist that will (however imperfectly) often compensate the injured worker. Taxpayers bear the costs of these programs. If the worker is not covered by workers' compensation, the costs of work accidents will be shifted away from employers and the workers' compensation system and onto the taxpayers instead.[22]

6. ***Disruption of risk analysis.*** Sixth, because many undocumented workers do not report their injuries, the statistician's and actuary's task of analyzing work accidents, and their true costs, is disrupted. Injury and death rates cannot be accurately counted, and insurance rates and premiums cannot be accurately established.[23]

7. ***An uneven playing field.*** Lastly, employers who fulfill their obligations under a state's workers' compensation law are at a disadvantage when competitors evade their own legal duties. While an employer conducting business in good faith would be subject to the costs of workers' compensation insurance premiums and reporting obligations, a company that chooses to hire undocumented workers and keep them "off the books" is rewarded with lower costs and higher profits. Given these underhanded tactics, many employers favor the coverage of undocumented workers, ensuring equal protection for all injured workers and equal obligations for all employers.[24]

C. The Undocumented Worker/Work Injury Problem: Literature and Press Accounts

One need not be an expert in the field to be aware of the problem of undocumented workers and their injuries. Accounts of such injuries, and deaths, often appear in the popular press. Often, stories involve workers struggling with an employer that has no insurance.[25]

$16,000 for every claim denied." Robert Correales, *Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENVER UNIVERSITY LAW REVIEW 347 (2003).

[22] Pamela Cohen & Frank Fennerty, *Recent Attempts to Exclude Undocumented Workers from Workers' Compensation Coverage: What's Really at Issue?*, 43 IAIABC JOURNAL p.61 (Fall 2006).

[23] With regard to reporting and data collection problems in this area, see D. Carolina Nunez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for Undocumented Workers*, 2010 WISCONSIN LAW REVIEW 817, 861-863 (2010).

[24] Mandy Locke, *Part 1: Cheating businesses make it tough for honest employers,* THE NEWS & OBSERVER (August 19, 2012), available at http://www.newsobserver.com/news/special-reports/the-ghost-workers/article16921211.html. (Last visited Jan. 26, 2017).

[25] The novel, *The Inheritance of Loss* (Atlantic Monthly Press 2006), by Kiran Desai, features a depiction of a work injury suffered by an undocumented worker. One of the protagonists, a young Indian man unlawfully overstaying his tourist visa, slips on rotten spinach in the kitchen of a Manhattan restaurant – at which he both works and *sleeps* – and hurts his knee. The owner, his boss and a fellow Indian, refuses to provide him with medical care:

1. ***The Short Sweet Dream of Eduardo Gutierrez*** (2002). In 2002, columnist Jimmy Breslin published a best-selling book, *The Short Sweet Dream of Eduardo Gutierrez*. Breslin sets forth an account of an unscrupulous employer employing an illegal worker on an unsafe construction project.

Gutierrez was a young Mexican illegal immigrant, working a labor job on new-building construction in Brooklyn. In November 1999, he fell to his death when structural steel on an upper floor collapsed, sending him and other workers downward into the basement. Gutierrez ultimately drowned while submerged in liquid concrete, which continued to be pumped into the basement in the wake of the collapse. The builder was later held criminally negligent in the accident, and he was also revealed as having used political influence (via financial contributions) to forestall aggressive building inspections. Ultimately, he was convicted of having lied to OSHA inspectors. He was also obliged to reimburse a number of the injured workers, and Gutierrez' father, who traveled from Mexico to the U.S. for a deposition. The elder Gutierrez ultimately recovered about $100,000.00 in a settlement.

Breslin humanizes and broadens the story by placing Gutierrez at the center of the account. The book thus becomes one that raises the issues not only of municipal corruption and workplace safety, but Mexican immigration and border policy as well.[26]

> In the Gandhi Café, a little after three years from the day he'd received his visa, [Biju] skidded on some rotten spinach in Harish-Harry's kitchen, streaked forward in a slime green track and fell with a loud popping sound. It was his knee. He couldn't get up.
>
> "Can you get a doctor?" he said to Harish-Harry after Saran and Jeev had helped him to his mattress between the vegetables.
>
> "Doctor?? Do you know what is medical expense in this country?"

For the definitive book review, see that of Pankaj Mishra in the *New York Times*: http://www.nytimes.com/2006/02/12/books/review/12mishra.html. (Last visited Jan. 16, 2017).

[26] It is also a human-interest read, as Breslin nicely sketches Gutierrez's life. He gives an account of this humble individual's life from boyhood through a shy adolescence, up to his catastrophic death. Breslin brings to life the circumstances and dreams of the Mexican poor, who are not starving, but who can only get ahead by seeking out opportunities across the border. The U.S. is, in this connection, a land which represents not so much a beacon of freedom, but a place where money can be earned to be sent back home to enhance the lives of family and other loved ones.

Breslin's book falls short of being – and was probably not intended as – an exhaustive documentary. The role of workers' compensation, for example, is actually left unmentioned. The specialist is left wondering whether the family pursued any remedy under the New York Act. The builder, notably, defrauds his liability carrier on another job, and one infers that he had no workers' compensation to cover Gutierrez and his co-workers. Similarly, Breslin submits no hard recommendations on immigration and border policy.

Though not mentioned by Breslin, the circumstances of Gutierrez's death are not unlike those of the protagonist in the labor classic, *Christ in Concrete* by Pietro di Donato (Signet Classics 1937, 1993). In that novel, the protagonist is an Italian immigrant laying bricks on a skyscraper project in Manhattan. The building collapses and he falls, dying in molten concrete. Later in the book, the surviving spouse and children are denied workers' compensation. This follows a tumultuous workers' compensation hearing, at which an uncaring referee sides with the insurance company lawyer – a crony – and dismisses the case on the grounds of lack of insurance coverage.

2. ***Newsday account*** (July 11, 2004).[27] This article discusses the case, said to be typical, of a migrant worker's struggle to secure compensation for injuries suffered while working for an uninsured contractor employing day labor. The injured worker was a legal Guatemalan immigrant, Nelson Morales, who fell from a roof, fracturing his spine and severing his spinal cord. His employer, an uninsured operator "in the underground economy that provides cheap labor for roofers, landscapers [and] tree surgeons," had paid his wages under the table and was never heard from again.

His care was complicated by refusal of U.S. immigration to allow his mother to come from Guatemala to provide personal care. Still, under the New York Act, bills and disability payments may be forthcoming: "[A] person in Morales' position typically can file a successful claim for medical expenses and lost wages through the New York State Workers' Compensation Board Uninsured Employers Fund…. In turn, the board can file a judgment against an uninsured employer, creating liens against the employer's property and possessions." According to the article, in 2003 the Board collected $5.4 million in penalties from uninsured employers and paid out $16 million to injured workers. The Fund, notably, "covers workers regardless of their immigration status and country of residence …." Thus, Morales could return to Guatemala and continue to receive benefits.

3. ***South Florida Sun-Sentinel account*** (December 26, 2004).[28] This 2004 article discussed at length how many Latin American immigrants, a great number of whom are undocumented Mexicans, are laboring dangerously in the South Florida construction industry. Such illicit work is an issue for several reasons, but the journalist concentrates on the hazards of work and a seemingly ubiquitous lack of insurance.

Many such workers are day laborers doing the most dangerous work (roofing and the like), often for unscrupulous contractors and subcontractors who are not carrying workers' compensation insurance. At least one contractor noted that when he has subcontractors on a job, he does not even know if they are employees of the *subcontractor* because, for all he knows, they may be the employees of an employment broker.

The workers themselves do not help matters. In just a few days of work, the writer explains, undocumented workers can make as much money as they would in months of the same work in their home countries. They are hence willing to take inordinate risks, and are not going to complain in advance of an accident of a suspected lack of insurance. In addition, many do not read or speak English. This leads to an inability to follow directions and work safely. When injuries *do* occur, a language barrier exists with regard to how to try to report an injury and secure available medical care. As noted above, statistics show that Latin American workers are injured and die in work injuries in greater numbers than in the population at large.

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[27] *Migrant Workers Struggle to Get Aid When Hurt on Job*, NEWSDAY (July 11, 2004), reprinted at http://www.lawnandlandscape.com/article/migrant-workers-struggle-to-get-aid-when-hurt-on-job/. (Last visited Jan. 28, 2017).

[28] Nancy Othon, *Local Hispanic Immigrants Risking Injury, Death to Work*, SOUTH FLORIDA SUN-SENTINEL (December 26, 2004).

None of this is terribly new, but some of the Florida numbers yielded in the midst of the region's then-current development boom are truly remarkable. The author writes, "The state Department of Financial Services' workers' compensation division conducts random sweeps at construction sites to ensure compliance with workers' compensation laws. So far this year, the agency has issued more than 2,200 stop-work orders to companies – the majority construction companies – that weren't carrying insurance for all of their workers."

All should be pleased that the state authorities are taking such action. On the other hand, at least one government official interviewed had mixed feelings: "It is easy to say we have to crack down on illegals, but this is a massive problem and it's very difficult to get a handle on it…. If we had a work stoppage of all illegals, you may have the collapse of an economy."

4. ***McClatchy Newspapers account*** (September 15, 2006).[29] This article discussed the undocumented worker problem at length, but featured at the outset, and throughout, the case of Jose Hernandez. Hernandez, who was an undocumented worker, worked for a tree removal company. On the date in question, he and the rest of the crew had been flown into the Everglades on a helicopter to chop down trees. After this activity, the crew took off again, but "something went wrong: The chopper lurched left, then plunged into murky water. A broken rotor blade slashed through Hernandez's left thigh." At first, the carrier paid benefits, but later unilaterally stopped, taking the position that Hernandez had committed fraud. The case was ultimately settled.

5. ***The Providence Journal account*** (January 15, 2008).[30] Perhaps the most notorious employer behavior is revealed in the saga of Edgar Velasquez, as reported in this Rhode Island newspaper article. Velasquez successfully recovered a workers' compensation settlement from an uninsured employer. The worker had been severely injured while using a saw, and when he pressed his claim the employer informed the immigration authorities about the initial workers' compensation proceedings. Claimant was arrested at the hearing and deported. In the end, however, he was allowed back in the country briefly to prosecute his case.

6. ***California television news account*** (May 17, 2010).[31] In 2010, a San Diego, California, television station reported on an electrocution injury suffered by an undocumented worker. At the time, the employee, Leonardo, was employed at a horse boarding ranch in Escondido, where he had worked for two years. The unusual incident occurred when he "touched some metal on a horse walking machine …." After receiving a shock that brought him to his knees, "[t]he electricity melted his wedding ring into his finger, partially severing it. Several skin grafts later, [he was] not sure if his ring finger [would] heal." According to the report, the employer denied

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[29] Liz Chadler, *Illegal Immigrants Frequently Denied Compensation*, MCCLATCHY NEWSPAPERS (September 15, 2006), summarized at http://www.workingimmigrants.com/2006/09/knight_ridder.html. (Last visited Jan. 16, 2017).

[30] Karen Lee Ziner, *Injured Tree Worker Wins $30,000.00 Compensation Claim*, THE PROVIDENCE JOURNAL (January 15, 2008), available at http://www.noiw.org/newsstories/maimed5.html. (Last visited Jan. 26, 2017).

[31] "Leonardo is Suing Owner of Horse Boarding Ranch in Escondido After Injuring Fingers," 10News.com (May 17, 2010), available at http://www.10news.com/news/23586085/detail.html. (Last visited Jan. 26, 2017).

that the injury occurred in the course of employment, but claimant alleged another motivation for the dispute – according to Leonardo, "The owner told my pregnant wife, don't claim workers' comp. or I'll have Leonardo deported and you'll raise the child alone." The lawyer representing the worker told the reporter that "this type of threat is often heard by injured immigrants." (Note: the owner denied making the statement.)

7. ***Voices Of NY account*** (April 1, 2013).[32] In this article, the author, Shannon Firth, recounts the experience of "Fausta," an undocumented worker from Mexico, who was injured at work in the Fall of 2011. Fausta, only 17, worked at a car wash on Staten Island. On multiple occasions, he slipped and injured himself on a metal bumper used to secure cars on the facility's wash track. Finally, after multiple injuries, Fausta eventually received treatment from an orthopedic surgeon. When Fausta presented the medical bills at work, his employer refused to even pay half of the amount owed. However, with the help of an immigrant advocacy group, Fausta pursued the case in court, reaching a $25,000 settlement.

The author notes that it can often prove difficult to find employers who are willing to assist in medical costs when an undocumented worker is injured; some employers go as far as to threaten the worker with revealing their undocumented status to authorities. Despite a holding by the New York State Court of Appeals, ruling that immigration status is not a factor in awarding workers' compensation benefits, undocumented workers regularly face unsafe work conditions, denial of reimbursement for medical care, and general feelings of being threatened by the employer.

In a 2010 incident, a 20-year-old Mexican migrant suffered a work injury, rendering him a quadriplegic. This individual's medical costs soared to $650,000. Because no long-term care facility would agree to provide service, the migrant was deported to his home state of Oaxaca. About one year after his return to Mexico, he died of sepsis at a small hospital that could not meet his treatment needs. Though troubling, this is not a rare phenomenon. While hospitals are required, by federal law, to stabilize any patient needing treatment, it is then also necessary to implement a discharge plan, thereby moving the patient to an "appropriate facility." It is through this protocol that hospitals will utilize "medical repatriation," which involves returning the patient to their particular native country. Immigration advocates label this process as "de facto deportation."

The author posits various ways in which the workers' compensation system can better serve the needs of injured undocumented workers. Specifically, Firth notes that more frequent OSHA inspections are needed to ensure compliance of workplace safety regulations, with greater penalties against those employers violating such rules. For further protection, the unionization of immigrant workers could serve to secure the rights of those who suffer injuries while in the course of their employment.

[32] Shannon Firth, *Special Report: Employers Turn Their Backs on Undocumented Workers Injured on the Job,* Voices Of NY (April 1, 2013), available at https://voicesofny.org/2013/04/employers-turn-their-backs-on-injured-undocumented-workers-2/. (Last visited Jan. 25, 2017).

8. ***Stamford Advocate account*** (September 12, 2016).[33] In late 2016, a small group of citizens in Stamford, Connecticut, formed a protest when an undocumented worker was injured in the course of her employment. The worker, Delmi Alberto Mejia, had been contracted to work on a ninth-floor renovation project. While engaged in such labor, she fell and suffered a dislocated elbow, radius fracture, and torn ligaments and tendons.

When interviewed for the report, Mejia claimed to have been hired by a company called Interior Construction, though, at some point, was coached to claim that she was hired by the project's subcontractor, Alva Interiors. At the time of injury, Mejia could not accurately identify her employer. Once her injuries were deemed to be severe enough, doctors performed surgery – despite Mejia lacking insurance. Following surgery, allegations surfaced that Interior Construction had asked Mejia to falsify both an I-9 and W-2 form before any past-due wages and workers' compensation benefits would be provided. When she refused to falsify these documents, the New England Regional Council of Carpenters assisted Mejia in filing the proper workers' compensation forms.

The author of the report notes that Alva Interiors declined comment, except to say that the company had no record of hiring this undocumented worker. Similarly, representatives of both Interior Construction and the project's general contractor, Signature Construction Group, declined to comment.

D. Particular Problem With "Day Labor"

In 2006, researchers at UCLA published a report on day labor of interest to members of the workers' compensation community.[34] The study reported, among other things, that many work injuries suffered by day laborers – many of whom are illegal immigrants – are improperly denied or otherwise not paid under workers' compensation policies. This is a serious issue, as many of the jobs to which day laborers are directed are at hazardous sites.

Day labor has always existed, particularly in the construction business. In the present day, however, the number of workers seeking and performing day labor has increased dramatically. The vast majority (91%), according to this report, were from Mexico, Central America, and South America. Approximately 117,600 day workers "are either looking for day-labor jobs or employed as a day laborer," and they find such work by gathering "in open-air markets by the side of the road, at busy intersections, in front of home improvement stores and in other public spaces …."

In most areas, the principal employers of day laborers are, perhaps predictably, contractors and businesses. But in the West and Southwest, a majority of employers are actually

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[33] Nora Naughton, *Construction worker's injury sparks small protest in Stamford*, STAMFORD ADVOCATE, (September 12, 2016), available at http://www.stamfordadvocate.com/local/article/Construction-worker-s-injury-sparks-small-9217899.php. (Last visited Jan. 26, 2017).

[34] Abel Valenzuela, Jr., Nik Theodore, Edwin Melendez & Ana Luz Gonzalez, *On the Corner: Day Labor in the United States* (January 2006), available at http://portlandvoz.org/wp-content/uploads/images/2009/04/national-study.pdf?phpMyAdmin=tYpXiWIhU6y6sfBbX4R7xljPl3e. (Last visited Jan. 26, 2017).

private individuals. The latter secure the labor of such workers to do things such as gardening, landscaping, and housecleaning.

The report is based upon the "National Day Labor Study," which is supported by groups such as the Ford Foundation. The authors, in undertaking the study, interviewed over 2,000 workers and over 250 day labor center organizers. The authors confirm that the majority of day laborers are illegal immigrants.

Of course, the phenomenon of day laboring by undocumented workers has surfaced in the ongoing debate of immigration reform. Many lawyers may recall the fractious situation in Herndon, Virginia. In that fast-growing Northern Virginia suburb, a day labor gathering place (the parking lot of a 7-11 convenience store), became an eyesore *and* a police problem, with the "Minutemen" group videotaping workers and homeowners who would drop by to employ them.

In analyzing the day labor phenomenon, the authors (1) examine the organization of the day-labor market (noting size and geographic location); (2) describe the nature of day labor work, and discuss "job assignments, wages and earnings, and working conditions…."; (3) establish the demographics of the day labor population; and (4) conclude by submitting proposals for safeguarding workers' rights and normalizing the hiring of day laborers. The authors favor the creation of additional worker centers so as to improve conditions in the day labor market. Not surprisingly, the authors submit that long term "realistic immigration reform" at the federal level is needed, and they are of the school that advocates "normalizing the immigration status of undocumented migrants."

The authors are plainly sympathetic to day laborers and believe that their study bears out what they perhaps suspected: many day laborers are insufficiently paid; are subject to wage theft by some employers (who feel no pressure to treat them fairly); and are victims of police abuse. In addition, workplace safety is a concern. The authors submit:

> Workplace injuries are common. One in five day laborers has suffered a work-related injury, and more than half of those who were injured in the past year did not receive medical care. More than two-thirds of injured day laborers have lost time from work….
>
> Several factors contribute to the high rates of on-the-job injury among the day-labor workforce. These include exposure to hazardous conditions (including exposure to chemicals, dust and toxic emissions), use of faulty equipment (including poor scaffold construction and tools that are in poor condition), lack of protective gear and safety equipment, and lack of safety training …. To a certain extent, day laborers face potentially dangerous [conditions] because many are employed in the construction industry which itself has high rates of work-related injury. But the levels of on-the-job injury experienced by day laborers cannot solely be accounted for by the industry in which they are employed. The inescapable conclusions are that day laborers are hired to undertake some of the most dangerous jobs at a work site and there is little, if any, meaningful enforcement of health and safety laws. Day laborers continue to endure unsafe

> working conditions, mainly because they fear that if they speak up, complain, or otherwise challenge these conditions, they will either be fired or not paid for their work….

With regard to treatment for injuries, the authors posit as follows:

> Among day laborers who have been injured on the job in the past year, more than half (54 percent) did not receive the medical care they needed for the injury, mainly because the worker could not afford health care or the employer refused to cover the worker under the company's workers' compensation insurance. It is likely that most of the work-related injuries suffered by day laborers that required medical attention should have been covered under workers' compensation policies. However, just 6 percent of injured day laborers had their medical expenses covered by the employer's workers' compensation insurance. In most cases, employers evade these costs (i.e., rising workers' compensation premiums), often by simply denying coverage to workers or by threatening workers with nonpayment of wages or other forms of retaliation should they attempt to file a claim.[35]

In a 2010 New Jersey case, the estates of two day laborers, killed in a trucking accident, were awarded $2,000,000 via arbitration. Despite the exclusive remedy provision of New Jersey's workers' compensation act, the claimants' estates successfully argued specific exceptions: (1) that the defendant acted with knowledge that its conduct was substantially certain to result in injury; (2) that the workers were, at most, casual employees; and (3) that the workers were on their way to the job site, rather than at their place of employment. The insurance company in the matter rejected the arbitrator's decision.[36]

In a 2014 article, KERA News reported the story of Santiago Arias, a Mexican day laborer working in Texas. Arias was injured multiple times, all in the course of day labor, between 2001 and 2006. In 2001, Arias lost a finger in a vehicle accident; in 2005, he lost an eye in a construction accident; and in October 2006, he was paralyzed from the

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[35] *Id. See also* Justin McDevitt, *Compromise is Complicity: Why There is no Middle Road in the Struggle to Protect Day Laborers in the United States*, 26 ABA JOURNAL OF LABOR & EMPLOYMENT LAW 114 (2010). In advocating the rights of day laborers, this writer has correctly remarked, "most day laborers are hired by private homeowners and thus almost always excluded from state workers' compensation laws, as are most independent contractors…. Workers who are injured in these casual employment arrangements are often limited to a potential tort recovery." *Id.* at 115. The writer, however, mischaracterizes the law in further positing that states had adopted "federal policies denying protections to undocumented workers. As an example, many state courts have used the *Hoffman Plastic* decision to justify denying undocumented workers any benefits under workers' compensation laws." *Id.* It is more accurate to say that courts have been influenced by IRCA and *Hoffman Plastic* to deny *wage replacement* benefits.

[36] LexisNexis Workers' Comp Law Newsroom Staff, *NJ: Over $2 Million in Arbitration Awarded to 3 New Jersey Day Laborers*, LEXISNEXIS (January 6, 2010), available at https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/newsheadlines/archive/2010/01/06/nj_3a00_-over-_2400_2-million-in-arbitration-awarded-to-3-new-jersey-day-laborers.aspx?Redirected=true. (Last visited Jan. 27, 2017). The authors of this seminar paper were unable to decipher the outcome of this case following rejection of the arbitration award.

chest down after falling from a roof. Arias accumulated $800,000 in unpaid medical costs related to his 2006 accident; his projected cost of care, for the rest of his life, was $125,000 per year. Ultimately, after suing his employer, Arias recovered less than the cost of one year of medical care.[37]

In 2016, multiple reports confirmed that day labor remains a threat to the health and well-being of undocumented workers. In particular, Brooklyn, New York, served as a focal point in the continued underground labor market.[38]

In a new study, both the Worker's Justice Project and Cornell's Worker Institute, in collaboration, found that many women work marginal and casual jobs with little regulatory protection. These women work multiple shifts per day under different employers, usually for below minimum wage. It is notable that, since the mid-20th century, little has changed for women living in these conditions. Immigrant women gather on street corners, waiting for potential employers to select them for jobs.

In many cases, these women work around 20 hours per week, earning less than $900 per month. While nearly all women surveyed had worked as housekeepers, around 80 percent were also employed, at some point, in construction, warehouse, and food-processing positions. These employment strategies prove systemic and perpetual; one-in-five women surveyed had utilized the street-side "gathering spot" for six or more years; over two-thirds spent two to five days per week seeking work through these methods.

Around 40 percent of respondents claimed to have been underpaid at some point in time. One-third of the women surveyed experienced verbal abuse and humiliation, with some employers even threatening to expose the worker's undocumented status. Often, the work required exposes day laborers to hazards such as toxic chemicals in cleaning products, risk of falls, and exposure to human pathogens (particularly while performing janitorial duties). Despite these increased risks, most respondents reported no regular source of healthcare.

E. The Compensation Problem:
Reflective of Default in Federal Immigration Policy

The many controversies surrounding undocumented workers' rights to workers' compensation has its roots in the federal government's failure to enact and maintain a rational immigration policy. Rightly or wrongly, the global economy has produced a need in the U.S. for a population of workers willing to perform dangerous jobs such as construction, agriculture, and

[37] Jay Root, *Behind Texas Miracle, A Broken System For Workers*, KERA News, (June 30, 2014), available at http://keranews.org/post/behind-texas-miracle-broken-system-workers. (Last visited Jan. 27, 2017).

[38] Michelle Chen, *Women Day Laborers are Tired of Waiting for Work, and for Justice*, THE NATION, (August 5, 2016), available at https://www.thenation.com/article/women-day-laborers-are-tired-of-waiting-for-work-and-for-justice/. (Last visited Jan. 27, 2017).

landscaping. Undocumented workers, mostly from Mexico and Central America, have filled this need.[39]

Businesses and the citizenry at large benefit from the labor of these workers. Yet, because of the incoherence and erratic enforcement of federal law, the traditional state mechanisms of providing compensation for work injuries cannot function as intended. The incoherence is evident in the comments of many in the business and insurance industry. When an Alabama court awarded benefits to an undocumented worker, a construction industry spokesman was hardly outraged: "The Hispanic tradesmen are an integral part of the industry here in Alabama …. Without these folks being here, we would not be able to run at capacity…."[40]

When, meanwhile, a California court held that undocumented workers were allowed benefits, an insurance industry spokesman stated:

> "An injured worker is an injured worker and should be entitled to benefits," said Nicole Mahrt, director of public affairs for the western region of the American Insurance Association. "We don't disagree with this ruling. Someone injured on the job should get the medical care they need and deserve regardless of immigration status. Insurers are not immigration officers." Immigration status "is an issue for the employers. Even before this ruling came out, AIA's position was that injured workers should get benefits if they are hurt on the job," Mahrt added.[41]

F. Employer Immunity at Risk by Excluding Undocumented Workers

Most employers likely do favor workers' compensation coverage for undocumented workers. This is so because if a worker has no basic right to compensation, and is conceived of as wholly outside the system, he or she necessarily has the right to sue the employer in tort at common law. The law is well settled, in this regard, that an undocumented worker is not deprived of his right to sue by virtue of his undocumented status.[42] IAIABC officers have noted this irony as follows:

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[39] *See* Pamela Cohen & Frank Fennerty, *Recent Attempts to Excluded Undocumented Workers from Workers' Compensation Coverage: What's Really at Issue?*, 43 IAIABC JOURNAL p.61 (Fall 2006).

[40] Steve Zurier, *Workers' Comp Wakeup: An Alabama Judge Awards an Illegal Hispanic 17-year-old Benefits for Life*, BUILDER (February 2006), available at http://www.builderonline.com/insurance/workers-comp-wakeup.aspx. (Last visited Jan. 16, 2017).

[41] Patricia-Anne Tom, *California Court Rules Illegal Immigrants Can Get Workers' Comp*, INSURANCE JOURNAL (November 7, 2005), available at http://www.insurancejournal.com/magazines/mag_features/2005/11/07/62430.htm. (Last visited Jan.16, 2017).

[42] *See* Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (N.Y. 2006). *See* Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 NYU REVIEW OF LAW & SOCIAL CHANGE 299 (2006) (discussing how employers in Virginia lobbied the legislature to amend law so that undocumented workers were covered employees, lest such workers gain the right to sue them in tort).

> Ironically, for advocates of different standards for undocumented workers, exclusion of the undocumented worker would potentially eliminate the exclusive remedy protection for the employer. The exclusive remedy affords employer protections from unlimited tort lawsuits for injuries on the job, and would not apply to any class of workers who were excluded from coverage of the law. Employers of such workers would face tort liability exposure under such a scenario to workers from whom they are currently protected.[43]

To the same effect was the Massachusetts Board, when it held that undocumented workers were entitled to compensation under the Massachusetts Act. The Board, in this regard, also ventured the opinion that if such workers were not so entitled, then a tort suit would be allowed: "The majority of the Board also indicated that if an undocumented immigrant worker were not an 'employee' covered for payment of workers' comp. benefits there would be the risk of a common law tort action."[44]

II. Statute and Case Law on Eligibility

A. General Rule as to Basic Eligibility

Undocumented workers have long been held entitled to workers' compensation benefits.[45] Indeed, prior to the passage of IRCA, and increased vigilance by the federal government as to illegal immigration, compensation eligibility was not a particularly controversial issue.

Scholars who have, in the present day, reviewed state laws relative to their treatment of undocumented workers invariably begin their analysis by categorizing employee-status statutory provisions. One analyst, Jason Schumann, found that three categories exist:

> The first category comprises eleven states which use the terms "unlawfully employed" and "alien" when defining "employee."
>
> In the second category, eight states use the word "alien" within the definition of "employee" but do not explicitly include illegally employed workers. In states falling within this category, courts and administrative agencies are left to determine whether "alien" includes or excludes illegal aliens …. [S]everal

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[43] Pamela Cohen & Frank Fennerty, *Recent Attempts to Exclude Undocumented Workers from Workers' Compensation Coverage: What's Really at Issue?*, 43 IAIABC JOURNAL p.61 (Fall 2006).

[44] Medellin v. Cashman, KPA, 17 Mass. Workers' Comp. Rep. 592 (2003). *See* Alan Pierce, *Massachusetts [Law with Regard to Undocumented Workers]*, ABA TTIPS WORKERS' COMPENSATION & EMPLOYER LIABILITY COMMITTEE NEWS, at 12 (Summer 2008).

[45] *See, e.g.*, Cenvill Development Corp. v. Tomas Candelo, 478 So.2d 1168 (Fla. 1st D.C.A. 1985); Testa v. Sorrento Restaurant, 10 A.D.2d 133 (N.Y. App. Div. 1960); Am. Sur. Co. v. City of Clarksville, 315 S.W.2d 509 (Tenn. 1958) ("employee" under the Act is determined "without regard to whether the employment be legal or illegal.").

> jurisdictions within this category … among them Nebraska, Michigan, and Minnesota, interpreted their workers' compensation statutes as including undocumented workers in the definition of "employee."
>
> And finally, thirty-one remaining states and the District of Columbia do not include the term "alien" within their definitions of "employee."… [W]ithin this latter category, despite the ambiguity, nearly every state court or administrative agency confronted with the issue of whether illegal aliens are "employees" within the states' statutes either explicitly or implicitly decided to include undocumented workers in the definition of "employee."[46]

As demonstrated in the appendix, state appellate courts and authoritative administrative agencies have held that undocumented workers are entitled to benefits in at least 32 states and the District of Columbia.

Employers arguing against coverage usually advance two arguments. First, employers argue that an undocumented worker cannot enter into an enforceable contract of employment. Second, employers have argued that the Immigration Reform & Control Act of 1986 (IRCA) preempts the operation of state workers' compensation laws, or that allowing benefits in any event defeats the federal law concern over controlling illegal immigration.[47]

These arguments have almost always been unsuccessful, at least with regard to *initial entitlement*. Delaware, Tennessee, the District of Columbia, Kentucky, Maryland, South Carolina, and Illinois courts have, in just the last few years, all rejected these arguments.

Such arguments have been unsuccessful despite the Supreme Court's 2002 holding in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*[48] There, the court, interpreting IRCA, ruled that,

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[46] Walter J. Ashbrook, *Defining "Employee" Within Arizona's Workers' Compensation Statute: An Argument for Inclusion*, 40 ARIZONA STATE LAW JOURNAL 691 (2008) (summarizing comments of Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA LAW REVIEW 709 (2004)). *See also* Thomas R. Lee & Dennis V. Lloyd, *Workers' Compensation and the Undocumented Worker*, http://www.aascif.org/public/Workers_Comp-Undocumented_Worker_FULL.doc. (Last visited Jan. 16, 2017); Larson, WORKERS' COMPENSATION (Desk Edition), § 66.03.

[47] IRCA is codified at 8 U.S.C. §§ 1101-1537. As explained by a leading commentator:

> Congress's passage in 1986 of the IRCA … sought to prohibit the knowing employment of undocumented immigrants …. The IRCA's purpose is to discourage employment of undocumented workers by requiring employers to attest in writing that they have verified the identity and work authorization of all newly hired employees…. Civil and criminal penalties can be imposed on employers that fail to comply with these requirements…. The statute also criminalizes the use of fraudulent documents by individuals attempting to surmount the employer verification system…. *Notably, it does not, however, penalize undocumented workers who accept employment*.

Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 NYU REVIEW OF LAW & SOCIAL CHANGE 299 (2006).

[48] Hoffman Plastic Compounds, Inc. v. N.L.R.B., 122 S.Ct. 1275 (2002).

while an illegal worker is an "employee" for purposes of NLRA protections, he or she is ineligible for backpay under that law when fired in retaliation for support of union organizing at work. The court reasoned that an award of backpay to an undocumented worker "not only trivializes the immigration laws, it also encourages and condones further violations." The court indicated that it could not allow the Board to "award backpay to an undocumented worker 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." (The worker in the case had submitted false papers.)

Courts and commentators have been almost unanimous in rejecting the idea that *Hoffman Plastic* should be interpreted as meaning that IRCA preempts workers' compensation laws. These courts and commentators have persuasively argued that Congress never intended such preemption.[49] In addition, they have persuasively explained that an award of disability benefits is different than an award of backpay.[50]

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[49] *See* Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 NYU REVIEW OF LAW & SOCIAL CHANGE 299 (2006); Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA LAW REVIEW 709 (2004). For 2010 cases that meticulously address the issue, see *Rodriguez v. Integrity Contracting*, 38 So.3d 511 (Lo. Ct. App. 1996), *cert. denied*, 131 S. Ct. 1572 (U.S. 2011); *Asylum Co. v. D.C. Dept. of Employment Services et al*., 10 A.3d 619 (D.C. Ct. App. 2010) (D.C. Act did not exclude undocumented workers, and IRCA did not preempt D.C. law); *Abel Verdon Constr. v. Rivera*, 348 S.W.3d 749 (Ky. Ct. App. 2010) (statute provides that "employee" is defined as "every person … whether lawfully or unlawfully employed," and IRCA did not preempt operation of Kentucky Act).

[50] *See* Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA LAW REVIEW 709 (2004):

> At first glance, *Hoffman Plastic* can be read as suggesting that income compensation awarded in workers' compensation claims – like backpay awarded in NLRA claims – is preempted by the IRCA. However, income compensation is distinguishable from backpay on two bases. First, income compensation serves as a substitute remedy for a common law tort, as opposed to backpay, which addresses statutory violations. In developing workers' compensation schemes, traditional tort remedies were severely curtailed in exchange for the application of a strict liability standard. This places additional importance on income compensation as a relief for injured workers who cannot bring separate tort suits to recover general compensatory or punitive damages.
>
> Second, injured workers have a much more difficult time mitigating their losses through replacement income. By contrast, workers entitled to backpay as a remedy for labor violations are not physically restricted and must mitigate damages due to the doctrine of avoidable consequences. Thus, disallowing lost wages as a remedy is of far greater consequence to the injured employee incapable of mitigating their losses.

Id.

For further discussion of how state courts have interpreted *Hoffman Plastic* when dealing with workers' compensation laws, see D. Carolina Nunez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for Undocumented Workers*, 2010 WISCONSIN LAW REVIEW 817, 858-860 (2010).

B. Recent Examples of State Courts Allowing Benefits

1. ***Delaware.*** *Delaware Valley Field Services v. Ramirez*, 105 A.3d 396 (Del. Super. 2013), *aff'd per curiam*, 61 A.3d 617 (Del. 2013). In this case, the Delaware Superior Court affirmed the decision of the Industrial Accident Board that an undocumented worker was an employee under the Delaware Act. There, the worker was apparently laboring in a white collar capacity for a mortgage company. He had presented false credentials as part of the job application. He sustained a serious, witnessed injury when he fell down a flight of six steps. He was a new employee (though having first worked six months as an independent contractor – for cash). When the claimant was then identified as undocumented, he was fired and deported to Honduras. He prosecuted his claim before the Board over a videoconference, with the Board utilizing an interpreter.

As noted above, the Board found coverage, awarded benefits, and the appeals court affirmed. The supreme court later affirmed *per curiam*. The court held that Ramirez's use of false information to become an employee did not remove him from coverage for job-related injuries, nor did his illegal status affect his eligibility for benefits. Further, addressing the more thorny issue of entitlement to continuing benefits, the court found that his legal inability to return to the U.S. was not the same as, or tantamount to, "incarceration," as argued by his employer. The court held, finally, that claimant's presence back in Honduras did not "automatically terminate his benefits due to his legal inability to [return to the U.S.] … for an employer arranged medical exam."

2. ***Iowa.*** *Staff Mgt. v. Jimenez*, 839 N.W.2d 640 (Iowa 2013). In this case, the supreme court held that an undocumented worker was indeed an "employee" potentially entitled to benefits. There, the claimant was a longtime worker who had allowed her work visa to lapse and was hence undocumented. She experienced abdominal pain while in the middle of exertion at work and was found to have sustained work-related hernias. While still treating for the problem, which had persisted, she was terminated from work upon her employer's determination that she was undocumented.

In the litigation that followed, the employer denied that the claimant could be an employee under the Iowa Workers' Compensation Act. The employer asserted that the statutory language did not include such workers and that an enforceable contract, in any event, could not have been formed as the claimant's work was illegal. The employer also asserted that even if the claimant was an employee, she was not entitled to a form of disability benefit called a "healing period," because the employer, now knowing of claimant's undocumented status, could not lawfully employ the claimant.

The commissioner, and then the court, rejected all of these arguments. The Iowa statute defines an employee as one who has contracted to work for another, and it also recounts a list of workers who are not employees. The court applied the rule of *expressio unius est exclusio alterius* and held that the "legislature did not intend to exclude undocumented workers from the [statute's] broad definition ...." Further, although federal immigration law prohibited employers from knowingly employing undocumented workers, nothing in the law persuaded the court that Congress intended to invalidate employment contracts for state workers' compensation purposes.

"The purpose of IRCA [Immigration and Reform Control Act of 1986]," the court admonished, "was to inhibit employment of undocumented workers. It was not to diminish labor protections for undocumented workers."

Further, it is a contract with an "illegal purpose" that is void, and the court could not conceive of the employment relationship in the present case as falling within such a category. Finally, the court recognized that the U.S. Supreme Court had held that an undocumented worker could not achieve back pay as a remedy, but the healing period disability payments that the commissioner had awarded were in a different category.

3. ***District of Columbia.*** *Asylum Co. v. D.C. Dept. of Employment Services et al*., 10 A.3d 619 (D.C. Ct. App. 2010). In late December 2010, the D.C. Court of Appeals placed the District in the majority rule column. The claimant in that case was an undocumented worker who had been employed in a restaurant as a busboy. He suffered a serious eye injury when he was struck by a bottle thrown by a customer. He required an operation and was not released for full duty for roughly eighteen months.

The court, affirming an ALJ's grant of benefits, rejected the employer argument that an undocumented worker could not be an employee under the District of Columbia Workers' Compensation Act, and that IRCA preempted the District's law. In addition, the court rejected the argument that claimant, even if found to be employee, had forfeited any wage-replacement rights. Employer had argued, in this regard, that it had been unable knowingly to provide the worker with light duty, and indeed had been obliged to fire him. The court took the position that it was still the work injury, and not undocumented status, that was the immediate cause (author's term) of the loss of earnings.

4. ***Maryland.*** *Design Kitchen & Baths, et al. v. Lagos*, 882 A.2d 817 (Ct. App. Md. 2005). Another case allowing coverage is *Design Kitchens & Baths*, in which Maryland's highest court held that undocumented workers are entitled to benefits. The case is enlightening as it identifies and discusses most, if not all, of the state court decisions that have decided the issue.

According to the Maryland court, only Virginia and Wyoming have produced decisions prohibiting undocumented workers from receiving benefits. In Virginia, the legislature reacted by amending the statute to include undocumented workers as "employees." In Wyoming, in contrast, the legislature had amended the law to prohibit undocumented workers from being considered employees, and the court in that case enforced the statute.

In *Design Kitchens*, the claimant, Lagos, was an undocumented worker. He was working for his employer, operating a saw, when he suffered an injury to his hand. The injury ultimately required two surgeries. The Maryland Commission and the trial court, on appeal, awarded benefits, and the employer further appealed. In the Maryland Supreme Court, employer argued that the worker's undocumented status necessarily meant that he could not legally engage in a contract of employment. In addition, the employer argued that federal immigration law, particularly IRCA (1986), preempted state workers' compensation statutes.

The court found neither argument persuasive. First, the Maryland Act did not exclude undocumented workers, and no ambiguity in the statute could be discerned. Second, IRCA did not preempt state workers' compensation laws to the extent that they provide benefits in the wake of a work injury. This conclusion, the court noted, had been reached by most courts that had considered the issue. Finally:

> [sound] public policy also favors the inclusion of undocumented workers as "covered employees" under the statute. Exclusion of this class of persons from the statute's coverage would retard the goals of workers' compensation laws and leave these individuals with only two options, receive no relief for work related injuries or sue in tort. Moreover, without the protection of the statute, unscrupulous employers could, and perhaps would, take advantage of this class of persons and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers.

5. ***South Carolina.*** *Curiel v. Environmental Management Services*, 655 S.E.2d 482 (S.C. 2007). In December 2007, the South Carolina Supreme Court, in *Curiel*, ruled in the same fashion. There, the claimant was an undocumented employee from Mexico. He suffered a detached retina in a work accident. The employer's argument was necessarily based on the idea of federal preemption, as the South Carolina statute defines employee as "every person engaged in employment … including aliens and also including minors, whether lawfully or unlawfully employed." The court rejected the preemption analysis on the same basis as the Maryland court.

6. ***Illinois.*** *Economy Packing Co. v. Illinois WC Comm'n*, 901 N.E.2d 915 (Ill. App. 2008). In December 2008, an Illinois appellate court also granted benefits to an undocumented worker. In that case, the claimant was an undocumented alien from Mexico, who had worked for the employer for a full ten years when she fell at work and injured her shoulder. The fact of the injury was uncontested, but employer apparently opposed her claim, particularly any claim for permanent total disability (PTD). The arbitrator, Commission, and Cook County Circuit Court, however, all awarded benefits.

In the appeals court, the employer continued to argue that PTD should not be awarded to an undocumented worker. In this regard, under Illinois law, when a worker seeks to gain benefits for PTD, she must prove "that she is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonable stable market for them." A special sub-test applies when the worker is not "obviously unemployable." In this respect, the worker must show that she is in an "odd-lot." She proves this status "(1) by showing a diligent but unsuccessful job search, or (2) by demonstrating that because of her age, training, education, experience, and condition, she is unable to engage in stable and continuous employment." The burden then shifts to the employer to show that suitable work is regularly and continuously available to the employee.

Employer argued that this test could not apply to an undocumented worker, as such a worker "would always be able to demonstrate … that no jobs are available regardless of the alien's condition." The court, however, was unmoved by this argument. True, IRCA would

prevent an undocumented alien such as the claimant from returning to any work. However, federal law does not prohibit a vocational expert from conducting a labor market survey to determine what suitable jobs, if any, are available that an undocumented worker might be able to obtain but for her immigration status. And, notably, "Illinois does not require that an employer establish that an actual job is available to an employee, only that suitable work is regularly and continuously available."

The court then modified the test. After first holding, like the Maryland and South Carolina courts, that IRCA did not preempt the Illinois Act, the court stated, "we conclude that an undocumented alien has the initial burden of proving that she cannot sustain regular employment in a well-known branch of the labor market without regard to her undocumented status. The burden then shifts to the employer to produce sufficient evidence that suitable jobs would be regularly and continuously available to the undocumented alien but for her legal inability to obtain employment."

Here, the claimant's vocational expert had persuaded the fact-finder that, regardless of her immigration status, she was unfit for any such work. Employer's vocational expert had not been found credible in rebuttal. Thus, claimant had met her burden under the revised test and she was entitled to benefits.

C. The California Experience

After the U.S. Supreme Court decision in *Hoffman Plastic*, the California legislature amended its law to confirm that undocumented workers are considered employees for purposes of the Act.[51] As explained by one writer:

> In 2003, the California Legislature amended the WCA in response to *Hoffman*. It enacted section 1171.5 of The California Labor Code to limit *Hoffman's* potential effect on state labor and civil rights laws. Under this section, immigration status

[51] California Labor Code § 1171.5 provides as follows:

> § 1171.5. Legislative findings and declarations regarding employment protections available regardless of immigration status
>
> The Legislature finds and declares the following:
>
> (a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.
>
> (b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.
>
> (c) The provisions of this section are declaratory of existing law….

> is irrelevant to an employer's obligation to compensate an injured employee. Section 1171.5 also prohibits using a person's immigration status as a basis for denying remedies. Finally, it provides an exception to this prohibition when inquiry into the worker's status is necessary to comply with federal immigration law.
>
> Section 1171.5 strengthens the position of undocumented workers against employers who rely on *Hoffman* to avoid workplace violation claims and workers' compensation awards. Following the Court's decision in *Hoffman*, employers argued undocumented workers were no longer entitled to labor rights in the workplace. By expressly forbidding an inquiry into a person's immigration status, section 1171.5 preserves not only entitlements but also civil remedies for all workers.[52]

The statute was applied in a 2005 case in which the employer unsuccessfully advanced the argument that IRCA had preempted state law altogether.[53] To the contrary, the court enforced the California statute and awarded benefits:

> In *Farmer Brothers*, the employer argued that the undocumented worker was not entitled to benefits because federal immigration laws – predominately the Immigration Reform and Control Act (IRCA) of 1986, 8 USC § 1324a – superseded the state's workers' compensation system. The Court of Appeals disagreed, specifically holding that there is no preemption language in IRCA expressly affecting state workers' compensation laws. Furthermore, the court reiterated that "California law has expressly declared immigration status irrelevant to the issue of liability to pay compensation to an injured worker."
>
> The *Farmer* court also held that the injured worker was an "employee" within the meaning of Labor Code 3351(a), which defines an employee as "every person in the service of an employer…whether lawfully or unlawfully employed." The employer in this case argued that the phrase "unlawfully employed" referred to the employer's violation of federal law by hiring undocumented workers and therefore excluded illegal employees from the definition of an "employee." However, the court found no such language in the statute to indicate the state legislature intended "unlawfully employed" to have such a meaning.[54]

Id.

[52] Katrina C. Gonzales, *Undocumented Immigrants and Workers' Compensation: Rejecting Federal Preemption of the California Workers' Compensation Act*, 41 UNIVERSITY OF CALIFORNIA (DAVIS) LAW REVIEW 2001 (June 2008).

[53] Farmer Bros. Coffee v. WCAB, 35 Cal. Rptr.3d 23 (Cal. Ct. App. 2005) (IRCA does not preempt California workers' compensation statute).

[54] D. Leggett, *California [Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 6 (Summer 2008).

D. The Florida Experience: Fraud Theories to Avoid Payment

Undocumented workers have long been held employees under the Florida Workers' Compensation Act, and a 2003 case held that IRCA did not preempt that law. This was so notwithstanding the holding in *Hoffman Plastic*.[55]

Still, according to Florida lawyers, employers have continued to be aggressive in trying to deny claims. According to one article, "Since many or most illegal aliens obtain employment by using fraudulent documentation … employers and carriers have been defending claims from aliens by asserting a fraud defense."[56] This defense is based on provisions of the Florida Act (title 440), which disqualify a worker from benefits if he or she engages in a criminal act to try to secure benefits, or presents false identification papers "for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits."[57]

According to these authors, this effort to deny benefits has proven difficult. In *Matrix Employee Leasing v. Leopoldo Hernandez*, for example, the claimant presented a false social security card for the purpose of obtaining employment and the employer did not find out until the date of the accident. However, the claimant did not use the false information to *secure benefits* and, hence, in the court's view, he did not commit any disqualifying crime.[58]

Still, in another case, the employer and carrier were able to invoke the fraud theory to successfully deny benefits:

> In many cases a claimant will give the fraudulent social security number to health care providers. Just one week after the decision in *Matrix*, a Judge of Compensation Claims filed his ruling in *Lopez v. FTL Electrical Services*, OJCC No. 07-023364RDM, (Fla. JCC Port Saint Lucie 2008).
>
> There, an employee was injured and the employer reported the injury to the E/C [employer/carrier] but shortly thereafter, the claims representative called the employer to report that the claimant's social security number was invalid. The claimant's wife gave the [E/C] the wrong number again, and later, the claimant himself spoke to the adjuster directly and provided a false social security number. The E/C denied all benefits pursuant to Fla. Stat. Section 440.105(4)(b) for trying to fraudulently obtain benefits.

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[55] Safeharbor Employer Services v. Velazquez, 860 So.2d 984 (Fla. 1st D.C.A. 2003).

[56] H. Byer & A. Craft, *Florida [Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 6 (Summer 2008).

[57] FLA. STAT. § 440.09(4)(a) (disqualification proviso cross-referencing section 440.105(4)(b). *See id.*, § 440.105(4)(b) (list of insurance fraud violations).

[58] Matrix Employee Leasing v. Hernandez, 975 So.2d 1217 (Fla. 1st D.C.A. 2008).

> The claimant argued that the First DCA's recent opinion in *Matrix* precluded the E/C from denying benefits. However, the JCC found this case distinguishable from *Matrix* because the claimant used a fraudulent Social Security number not only to obtain employment, but also "for the purpose of obtaining benefits" which equates to statutory misconduct.
>
> So while an illegal alien is not automatically disqualified from receiving workers' compensation benefits; if in order to obtain benefits the person commits fraud then no further workers' compensation benefits are due.[59]

An employer sought to invoke the fraud disqualification theory in a 2009 case. There, the claimant, an undocumented worker, was involved in an accident in 2008, and his injuries included the amputation of a portion of his left leg with consequent need for a prosthesis. Employer argued that claimant had allegedly failed to report "all of his 2008 taxable income to the IRS," an act of fraud which should serve to disqualify him from all benefits. The JCC and court, however, considered the issue waived as only having been raised after trial.[60]

In a 2014 case,[61] the Florida Fourth District Court of Appeal considered whether presenting false documents at the time of hiring, without more, triggered an employee's violation of the title 440 fraud disqualification provisions.[62]

There, Defendant Brock was charged with one count of fraud when the Florida Department of Revenue, Division of Unemployment Compensation database revealed that Brock had provided a false social security number upon his hiring by Waste Pro USA. Further, Brock was an illegal alien and had used this social security number on his various employment documentation (including Form I-9).

In his motion to dismiss, Brock argued that: (1) Waste Pro hired Defendant, knowing that his documentation was falsified, therefore they were not misled; and (2) Defendant had not filed a workers' compensation claim. Under this theory, the mere presenting of false documents to gain employment, absent a claim for workers'

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[59] H. Byer & A. Craft, *Florida [Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 6 (Summer 2008).

[60] Rene Stone Work Corp. et al. v. Gonzalez, 25 So.3d 1272 (1st D.C.A. 2010). In this case, claimant's employer did not deduct taxes, solicit from claimant a W-4, and did not issue a W-2. After the injury, claimant filed a 2008 tax return, but only reported the wages that he had earned with employer – not those from other entities for whom he labored earlier in 2008. Employer alleged this to be a misrepresentation justifying forfeiture. For another case where claimant's counsel had an undocumented claimant fill out tax returns in the wake of an injury, see *J.B.D. Brother's v. Miranda*, 25 So.3d 1271 (1st D.C.A. 2010).

[61] State v. Brock, 138 So.3d 1060 (Fla. 4th D.C.A. 2014).

[62] FLA. STAT. § 440.105(4)(b)(9) (stating, "[It shall be unlawful for any person:] To knowingly present or cause to be presented any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits.").

compensation, would not trigger a violation of Section 440.105(4)(b)(9). The trial court, agreeing with Defendant, granted his motion to dismiss.

The appellate court, however, reversing, found that the statute was clear and unambiguous, noting that the individual clauses of the statute indicate that it may be violated in more than one way: either by presenting false documents in order to obtain employment *or* presenting false documents in support of a workers' compensation claim. In comparing this case to *Matrix*, the court stated that, "To the extent *Matrix* has any application to this case, it shows that a violation [under the statute] should be considered distinctly separate from whether the violation was done for the purpose of obtaining benefits."

In light of this decision, the Florida Fourth District Court of Appeal overturned a trial court's recent dismissal of fraud charges in a separate case. Because no evidence existed that the defendants obtained employment for the purposes of obtaining workers' compensation benefits, the trial court had dismissed the state's charges. Pursuant to the analysis in *Brock*, the Fourth District remanded for a ruling consistent with proper interpretation of the fraud disqualification provisions.[63]

III. The Problem of Continued Eligibility

A. Introduction

In light of IRCA (1986) and *Hoffman Plastic* (2002), an undocumented worker's right to continuing disability benefits and vocational rehabilitation may be imperiled in many jurisdictions. A leading example is found in the 2008 New York case, *Ramroop v. Flexo-Craft Printing.*[64] There, the court affirmed a 1960 ruling that undocumented workers were entitled to benefits. Still, the court held that "additional benefits," payable in certain scheduled injury cases, are not payable to such worker, as he or she could not engage in the required "approved rehabilitation program." As noted in one monograph on the issue:

> While wage-replacement benefits have not been deemed categorically preempted under *Hoffman Plastic*, the courts have struggled with the question of whether and to what extent a worker's illegal status may affect termination or reduction of such benefits. This question arises, for example, where the wage replacement benefit is subject to reduction where the worker is deemed capable of returning to light work – whether in his original position or in a "modified" or "light duty" capacity. An illegal worker cannot legally accept any such work

[63] State v. Hector, 138 So.3d 1063 (Fla. 4th D.C.A. 2014).

[64] Ramroop v. Flexo-Craft Printing, 896 N.E.2d 69 (N.Y. 2008). *See* Peter Rousmaniere, *NY State Illegal Worker Denied Work Rehab Benefits* (July 11, 2008), available at http://www.workingimmigrants.com/2008/07/ny_state_illegal_worker_denied.html. (Last visited Jan. 16, 2017).

under IRCA; the legal question that arises is whether the employer can still reduce its burden to pay wage replacement benefits.[65]

B. Cases Allowing Suspension or Reduction of Disability Benefits Based on Illegal Status

Under the Georgia Act, undocumented workers are considered employees. Still, according to Georgia attorneys, the issue of "whether undocumented workers can continue to collect disability benefits after being released to light duty remains unsettled." In *Martines v. Worley & Sons Constr.*,[66] notably, the court held that, in the case of such a worker, disability benefits may be suspended upon claimant's release to light duty, as he or she is unable to pursue such work.

This is also the rule in Pennsylvania. In the controlling Pennsylvania case, *Reinforced Earth Co. v. WCAB (Astudillo)*,[67] the Appeal Board, Commonwealth Court, and Supreme Court all held that an undocumented worker is not excluded from coverage. Under the Supreme Court's final ruling, however, disability benefits will be limited. In this regard, once the worker recovers and regains the ability to perform any meaningful level of work, he or she will be precluded from continuing TTD or TPD because of his or her necessary unavailability for work.

Similarly, under Michigan law, undocumented workers are considered employees, but disability benefits are suspended given the inability of such workers to perform work.[68] Under the Kansas Act, the undocumented worker will experience a reduction in his or her PPD award. In this regard, under the Kansas Act, PPD for an undocumented worker is calculated based only on his or her impairment rating, as the usual added percentage points based upon loss of earning power cannot properly be taken into account.[69] The ability of an undocumented worker in Kansas to pursue benefits may also be impeded by the imposition of penalties for his or her use of false identification in the course of administrative proceedings.[70]

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[65] Thomas R. Lee & Dennis V. Lloyd, *Workers' Compensation and the Undocumented Worker*, available at http://www.aascif.org/public/Workers_Comp-Undocumented_Worker_FULL.doc. (Last visited Jan. 16, 2017).

[66] Martines v. Worley & Sons Constr., 628 S.E.2d 113 (Ga. Ct. App. 2006). For a complete review, see Bernadett Rosszer, *Illegal Aliens and the Georgia Workers' Compensation Act: The Employer/Insurer's Perspective*, available at https://www.gabar.org/committeesprogramssections/sections/workerscompensation/upload/wcwinter07news.pdf. (Last visited Jan. 26, 2017).

[67] Reinforced Earth Co. v. WCAB (Astudillo), 810 A.2d 99 (Pa. 2002).

[68] Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510 (Mich. Ct. App. 2003).

[69] C. Stubbs & B. Jackson, *Kansas [Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 11 (Summer 2008). *Compare generally* Gonzales v. Performance Painting, Inc., 2011 N.M. App. LEXIS 6 (N.M. Ct. App. 2011) (Act barred neither coverage nor disability benefits, but PPD "modifier" not applicable to undocumented worker), *reversed in part*, 303 P.3d 802 (N.M. 2013).

[70] Doe v. Kansas Dept. of Human Resources, 90 P.3d 940 (Kan. 2004). For a critique of this case, see Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 DRAKE JOURNAL OF AGRICULTURAL LAW 263 (2008).

C. Cases Allowing Disability Benefits Despite Illegal Status

Under the North Carolina Act, an undocumented worker can potentially continue to receive benefits. The claimant is not automatically disqualified, as in Pennsylvania and Michigan. Instead, the employer still must seemingly move forward with proofs that the work injury is no longer the proximate cause of disability, and that instead the undocumented status is the cause. In this regard, the employer, to reduce benefits, has the burden to produce evidence that there are suitable jobs claimant can secure "but for" his illegal status.[71]

According to one analyst, "Until the employee reaches this 'but for situation,' the employer may perform any vocational rehabilitation to place the plaintiff in a position where he could otherwise be employed. Such activities may include labor market surveys to determine what jobs, if any, are available in the area where plaintiff resides that fit the injured workers' physical limitations, as well as helping the plaintiff take steps to obtain proper authorization forms."[72]

An Illinois court has undertaken a similar analysis as it considered whether an undocumented worker was entitled to PTD. After first holding that IRCA did not preempt the Illinois Act, the court stated, "we conclude that an undocumented alien has the initial burden of proving that she cannot sustain regular employment in a well-known branch of the labor market without regard to her undocumented status. The burden then shifts to the employer to produce sufficient evidence that suitable jobs would be regularly and continuously available to the undocumented alien but for her legal inability to obtain employment." Here, the claimant's vocational expert had persuaded the fact-finder that, regardless of her immigration status, she was unfit for any such work. Employer's vocational expert had not been found credible in rebuttal. Thus, claimant had met her burden under the revised test and she was entitled to benefits.[73]

Under the Minnesota Act, before a worker is entitled to temporary wage loss benefits, "an employee must demonstrate that he has performed a diligent job search." In one case, an employer argued that the undocumented worker was barred from such benefits, as he or she necessarily could not undertake such a job search. The Minnesota Supreme Court, however, disagreed. "The court did not," according to one analyst, "address the underlying policy issue of whether an unauthorized alien can legitimately perform a diligent job search '[b]ecause the IRCA does not preclude payment of temporary total disability benefits and the language of our Act is clear.'" Thus, the court held that "unauthorized aliens are entitled to receive temporary

[71] Gayton v. Gage Carolina Metals, Inc., 560 S.E.2d 870 (N.C. Ct. App. 2002). This analysis was upheld in Roset-Eredia v. F.W. Dellinger, Inc., 660 S.E.2d 592 (N.C. Ct. App. 2008).

[72] R.S. Adams, North Carolina *[Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 17 (Summer 2008).

[73] Economy Packing Co. v. Illinois WC Comm'n, 901 N.E.2d 915 (Ill. App. Ct. 2008).

total disability benefits conditioned on a diligent job search."[74] (Still, if the employer offers light duty, and claimant refuses it based on immigration status, disability benefits can be discontinued.[75])

In a 2014 case, the Delaware Supreme Court held that an undocumented worker *possessed* an ongoing right to disability benefits, despite his undocumented status.[76] The court held, specifically, that an employer seeking termination of total disability benefits was not relieved of proving job availability in light of a worker's undocumented status. There, a construction company hired the claimant, who spoke almost no English, without verifying his social security number (SSN). Claimant labored for the employer for three years, but then suffered permanent impairment of his shoulder and back when he was thrown from a truck while working. Benefits were paid voluntarily.

Eventually, the employer investigated claimant's immigration status at the request of the carrier. It found that the SSN that claimant had provided was invalid. When claimant was unable to provide a valid SSN, the employer discharged him, and hired a doctor to re-evaluate his condition. The physician concluded that the claimant was still impaired, but able to return to light-duty work. The employer then sought termination of benefits. The Board concluded that employer had met its burden for termination of total disability benefits and declined to award partial disability benefits because the claimant's reduced earning capacity was caused by his immigration status rather than his injury.

The high court reversed, holding that, in order to avoid making partial disability payments, employer was required to prove that the claimant did not have a reduced earning power. Although the employer had baldly asserted that it would re-hire claimant (for light-duty work) but for his immigration status, the court found that this evidence was insufficient to demonstrate job availability. The court expressed concern that a decision to the contrary would mean that "an employer could always hire an undocumented worker, have him suffer a workplace injury, and then avoid partial disability benefit payments by 'discovering' his immigration status, offering to re-employ him if he could fix it, and claiming that a job is available to him at no loss in wages." According to the court, such a result "would be contrary to the Workers' Compensation Act."

Under the California system, undocumented workers are entitled to most benefits, but both regulation and case law limit job placement and rehabilitation benefits. One California analyst explained as follows:

> In *Del Taco v. Workers' Compensation Appeals Board, ...* 94 Cal. Rptr. 2d 825 (2000), the Court of Appeals held that an injured worker may not be medically

[74] S. Sorensen, *Minnesota [Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 14 (Summer 2008). The analyst in this note is discussing *Correa v. Waymouth Farms, Inc*., 664 N.W.2d 324 (Minn. 2003).

[75] Rivas v. Car Wash Partners, 2004 WL 1444564 (W.C.C.A. June 4, 2004) (cited in *Sorensen*, *supra*).

[76] Campos v. Daisy Constr. Co., 107 A.3d 570 (Del. 2014).

> eligible for vocational rehabilitation benefits when the employee is unable to return to work solely because of immigration status and is not precluded from returning to work due to disability. See also *Hermosilla v. Workers' Compensation Appeals Board*, 70 Cal. Comp. Ca 632 (2005). California regulations further clarify that employers can deny such benefits to a worker if, after offering modified or alternative work, the employer learns that the worker's immigration status prevents him or her from working lawfully in the country. 8 Cal. Code Regs 10131(d). Practically, injured workers may be required to show proof of permanent legal residency or authorization to be employed in the United States before qualifying for continued rehabilitation services.[77]

In a case interpreting the D.C. Act, the court allowed a disability claim. It rejected the idea that claimant, even if undocumented, had forfeited any lost wage rights. Employer, in this regard, had argued that it was unable, under IRCA, to have knowingly provided claimant with light duty. The court took the position that it was still the work injury, and not undocumented status, that was the immediate cause (author's term) of the loss of earnings.

"To be sure," the court acknowledged, "Claimant's termination prevented him from working for the Employer and his undocumented status prevented other employers [from doing the same.]" "But," the court insisted, "it was the work-related injury to Claimant's eye, and the time required for Claimant to recover from that injury and to adjust to his impaired vision, that made him physically unable to return to comparable wage-earning *anywhere*, thereby rendering him 'disabled' within the meaning of the Act…."[78]

D. Rehabilitation and Retraining Benefits

The undocumented worker's ability to seek rehabilitation and retraining is, in the view of many analysts, gravely imperiled by IRCA and *Hoffman Plastic*. Writers Lee and Lloyd, in their monograph, set forth the mainstream view:

> Finally, IRCA and *Hoffman Plastic* have important implications for workers' compensation remedies that call for rehabilitation and retraining of the injured illegal worker. Under IRCA, "[i]t is unlawful for a person or other entity … to refer for a fee, [an illegal alien] for employment in the United States." 8 U.S.C. § 1324a(a)(1)(A). Although workers' compensation statutes may permit or even require rehabilitation or retraining of an injured worker, any such

[77] D. Leggett, *California [Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 6 (Summer 2008).

[78] Asylum Co. v. D.C. Dept. of Employment Services et al., 10 A.3d 619 (D.C. Ct. App. 2010). *See also* Visoso v. Cargill Meat Solutions, 778 N.W.2d 504 (Neb. Ct. App. 2009) ("If it was the intent of the Nebraska Legislature to exclude illegal aliens from the definition of covered employees or workers, it could have easily included a modifier doing so in the statute, but the Legislature did not, and has not, done so.") (court also allowing TTD benefits: "Even though Visoso's illegal work status would have prevented him from working, Visoso was nonetheless entitled to temporary total disability benefits because one of the causes of his inability to return to work was his work injury."). The Supreme Court affirmed. *See* 826 N.W.2d 845 (Neb. 2013) (undocumented worker was entitled to permanent impairment and partial disability benefits).

remedies run a serious risk of running afoul of IRCA when they are extended to illegal workers. Under the governing regulations, "referral" is defined broadly to include transmitting documentation or information (such as a letter of recommendation) with the intent of helping an illegal alien get employment. A fee constitutes "remuneration whether on retainer or contingency basis." Thus, if an employer or workers' compensation insurer pursues rehabilitation or training aimed at putting an illegal alien back to work, it may well be contravening the prohibitions of federal immigration law.

With this concern in mind, the courts have started to identify some IRCA limitations on rehabilitation remedies under workers' compensation statutes. As with wage-replacement, some courts allow reemployment plans if they are aimed at evaluating jobs that would be available "but for" the worker's illegal status. *See Gayton*, 560 S.E.2d 870 [the Georgia case cited, *supra*]. Other courts state that vocational benefits may be provided only if they are aimed at putting the worker into a job outside the United States. *Cf. Tarango v. State Indus. System*, 25 P.3d 175 (Nevada 2001) ("we do not consider it outside the realm of possibility that appellant's future employment lies outside the boundaries of the United States, and such vocational training could be put to use elsewhere"). Still others hold that vocational benefits aimed at reemployment outside the United States would violate equal protection because they would be more costly than local benefits, *Foodmaker, Inc. v. WCAB*, 67 Cal. App. 4th 74 (1998), or would be contrary to the state priority scheme, *Tarango*, 25 P.3d at 180-81 ("[a]warding Tarango formal vocational training under [the Nevada workers' compensation statute] diametrically opposes the express intent of our workers' compensation scheme. . . . The [state scheme] was not intended as a means to expand the agency's powers to award vocational benefits beyond the borders of Nevada – let alone the borders of the United States.") ….[79]

Another analyst, however, has submitted that IRCA does not preempt state workers' compensation laws, even to the extent that they provide for vocational rehabilitation.[80]

E. Critique of Laws Restricting Disability Benefits

One commentator, the Virginia lawyer Paul Holdsworth, criticizes approaches limiting disability benefits. He asserts, in this regard, that "the argument that limiting damages is justified due to the alien's inability to mitigate damages is misplaced and overemphasized."[81]

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[79] Thomas R. Lee & Dennis V. Lloyd, *Workers' Compensation and the Undocumented Worker*, available at http://www.aascif.org/public/Workers_Comp-Undocumented_Worker_FULL.doc. (Last visited Jan. 16, 2017).

[80] Robert I. Correales, *Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENVER UNIVERSITY LAW REVIEW 347 (2003).

[81] Paul Holdsworth, *America's (Not so) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers*, 48 UNIVERSITY OF RICHMOND LAW REVIEW 1369 (2014).

The author identifies Pennsylvania, among other jurisdictions, as featuring precisely such a holding.

As discussed above, rulings typically have their genesis in the court's conviction that the proximate cause of disability must necessarily be the now-revealed undocumented status (and consequent unemployability), as opposed to the injury itself. (Holdsworth, however, also suspects a *punitive* motive.) In Pennsylvania, still primarily a wage-loss state, this reasoning has some validity, as proof of partial disability by the employer includes showing that vacant jobs exist in the local economy that the injured worker is capable of performing. If the new employer commits a criminal act by knowingly employing the worker, it is hard to conceive of the job as being "available."

But why, Holdsworth inquires, is this the end of the inquiry? For example, "an illegal immigrant may mitigate damages and become employed in a number of ways, including self-employment or through his development of independent contractor skills such as roofing or plumbing …. Mitigation is not necessarily impossible."

IV. Practical Problems Surrounding Litigation of Undocumented Worker Cases

When an undocumented worker case actually makes it to court, lawyers representing both employer and worker are faced with significant challenges.

One analyst, a New Mexico workers' compensation attorney, published a summary of panel discussions at the 2007 ABA Workers' Compensation Committee meeting that addressed this difficult issue.[82] One such panel was made up of attorneys from Kansas, where handling work injuries sustained by undocumented workers in the meatpacking industry has been a thorny issue. The panel members "painted a grim picture of the dangers undocumented workers face when they file workers' compensation claims, as well as the ethical quagmire in which attorneys may find themselves when an undocumented worker suffers a compensable on-the-job injury." With regard to attorney ethics, the panelists asserted, among other things:

> 1. The defense attorney has the duty to counsel their client, the employer, against continuing to violate immigration laws.
>
> 2. The defense attorney may encounter the "ever-present possibility of a conflict of interest between the employer and insurer clients" when the "insurer instructs counsel to pursue a defense that involves exposing the undocumented status of a claimant and the employer instructs the attorney not to pursue that line of defense."
>
> 3. Claimant's attorney faces the "potential conflict between the attorney's duty to the client and duty of candor to the courts, which can arise if the claimant confides that his or her immigration status is unlawful."

[82] Tequila Brooks, *Immigrant Workers and U.S. Workers' Compensation Laws*, LABOR AND EMPLOYMENT LAW (AMERICAN BAR ASSOCIATION), Volume 35, No. 4, p.13 (Summer 2007).

4. Claimant's attorney must face the decision "whether to counsel a client to pursue a valid workers' compensation … claim that could not only result in deportation but also in prosecution and incarceration …."

The author also notes that even *legal* immigrants have encountered problems with their workers' compensation rights after they return to their native countries. These workers "face the difficulties of obtaining a visa to return to the United States for hearings and scheduling depositions of workers now living in foreign countries."

Establishing undocumented status and the Fifth Amendment: A Pennsylvania case. A special challenge has arisen for defense lawyers practicing under the Pennsylvania Act. There, an undocumented worker is considered an employee, but *disability* benefits are to be suspended when, after a work injury, he or she recovers and is fit for some level of work. Immigration status is thus a relevant inquiry. The challenge? The state supreme court has held that the defense cannot satisfy its burden of proof of showing illicit undocumented status by pointing to the claimant's invocation of the Fifth Amendment when asked about his immigration status.[83]

V. Limiting Benefits to Foreign, Nonresident Dependents

A. Pennsylvania Law

An old provision of the Pennsylvania Act limits the ability of nonresident alien dependents to recover benefits in the fatal claim context. This is Section 310 of the Act.[84] It has had several manifestations over the years, and seems to have had no recent interpretation. Many states have similar provisions. Such laws may limit the benefits available to dependents of both legal and undocumented aliens.

Prior to 1939, under the Pennsylvania Act, non-resident aliens' dependents were allowed recovery. According to Skinner, an early treatise writer, in those days "there were a large number of cases involving [the need for] proof of dependency of alien widows and children…." These cases were made "obsolete" by a major amendment of 1939 which provided, "alien widows, children, widowers, parents, brothers and sisters no[t] residents of the United States shall not be entitled to any compensation."[85]

In 1955, however, the right to benefits was restored in part, apparently by change of the statute to its current version. Dependency is not presumed, as is the case when the widow or child is a U.S. resident. The statute also carries an "Iron Curtain"-era provision forbidding the transmission of funds to certain countries. The statute, which features a glaring sexism, provides as follows:

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[83] Cruz v. WCAB (Kennett Square Specialties), 99 A.3d 397 (Pa. 2014).

[84] 77 P.S. § 563.

[85] WILLIAM A. SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW, Volume 1, p.588 (Bisel 4th ed. 1947).

> Alien widows, children and parents, not residents of the United States, shall be entitled to compensation, but only to the amount of fifty per centum of the compensation which would have been payable if they were residents of the United States: Provided, That compensation benefits are granted residents of the United States under the laws of the foreign country in which the widow, children or parents reside.
>
> [A]lien widowers, brothers and sisters who are not residents of the United States shall not be entitled to receive any compensation.
>
> [I]n no event shall any nonresident alien widow or parent be entitled to compensation in the absence of proof that the alien widow or parent has actually been receiving a substantial portion of his or her support from the decedent.
>
> [W]here transmission of funds in payment of any such compensation is prohibited by any law of the Commonwealth or of the United States to residents of such foreign country, then no compensation shall accrue or be payable while such prohibition remains in effect and, unless such prohibition is removed within six years from the date of death, all obligation to pay compensation under this section shall be forever extinguished.
>
> In every instance where an award is made to alien widows, children or parents, not residents in the United States, the referee or the board shall, in the award, fix the amount of any fee allowed to any person for services in connection with presenting the claim, and it shall be a misdemeanor punishable by a fine of not more than five hundred dollars or imprisonment for not more than six months, or both, to accept any remuneration for the services other than that provided by the referee or board.

B. Ubiquity of Fatal Claim Limitation Laws

Statutes like that of Pennsylvania are ubiquitous in workers' compensation laws.[86] Larson notes, among other things, that such statutes have over the years been found in conflict with U.S. treaties in force with other countries. And, indeed, the 1939 Pennsylvania total ban on benefits was held invalid to the extent that it was in conflict with the Italian-American Treaty of 1949. That treaty provided that both countries, where pertinent laws are applicable, will grant to relatives of wage earners "pecuniary compensation … on account of … injury or death arising out of … the course of employment."[87]

[86] *See* Arthur Larson, WORKERS' COMPENSATION, § 97.07. *See also* Tracey A. Bateman, *Validity, Construction and Application of Workers' Compensation Provisions Relating to Non-Resident Alien Dependents*, 28 ALR 5th 547 (1995).

[87] Giovannetti v. Conte Equipment Co., 24 Pa. D.&C.2d 505 (Ct. Common Pleas Allegh. Co. 1961).

In the contemporary period, these restrictive laws have come under attack. For example, in the early 1990's, a Kansas court held unconstitutional the state's law drastically limiting the ability of an alien dependent to recover death benefits.[88] The Georgia statute, meanwhile, limits such dependents to $1000.00. That restriction has withstood attack.[89]

The Alabama statute is fairly remarkable. It directs that fatal claim benefits are only payable to dependents who were resident in the United States at the time of the worker's death. Recently, the constitutionality of this provision was called into question, but the Alabama Supreme Court avoided the issue, resolving the case on procedural grounds.[90]

According to Alabama lawyers commenting on the law, "The constitutionality of § 25-5-82 of the Alabama Code remains a question that is becoming increasingly ripe for review. With increasing attention to undocumented workers in the United States and higher concentrations in the Southeast, the Alabama courts will likely weigh the apparent disparity in injury compensation benefits to undocumented workers and the denial of death benefits to dependents living outside of the United States."[91]

VI. Bibliography

A. Law Journal Articles

Paul Holdsworth, *America's (Not so) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers*, 48 UNIVERSITY OF RICHMOND LAW REVIEW 1369 (2014).

Dorothy Haibek, Michelle Park, Rachael Dizard & Karen Mainieri, *Emerging from the Jungle: New Jersey Workers' Compensation and Workers Without Lawful Immigration Status*, 37 SETON HALL LAW JOURNAL 261 (2013).

Mark Nunez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for Undocumented Workers,* 2010 WISCONSIN LAW REVIEW 817 (2010).

[88] *See* Jurado v. Popejoy Constr. Co., 853 P.2d 669 (Kan. 1993). The limit was $750.000. For a treatment of the case, see Note, *Jurado v. Popejoy Constr. Co.: Determining the Constitutionality of Disparate Awards of Workers' Compensation Death Benefits to Nonresident Alien Dependents*, 39 VILLANOVA LAW REVIEW 705 (1994).

[89] *See* Peter J. Diskin, *Georgia's Workers' Compensation Law: Are Limitations on Death Benefits to Foreign, Nonresident Dependents Constitutional?*, 24 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 397 (1994); Adam S. Hersh, *Go Home Stranger: An Analysis of Unequal Workers' Compensation Death Benefits to Nonresident Alien Dependents*, 22 FLORIDA STATE LAW REVIEW 217 (1994).

[90] Taliaferro v. Goff Group, 947 So.2d 1073 (Ala. Civ. App. 2006) (referencing ALA. CODE § 25-5-82).

[91] C. Bolin & W. Lancaster, Alabama *[Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 6 (Summer 2008).

Gregory T. Presmanes & Seth Eisenberg, *Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits*, 43 TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 247 (Winter 2008).

Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 DRAKE JOURNAL OF AGRICULTURAL LAW 263 (2008).

Rachel Feltman, *Undocumented Workers in the United States: Legal, Political, and Social Effects*, 7 RICHMOND JOURNAL OF GLOBAL LAW & BUSINESS 65 (Winter 2008).

Katrina C. Gonzales, *Undocumented Immigrants and Workers' Compensation: Rejecting Federal Preemption of the California Workers' Compensation Act*, 41 UNIVERSITY OF CALIFORNIA-DAVIS LAW REVIEW 2001 (June 2008).

Walter J. Ashbrook, *Defining "Employee" Within Arizona's Workers' Compensation Statute: An Argument for Inclusion*, 40 ARIZONA STATE LAW JOURNAL 691 (2008).

Brooks, *Immigrant Workers and U.S. Workers' Compensation Laws*, LABOR AND EMPLOYMENT LAW (American Bar Association), Volume 35, No. 4, p. 13 (Summer 2007).

Anne Marie O'Donovan, *Immigrant Workers and Workers' Compensation After Hoffman Plastic Compounds, Inc. v. NLRB*, 30 NYU REVIEW OF LAW & SOCIAL CHANGE 299 (2006).

Pamela Cohen & Frank Fennerty, *Recent Attempts to Exclude Undocumented Workers from Workers' Compensation Coverage: What's Really at Issue?*, 43 IAIABC JOURNAL p. 61 (Fall 2006).

Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA LAW REVIEW 709 (2004).

Robert I. Correales, *Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENVER UNIVERSITY LAW REVIEW 347 (2003).

B. Monographs (Online)

Gary Wickert, *Donde Estan Mis Beneficios? Workers' Compensation Claims by Undocumented Employees* (2017), https://www.mwl-law.com/donde-estan-mis-beneficios-workers-compensation-claims-by-undocumented-employees/ (Last visited January 22, 2017).

John Annarino et al., *Illegal Aliens and Workers' Compensation* (2006) http://www.aascif.org/public/jan_feb_mar06/alien.htm (Last visited January 22, 2017).

Thomas R. Lee & Dennis V. Lloyd, *Workers' Compensation and the Undocumented Worker*, http://www.aascif.org/public/Workers_Comp-Undocumented_Worker_FULL.doc (Last visited January 22, 2017).

C. Text

Arthur Larson, WORKERS' COMPENSATION (Desk Edition), § 66.03.

D. Website

www.WorkingImmigrants.com
Website of Mr. Peter Rousmaniere. He describes this site as follows: "At Working Immigrants, we exchange information and ideas about the business of immigrant work: employment, compensation, legal protections, education, and mobility."

APPENDIX: TABLE

UNDOCUMENTED WORKERS AND ENTITLEMENT TO WORKERS' COMPENSATION (WITH RELATED MISCELLANEOUS ISSUES)

FIFTY STATES, DISTRICT OF COLUMBIA, AND LHWCA

Torrey/Beck (1.31.2017)

Jurisdiction, Statutory Class*	Appellate Case Law on Award?	Leading Case	Remarks
Alabama (II)	No, but award likely. Statute includes "aliens" in definition of employee. In addition, a trial court has awarded benefits to an illegal alien.	*Santa-Cruz v. Henry Lambert Constr.* (2005) (trial court holding that undocumented worker was employee under Act).[92]	
Alaska (III)	Undecided		
Arizona (I)	Undecided, but statute implies coverage.	*Gamez v. Indus. Comm'n*, 141 P.3d 794 (Ariz. Ct. App. 2006) (concurring judge opining that illegal aliens should be excluded as covered employees).[93]	Statute does define employee as: "Every person in the service of any employer subject to this chapter, including aliens and minors legally or illegally permitted to work for hire …." A.R.S. § 23-901(6). According to attorney Gary Wickert, writing in 2017, a 2003 "state court ruling of limited precedential value" exists suggesting that undocumented workers are covered. The case is cited as *Tiger Transmissions v. ICA*, No. 1 CA-IC 02-0100

* Legal analyst Jason Schumann, in a 2004 article, identified three types of employee-definition provisions that must be referred to when considering the employee status of illegal aliens. Class I makes specific reference to illegal employment; Class II makes reference to "aliens"; and Class III makes no reference whatsoever either to the legality of employment or alien status. Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers' Compensation*, 89 IOWA LAW REVIEW 709 (2004).

[92] This non-reported case, and the parties' and the public's response, is discussed at http://www.builderonline.com/insurance/workers-comp-wakeup.aspx. (Last visited Jan. 22, 2017).

[93] For a criticism of this concurring opinion, see Ashbrook, *Defining "Employee" Within Arizona's Workers' Compensation Statute: An Argument for Inclusion*, 40 ARIZONA STATE LAW JOURNAL 691 (2008).

			(filed May 29, 2003). This case does not seem to have a Lexis or Westlaw cite.
Arkansas (III)	Undecided		*Francisc v. Rodriguez*, 2007 AR Wrk. Comp. LEXIS 481 (Arkansas Div. of Workers' Compensation, 2007) (though courts in Arkansas have not yet ruled on the issue, as far as the Commission was concerned, undocumented workers were employees).
California (I)	Yes Cal. Labor Code § 1171.5, § 3351 8 Cal. Code Regs. § 10131(d)	*Farmer Bros. Coffee v. WCAB*, 35 Cal. Rptr.3d 23 (Cal. Ct. App. 2005) (IRCA does not preempt CA WC statute). *Del Taco v. WCAB*, 94 Cal. Rptr. 825 (Cal. Ct. App. 2000) (worker not eligible for VR benefits when unable to RTW because of immigration status).	Statute and regulations limit rehabilitation and continuing benefits when worker is undocumented.
Colorado (I)	Yes	*Champion Auto Body v. Indus. Claim Appeals Off.*, 950 P.2d 671 (Colo. Ct. App. 1997) (noting that statute referred to coverage for employees "whether lawfully or unlawfully employed.").	
Connecticut (III)	Yes	*Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998).	The reasoning of the *Dowling* case has been cited by many other state courts.
Delaware (III)	Yes	*Delaware Valley Field Services v. Ramirez*, 105 A.3d 396 (Del. Super. 2013), *aff'd per curiam*, 61 A.3d 617 (Del. 2013).	Later cases have held that a claimant can secure ongoing benefits despite undocumented status. These cases include *Campos v. Daisy Constr. Co.*, 107 A.3d 570 (Del. 2014); and *Rios Foods v. Guardado*, ___. A3d ___ (Del. 2016) [2016 Del. LEXIS 620].

Florida (I)	Yes	*Safeharbor Employer Services v. Velazquez*, 860 So.2d 984 (Fla. 1st D.C.A. 2003) (IRCA does not preempt FL WC statute).	Despite many years of court cases holding that undocumented workers are entitled to benefits, employers have, invoking fraud theories, aggressively argued against such claims.[94]
Georgia (III)	Yes	*Continental Pet Technologies v. Palacios*, 604 S.E.2d 627 (Ga. Ct. App. 2004) (claimant allowed claim despite her illegal status, and "even though she originally used fraudulent documents to obtain the … position in which she was injured.").	In case of undocumented worker, disability benefits may be suspended upon claimant's release to light duty, as he or she is unable to pursue such work. *See Martines v. Worley & Sons Constr*., 628 S.E.2d 113 (Ga. Ct. App. 2006).[95]
Hawaii (III)	Undecided		
Idaho (I)[96]	Yes	*Serrano v. Four Seasons Framing*, 336 P.3d 242 (Idaho 2014) (dissent noting that majority of Commission, in its decision, held that an undocumented worker "is a covered employee subject to the provisions of the [Worker's Compensation] Act under Idaho Code § 72–204 …."	Statute defining employee provides as follows: "A person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer." IDAHO CODE § 72-204. According to attorney Gary Wickert, writing in 2017, Idaho should be considered a state where the question of basic

[94] *See* H. Byer & A. Craft, *Florida [Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 6 (Summer 2008).

[95] For a summary and analysis, see Gregory T. Presmanes & Seth Eisenberg, *Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits*, 43 TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 247 (Winter 2008).

[96] Memo to Judge Torrey from Ms. Margie Cleverdon, Esq., Boise, ID, May 25, 2017.

			coverage is still undecided.
Illinois (II)	Yes	*Economy Packing Co. v. Illinois WC Comm'n*, 901 N.E.2d 915 (Ill. App. Ct. 2008) (undocumented workers are not excluded from coverage).	
Indiana (III)	No		
Iowa (III)	Yes	*Staff Mgt. v. Jimenez*, 839 N.W.2d 640 (Iowa 2013) (undocumented worker was an "employee" potentially entitled to benefits).	
Kansas (III)	Yes	*Doe v. Kansas Dept. of Human Resources*, 90 P.3d 940 (Kan. 2004) (undocumented worker is entitled to workers' compensation benefits, "though such worker could be subject to civil penalties for providing false name or [SSN] in applying for such benefits.").[97]	Under Board authority, the injured worker may be limited in PPD payments, but TTD is allowed. For recent authority from the Appeal Board, see *Van Coller v. Massieon Farms*, Docket No. 1,062,045 (WCAB Sept. 2013) (applying 2011 reform law, K.S.A. 44-510e(a)(2)(E)(i)(Supp. 2015), providing that claimants now have the burden of proving "the legal capacity to enter into a valid contract of employment" to qualify for work disability compensation in excess of the functional impairment percentage, and disallowing a 68.87% work disability award because claimant was found to have failed to prove the "legal capacity to contract" wage loss proof requirement).[98] *See also Fernandez v. McDonald's*, 292 P.3d 311 (Kan. 2013)

[97] C. Stubbs & B. Jackson, Kansas *[Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 11 (Summer 2008).
[98] Note to the Authors from Kim R. Martens, Esq., Wichita, KS (Jan. 24, 2017).

			(undocumented worker is entitled to a form of benefits termed "permanent partial general work disability" (PPGD)).
Kentucky (II)	Yes	*Abel Verdon Constr. v. Rivera*, 348 S.W.3d 749 (Ky. Ct. App. 2010) (statute provides that "employee" is defined as "every person … whether lawfully or unlawfully employed," and IRCA did not preempt operation of Kentucky Act).	Court rejects idea that allowing benefits will encourage undocumented workers to migrate to Kentucky "in order to take advantage" of such benefits; "In fact, the opposite is more likely. Were we to find [that the Kentucky Act] is preempted by IRCA, we might well be adding incentive to the hiring of illegal aliens, and then taking away the incentive … to maintain a safe workplace…."
Louisiana (III)	Yes	*Artiga v. M.A. Patout & Son*, 671 So.2d 1138 (Lo. Ct. App. 1996) (finding that the state legislature did not intend to exclude undocumented workers from recovering under the WC Act); *Rodriguez v. Integrity Contracting*, 38 So.3d 511 (Lo. Ct. App. 2010) (same), *cert. denied* (U.S. 2011).	
Maine (III)	Undecided		

Maryland (III)	Yes	*Design Kitchen & Baths, et al. v. Lagos*, 882 A.2d 817 (Md. Ct. App. 2005) (Maryland Act did not exclude undocumented workers, and no ambiguity in statute could be discerned; also, IRCA did not preempt compensation laws to extent they provide benefits after injury).	
Massachusetts (III)	Yes	*Medellin v. Cashman, KPA*, 17 Mass. Workers' Comp. Rep. 592 (2003) (IRCA does not preempt Mass. WC statute).	
Michigan (II)	Yes	*Sanchez v. Eagle Alloy, Inc*., 658 N.W.2d 510 (Mich. Ct. App. 2003) (while undocumented workers are considered employees, disability benefits are suspended given inability of such workers to perform work because of commission of criminal act).	
Minnesota (II)	Yes	*Gonzales v. Midwest Staffing Group*, 1999 WL 297157 (Minn. W.C.C.A. 1999) (as "aliens" are included in the definition of employee in the Act, undocumented workers are considered employees).	*See also Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003) (undocumented workers are entitled to receive WC wage loss benefits provided that they perform a diligent job search). *And see Sanchez v. Dahlke Trailer Sales, Inc*., 2016 Minn. App. Unpub. LEXIS 555 (filed June 6, 2016) (undocumented worker not barred from filing retaliatory discharge suit).
Mississippi (III)	Undecided		
Missouri (III)	Undecided		
Montana (I)	Undecided		
Nebraska (II)	Yes	*Visoso v. Cargill Meat Solutions*, 778 N.W.2d	A Nebraska court has denied VR benefits to an

		504 (Neb. Ct. App. 2009) ("If it was the intent of the Nebraska Legislature to exclude illegal aliens from the definition of covered employees or workers, it could have easily included a modifier doing so in the statute, but the Legislature did not, and has not, done so.") (court also allowing TTD benefits). This case was affirmed by the state supreme court in 2013. *See* 826 N.W.2d 845 (Neb. 2013) (undocumented worker was entitled to permanent impairment and partial disability benefits).	illegal as undocumented status made him ineligible to return to U.S. employment. *Ortiz v. Cement Prods., Inc*., 708 N.W.2d 610 (Neb. 2005).
Nevada (I)	Yes	*Tarango v. State Indus. Ins. System*, 25 P.3d 175 (Nev. 2001) (upholding workers' compensation benefits for undocumented worker but denying him vocational rehabilitation benefits because the latter would violate express terms of IRCA).	As noted at left, VR benefits are limited.
New Hampshire (III)	Undecided		According to attorney Gary Wickert, writing in 2017, New Hampshire should be considered a state where coverage exists. He cites a 2005 case in which the plaintiff, an undocumented worker, was permitted to sue in tort. *Rosa v. Partners in Progress, Inc*., 868 A.2d 994 (N.H. 2005).
New Jersey (III)	Yes	*Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. Super. App. Div. 1996); *Fernandez-Lopez v. Jose Cervino, Inc.*, 671 A.2d 1051 (App. Div. 1996) (awarding benefits even though statute makes no	*See* Dorothy Haibek, Michelle Park, Rachael Dizard & Karen Mainieri, *Emerging from the Jungle: New Jersey Workers' Compensation and Workers Without Lawful Immigration Status*, 37

		reference at all to aliens).	SETON HALL LEGISLATIVE JOURNAL 261 (2013).
New Mexico (III)	Yes	*Gonzalez v. Performance Painting, Inc.*, 303 P.3d 802 (N.M. 2013) (undocumented worker was covered as an employee, and his entitlement to permanent partial disability benefits after reaching MMI depends on whether the employer knew or should have known, at the time of hire, of the claimant's undocumented status).	
New York (III)	Yes	*Ramroop v. Flexo-Craft Printing*, 896 N.E.2d 69 (N.Y. 2008) (affirming a 1960 ruling, undocumented workers are entitled to benefits; however, "additional benefits" payable in certain scheduled injury cases are not payable to such worker, as he or she cannot engage in the required "approved rehabilitation program."	
North Carolina (I)	Yes	*Rivera v. Trapp*, 519 S.E.2d 777 (N.C. Ct. App. 1999).	Employer, to reduce benefits, has burden to produce evidence that there are suitable jobs claimant can secure, "but for" his illegal status. *Gayton v. Gage Carolina Metals, Inc.*, 560 S.E.2d 870 (N.C. Ct. App. 2002).
North Dakota (II)	Undecided		
Ohio (II)	Yes	*Rajeh v. Steel City Corp*., 813 N.E.2d 697 (Ohio Ct. App. 2004) (undocumented worker was an employee for purposes of Act, court noting that Ohio Act contains a list of excluded individuals, and undocumented workers are not among them).	

Oklahoma (III)	Yes	*Lang v. Landeros*, 918 P.2d 404 (Okla. Ct. App. 1996) (holding that undocumented workers are employees for purpose of the Act, observing that citizenship is not mentioned as a condition precedent: "Any employment is covered by the Workers' Compensation Act unless specifically excluded.").	
Oregon (III)	Yes	*Hernandez v. SAIF Corp*., 35 P.3d 1099 (Or. Ct. App. 2001) (undocumented workers covered; however, if unable to undertake modified duty, benefits are to be reduced to reflect the income they would have received but for their illegal status).	
Pennsylvania (III)	Yes	*Reinforced Earth Co. v. WCAB (Astudillo)*, 810 A.2d 99 (Pa. 2002) (as Act does not exclude undocumented workers, they are deemed covered employees).	As undocumented workers cannot accept available modified work, they are unable to collect TPD. *Morris Painting v. WCAB (Piotrowski)*, 814 A.2d 879 (Pa. Commw. 2003). See, in this regard, *Mora v. WCAB (DDP Contracting Co., Inc*.), 845 A.2d 950 (Pa. Commw. 2004) (undocumented worker is an employee, but once post-injury, if he or she regains any level of ability to return to work, disability benefits are to be suspended).
Rhode Island (III)	Undecided	Remarkable case: *Villa v. E. Wire Prods. Co*., 554 A.2d 644 (R.I. 1989) (trial commissioner committed error in denying benefits to a *legal alien*, as his only	Court in *Villa* remarked that as to eligibility of *undocumented* worker, "We shall await a concrete case before deciding this issue which is not presented by this case."

		basis for doing so was his "obvious disapproval of employee's [initial] method of entry into this country ….").	
South Carolina (I)	Yes	*Curiel v. Environmental Management Services*, 655 S.E.2d 482 (S.C. 2007) (IRCA did not preempt Act, which provides that unlawfully employed alien *was* an employee).	
South Dakota (III)	Undecided		
Tennessee (III)	Yes	*Torres Precision Indust., Inc*., 2014 WL 3827820 (Tenn. Ct. App. Aug. 5, 2014). (holding flatly that an undocumented worker was an "employee," and then proceeding to hold that such worker possessed a cause of action for wrongful discharge for exercise of workers' compensation rights).	Case law has long held that "employee" under the Act is determined "without regard to whether the employment be legal or illegal." *Am. Sur. Co. v. City of Clarksville*, 315 S.W.2d 509 (Tenn. 1958). *See also Martinez v. Lawhon*, 2016 Tenn. LEXIS 840 (Tenn. Ct. App. 2016) (2009 amendment to the law which limited an undocumented worker's PPD award to "one and one-half times the medical impairment rating" was unconstitutional as violative of the federal Supremacy Clause; such a proviso was "unconstitutional on the basis of federal preemption ….").
Texas (I)	Yes	*Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972) ("a person residing in this State whose entry may be contrary to the immigration laws is not barred, by that reason alone, from receiving … benefits.").	
Utah (I)	No court case, so undecided; statute does		

	provide that illicit employments are covered, to wit, those "illegally working for hire." UTAH CODE § 34A-2-104(1)(b).		
Vermont (III)	Undecided		
Virginia (I)	Yes	*Rios v. Ryan*, 542 S.E.2d 790 (Va. Ct. App. 2001) (noting statute referenced at right).	Supreme Court in 1999 held that an undocumented worker could not form a valid contract with an employer. Thus, an undocumented worker could not be an employee under the Virginia Act. *Granados v. Windson Development*, 509 S.E.2d 290 (Va. 1999). Thereafter, legislature amended the law to provide coverage. *See* VA. CODE ANN. § 65.2-101 ("employee" includes one engaged in illegal employment).
Washington (III)	Undecided		
West Virginia (III)	Undecided		
Wisconsin (III)	Yes	*Arista-Reav Kenosha Beef*, 1999 WL 370027 (Wis. L.I.R.C. 1999); *Zaldivar v. Hallmark Drywall*, 2014 WL 1647891 (Wis. L.I.R.C. 2014).	To date, undocumented workers have not been denied disability claims by the Wisconsin Labor and Industry Review Commission.[99]
Wyoming (I)	No, with exceptions	*Felix v. State*, 986 P.2d 161 (Wyo. 1999) (interpreting Act proviso that legal aliens are covered, court infers that *illegal* aliens are *not*).	WYO. STAT. § 27-14-102(a)(vii) currently provides as follows: "'Employee' means any person engaged in any extrahazardous employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written, and includes legally employed minors, aliens authorized to work by the United States department of justice,

[99] T. Domer & C. Domer, Wisconsin *[Law with Regard to Undocumented Workers]*, ABA TTIPS WC & EL COMMITTEE NEWS, at 19 (Summer 2008).

			office of citizenship and immigration services, and aliens whom the employer reasonably believes, at the date of hire and the date of injury based upon documentation in the employer's possession, to be authorized to work by the United States department of justice, office of citizenship and immigration services ….” For cases interpreting this provision, see *L&L Enterprises v. Arellano*, 344 P.3d 249 (Wyo. 2015); *Gonzalez v. Reiman Corp*., 357 P.3d 1157 (Wyo. 2015). *See also Herrera v. Phillips*, 334 P.3d 1225 (Wyo. 2014) (if an employer “reasonably believes, at the date of hire and on the date of injury based upon documentation in [its] possession,” that the undocumented worker is “authorized to work,” such worker is an “employee” for workers’ compensation purposes.).
District of Columbia (III)	Yes	*Asylum Co. v. D.C. Dept. of Employment Services et al*., 10 A.3d 619 (D.C. Ct. App. 2010) (undocumented workers not excluded).	
LHWCA	Likely yes	*Bollinger Shipyards v. Director, Officer of Workers' Compensation Programs*, 604 F.3d 864 (5th Cir. 2010) (undocumented workers not excluded.)	