

IMMIGRANT WORKERS AND WORKERS' COMPENSATION AFTER *HOFFMAN PLASTIC COMPOUNDS, INC. v. N.L.R.B.*

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I.

INTRODUCTION

In August of 2000, Guillermo Medellin, an undocumented immigrant from Mexico, was injured while working at a construction site in Boston.¹ Unable to work due to his injury, Mr. Medellin applied for workers' compensation benefits and prevailed at his initial administrative hearing despite the opposition of his employer, Cashman KPA, and the employer's insurer. Not once did Mr. Medellin's immigration status arise as an obstacle to his recovering benefits at the initial hearing.² The law in Massachusetts, as in most other states, was clear: undocumented immigrants were covered by workers' compensation on the same terms as any other worker.³

Two years later, however, Mr. Medellin's undocumented status was the sole basis of an appeal by his employer to the Massachusetts Department of Industrial Accidents.⁴ What changed? In March 2002, the Supreme Court held in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*⁵ that an undocumented worker fired in retaliation for his support of union organizing at work was ineligible for backpay under the National Labor Relations Act ("NLRA").⁶ The Court

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1. While Mr. Medellin was working, the ground collapsed beneath him and he fell at least eight feet. See Medellin, 17 Mass. Workers' Comp. Rep. 592, No. 03324300, 2003 WL 23100186, at *1 (Dep't Ind. Acc. Dec. 23, 2003).

2. *Id.* at *3.

3. Brambila, 11 Mass. Workers' Comp. Rep. 410, 1997 WL 487359, at *5 (Dep't Ind. Acc. Aug. 22, 1997) (holding that state workers' compensation coverage extends to all workers under any contract of hire, including undocumented immigrants). See also *infra* part II.A (discussing access by undocumented immigrants to workers' compensation pre-*Hoffman*).

4. Medellin, 2003 WL 23100186, at *3.

5. 535 U.S. 137 (2002).

6. *Id.* *Hoffman* involved the discharge of a California factory worker called Jose Castro (not his real name). The National Labor Relations Board ("NLRB") had determined that Mr. Castro's discharge violated section 8(a)(3) of the National Labor Relations Act ("NLRA"), codified in total at 29 U.S.C. §§ 151-169 (2000), which prohibits discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (2000). It authorized an award of backpay pursuant to its authority under section 10(c) of the Act. 29 U.S.C. § 160(c) (2000).

reasoned that an award of backpay to a worker not “available” to legally work in the United States was beyond the remedial discretion of the National Labor Relations Board (“NLRB”) because it conflicted with the Federal Immigration Reform and Control Act of 1986 (“IRCA”),⁷ which prohibits the employment of undocumented immigrants.⁸ It observed that an award of backpay to an undocumented worker “not only trivializes the immigration laws, it also encourages and condones future violations.”⁹ Notably, the undocumented worker in *Hoffman* had submitted false documents to obtain employment in violation of the IRCA’s employment verification provisions.¹⁰ The Court stated that it could not allow the Board to “award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.”¹¹

Employers have taken the *Hoffman* decision as a green light to contend that undocumented workers are without a range of state and federal workplace rights, including the right to receive workers’ compensation benefits after suffering a job-related injury.¹² The majority of these challenges have failed. In the workers’ compensation context, for example, state courts and agencies have overwhelmingly upheld the rights of undocumented immigrants to receive benefits after *Hoffman*.¹³ Nevertheless, two state courts have relied on *Hoffman* to allow the suspension of wage-loss benefits under workers’ compensation laws for undocumented immigrants.¹⁴

Workers’ compensation benefits are an important resource for injured immigrant workers and their dependents.¹⁵ Under most state workers’ compensation laws, injured workers are reimbursed for the medical expenses

7. 8 U.S.C. §§ 1101–1537 (2000).

8. *Hoffman*, 535 U.S. at 145–46.

9. *Id.* at 150.

10. *Id.* at 141; *Hoffman Plastic Compounds, Inc.*, 314 NLRB 683, 685 (1994).

11. *Hoffman*, 535 U.S. at 148.

12. *See, e.g.*, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) (backpay under Title VII); *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601 (S.D. Fla. 2002) (compensation for non-payment of wages guaranteed under the Migrant and Seasonal Agricultural Worker Protection Act); *Cortez v. Medina’s Landscaping*, No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. Sept. 30, 2002) (compensation for unpaid overtime and liquidated damages under the Fair Labor Standards Act); *Lopez v. Superflex, Ltd.*, No. 01 Civ. 10010 (NRB), 2002 WL 1941484 (S.D.N.Y. Aug. 21, 2002) (protection against discrimination under the Americans with Disabilities Act); *Singh v. Jutla & C.D. & R’s Oil, Inc.*, 214 F. Supp.2d 1056 (N.D. Cal. 2002) (protection against retaliation under the Fair Labor Standards Act); *Design Kitchen and Baths v. Lagos*, 388 A.2d 718 (Md. 2005) (workers’ compensation).

13. *See infra* part II.B (discussing state workers’ compensation decisions post-*Hoffman*).

14. *Reinforced Earth Co. v. Workers’ Comp. Appeal Bd.*, 810 A.2d 99 (Pa. 2002); *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003), *cert. granted*, 671 N.W.2d 874 (Mich. 2003), *cert. grant vacated*, 684 N.W.2d 342 (Mich. 2004).

15. *See* Letter from Paul Trause, Director Wash. State Dep’t of Labor and Indus., to Don Benton, Washington State Senator (Feb. 10, 2003) (on file with author) (explaining that wage-loss benefits “enable workers and their families to meet the basic necessities of survival while recovering from an industrial injury”).

they incur as a result of their injury and up to two-thirds of the wages they are unable to earn due to a workplace accident (wage-loss benefits).¹⁶ Dependents of deceased workers typically also receive benefits, though the amounts vary somewhat arbitrarily.¹⁷ In many jurisdictions, workers receive job training and rehabilitation.¹⁸ It is also significant that workers' compensation benefits replace a workers' right to sue in tort. In what has been called the "compensation bargain," workers surrender their right to sue their employers in tort, in exchange for a "swift and certain"—though limited—recovery in workers' compensation.¹⁹ Finally, as a general rule, employers finance workers' compensation through private insurance or by paying into a state fund, which has a deterrent function;²⁰ employers feel the impact of workplace accidents because, under the experience rating system typical in many states, frequent or sizeable workers' compensation claims by employees translate into higher insurance premiums for their employers.²¹

Access by undocumented immigrants to workers' compensation is being jeopardized at a time when the number of immigrant beneficiaries threatens to skyrocket, as unprecedented numbers of immigrant workers are being injured and are dying in the workplace.²² There are approximately

16. See 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* §§ 1.01, 1.03 (2004) [hereinafter LARSON & LARSON]. Compensation for lost earnings typically varies depending on whether a worker's injury is categorized as: (1) temporary total (e.g., some back injuries); (2) temporary partial (e.g., a broken wrist); (3) permanent partial (e.g., loss of a hand); or (4) permanent total (e.g., full paralysis). 9 LARSON & LARSON § 80.03.

17. See LARSON & LARSON, *supra* note 16, § 1.01(d).

18. See *id.* § 1.01.

19. See Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800 (1982).

20. *Id.* Additionally, employers in some states have the option of self-insurance. See Brief of Amicus Curiae Farm Labor Organizing Committee ("FLOC"), AFL-CIO at 2, *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. App. 2003) (No. 238003-G). Employees arguably pay for benefits as well via decreased wages. See PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 18, 23, 64-69 (2000). Of course, consumers likely foot the bill for increased workplace accidents, "since compensation premiums, as part of the cost of production, will be reflected in the price of the product." 1 LARSON & LARSON, *supra* note 16 § 1.01(h).

21. 1 LARSON & LARSON, *supra* note 16 at §§ 1.01, 1.04 (defining experience rating as the adjustment of workers' compensation premiums on the basis of past accident and liability records). See also Brief of Amici Curiae Greater Boston Legal Services at 15, *Medellin*, 17 Mass. Workers' Comp. Rep. 592, No. 03324300, 2003 WL 23100186 (Mass. Dep't Ind. Acc. Dec. 23, 2000) ("[P]revention, deterrence, and safety-promotion goals . . . are reflected in the [Massachusetts] system of premium rate-setting").

22. See Nurith C. Aizenmen, *Harsh Rewards for Hard Labor*, WASH. POST, Dec. 29, 2002, at C1 (reporting that foreign-born Latino men are now almost two-and-a-half times more likely to be killed at work than the average U.S. worker). News reports of immigrant worker deaths abound; Justin Pritchard, *A Mexican Worker Dies Each Day*, AP Finds, NEWSDAY, Mar. 14, 2004 (reporting that Mexican workers in the United States are dying at a rate of a worker a day and that death rates have risen fifty percent since the mid-1990s); See, e.g., David Barstow, *California Leads Prosecution of Employers in Job Deaths*, N.Y. TIMES, Dec. 23, 2003, at A1 (describing

seven million undocumented immigrants in the U.S. labor force.²³ National studies have found that these workers are disproportionately employed in hazardous industries, such as construction, mining, and agriculture.²⁴ (For example, while construction accounts for only seven percent of all employment, twenty percent of all workplace deaths occur in the construction industry.)²⁵ The toll on immigrant workers should be clear; the Associated Press has recently reported that a Mexican worker dies on the job every day in the United States.²⁶ In 2002, a National Academy of Sciences study showed that foreign-born Latino workers were nearly two-and-one-half times more likely to be killed on the job than the average U.S. employee.²⁷ Often these workers are leaving behind families who relied on their earnings.

This article makes two primary arguments. First, it contends that the Supreme Court's decision in *Hoffman* does not require state courts to deny workers' compensation benefits to immigrant workers. Such a result is not only unwarranted by the Court's holding, but it would also be bad social policy. Second, it urges state legislatures to proactively pass legislation to protect immigrant workers' rights to workers' compensation benefits. The conditions that have historically given rise to workers' compensation laws still exist in the workplace today. Advocates can draw attention to these conditions by educating the public, particularly employers, that mandatory coverage of all workers, regardless of immigration status, is in their economic interest.

gruesome deaths of two undocumented Mexican workers who drowned in a sump hole at a California dairy farm; the workers had received no training regarding the task which killed them); Paul J. Nyden, *Desperation's Risk: Immigrant Worker's Death Was an American Tragedy*, CHARLESTON GAZETTE, June 30, 2002, at P3F (reporting immigrant worker death during scaffolding collapse).

23. JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION, 2, 5 (2005), <http://pewhispanic.org/reports/report.php?ReportID=44> (noting that there are approximately 10.3 million undocumented immigrants residing in the United States).

24. CDC *Efforts to Address the Health and Safety Needs of Immigrant Workers: Hearing Before the S. Subcomm. on Employment, Labor and Pensions of the S. Comm. on Health, Labor and Pensions*, 107th Cong. (2002) (statement of Rosemary Sokas, M.D., M.O.H., Assoc. Dir. for Sci., Nat'l Inst. for Occupational Safety and Health, Ctrs. for Disease Control and Prevention, HHS); Jim Hopkins, *Fatality Rates Increase for Hispanic Workers*, USA TODAY, March 13, 2003, at 1B.

25. *Hearing before the S. Subcomm. on Employment, Safety, and Training of the S. Comm. On Health, Education, Labor and Pensions*, 107th Cong. (Feb. 27, 2002) (statement of John L. Henshaw, Asst. Sec'y of Labor for Occupational Safety and Health). Hispanic and Latino workers account for approximately fifteen percent of the workforce in the construction industry. *Id.* See also Hopkins, *supra* note 24 (reporting that deaths in the construction industry account for 20.8 percent of all workplace deaths).

26. Pritchard, *supra* note 22.

27. Aizenman, *supra* note 22.

II.

ACCESS BY INJURED IMMIGRANT WORKERS TO WORKERS' COMPENSATION—
BEFORE AND AFTER *HOFFMAN*

A. Pre-Hoffman

In the years preceding the *Hoffman* decision, the clear consensus among states was that immigration status had no bearing on injured workers' eligibility for workers' compensation benefits. Courts had interpreted state statutes to authorize the awarding of wage-loss benefits and medical expenses to unauthorized immigrant workers and their beneficiaries.²⁸ By the time that *Hoffman* was decided in 2002, state legislatures had decided overwhelmingly to include undocumented immigrants in the definition of "employee" under workers' compensation statutes.²⁹ Only one state, Wyoming, had explicitly limited by statute workers' compensation coverage to individuals legally permitted to work in the United States.³⁰

Congress's passage in 1986 of the IRCA,³¹ which sought to prohibit the knowing employment of undocumented immigrants, did not change this status quo. 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.³² Civil and criminal penalties can be imposed on employers that fail to comply with these requirements.³³ The statute also criminalizes the use of fraudulent documents by individuals attempting to surmount the employer verification system.³⁴ Notably, it does not, however, penalize undocumented workers who accept employment.

The passage of the IRCA did precipitate a number of employer challenges to

28. See *Gene's Harvesting v. Rodriguez*, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982); *Testa v. Sorrento*, 197 N.Y.S.2d 560 (App. Div. 1960); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635, 637 (Tex. Civ. App. 1972).

29. See ALA. CODE § 25-5-1(5) (2000); ARIZ. REV. STAT. ANN. § 23-901(5)(b) (1995); CAL. LAB. CODE § 3351(a) (West 1996); COLO. REV. STAT. § 8-40-202(1)(b) (2002); FLA. STAT. § 440.02(15)(a) (1993); 820 ILL. COMP. STAT. 305/1(b)(2) (1993); MICH. COMP. LAWS § 418.161(1)(l) (2002); MINN. STAT. § 176.011, subd. 9 (2002); MISS. CODE ANN. § 71-3-27 (1999); MONT. CODE ANN. § 39-71-118(1)(a) (2001); NEB. REV. STAT. § 48-115(2) (2002); NEV. REV. STAT. § 616A.105(1) (1987); N.M. STAT. ANN. § 52-3-3, subd B (1990); N.Y. WORKERS' COMP. LAW § 17 (McKinney 1993); N.C. GEN. STAT. § 97-2(2) (2002); N.D. CENT. CODE § 65-01-02(16)(a)(2) (1995); OHIO REV. CODE ANN. § 4123.01(A)(1)(b) (LexisNexis 1995); S.C. CODE ANN. § 42-1-130 (2001); TEX. LAB. CODE ANN. § 406.092(a) (Vernon 1994); UTAH CODE ANN. § 34A-2-104(1)(b)(ii) (2001); VA. CODE ANN. § 65.2-101 (2002). But see 10 LARSON & LARSON, *supra* note 16 at § 97.07 (noting that in the context of cases involving death, all but nine states place non-resident dependents on a different—largely limited—footing from dependents who are residents).

30. WYO. STAT. ANN. § 27-14-102(a) (vii) (2003).

31. 8 U.S.C. §§ 1101-1537 (2000).

32. 8 U.S.C. § 1324a(b)(1)(A) (2000).

33. 8 U.S.C. §§ 1324a(e)(4), (5) & 24a(f) (2000).

34. 8 U.S.C. § 1324c(a) (2000).

workers' compensation claims filed by undocumented immigrants. However, until *Hoffman* was decided, state courts consistently found no conflict between the federal IRCA's ban on the knowing employment of undocumented workers, and state law compensation requirements for those same individuals who had suffered workplace injuries.³⁵ The overwhelming majority of courts to consider the issue in the wake of the IRCA's passage found that undocumented workers were still covered by state workers' compensation statutes.³⁶

B. Post-Hoffman

After *Hoffman*, however, undocumented workers' ability to access workers' compensation benefits is less certain. The majority of state courts and agencies, including courts in Georgia, Florida, Maryland, Minnesota, and Oklahoma, have found that *Hoffman* does not preclude awards of wage-loss benefits and medical expenses to undocumented workers under state law.³⁷ However, the Michigan Court of Appeals and Pennsylvania Supreme Court clearly relied on *Hoffman*'s reasoning in their decisions interpreting state law to permit the denial of wage-loss benefits to undocumented workers based of their immigration status.³⁸

Based on a state-law provision restricting wage-loss benefits for individuals who are unable to work because they had committed a crime,³⁹ the Michigan Court of Appeals held in *Eagle Alloy v. Sanchez*⁴⁰ that crucial wage-loss benefits should be withheld from undocumented workplace accident victims

35. See, e.g., *Champion Auto Body v. Indus. Claim Appeals Office*, 950 P.2d 671, 673 (Colo. Ct. App. 1997); *Dowling v. Slotnick*, 712 A.D.2d 396, 402–05 (Conn. 1998). See also *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 178 (Nev. 2001) (affirming award of permanent partial disability benefits notwithstanding IRCA). Cf. *Iowa Erosion Control, Inc. v. Sanchez*, 599 N.W.2d 711, 715 (Iowa 1999) (finding that IRCA did not preclude benefit award to undocumented dependent of deceased worker).

36. *Del Taco v. Workers' Comp. Appeals Bd.*, 94 Cal. Rptr. 2d 825, 828 (Ct. App. 2000); *Dynasty Sample Co. v. Beltrain*, 479 S.E.2d 773 (Ga. 1996); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138, 1139 (La. Ct. App. 1996); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221, 224 (N.J. Super Ct. App. Div. 1996); *Gayton v. Gage Carolina Metals, Inc.*, 560 S.E.2d 870 (N.C. Ct. App. 2002); *Rivera v. Trapp*, 519 S.E.2d 777, 781 (N.C. Ct. App. 1999); *Lang v. Landeros*, 918 P.2d 404, 405–06 (Okla. Civ. App. 1996).

37. *Farmers Bros. Coffee v. Workers' Comp. Appeals Bd.*, 133 Cal. App. 533 (Cal. Ct. App. 2005); *Safeharbor Employer Servs. I, Inc. v. Velasquez*, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003); 2003); *Earth First Grading v. Gutierrez*, 606 S.E.2d 332 (Ga. Ct. App. 2004); *Cont'l PET Tech., Inc. v. Palacias*, 604 S.E.2d 627 (Ga. Ct. App. 2004); *Wet Walls, Inc. v. Ledezma*, 598 S.E.2d 60 (Ga. Ct. App. 2004); *Design Kitchen and Baths v. Lagos*, 882 A.2d 817 (Md. 2005); *Medellin*, 17 Mass. Workers' Comp. Rep. 592, No. 03324300, 2003 WL 23100186 (Dep't Ind. Acc. Dec. 23, 2003); *Correa v. Waymouth Farms Inc.*, 664 N.W.2d 324 (Minn. 2003); *Cherokee Indus. v. Alvarez*, 84 P.3d 798 (Okla. Civ. App. 2004). Additionally, a workers' compensation court in Nebraska recently authorized an award of vocational rehabilitation benefits, as well as wage-loss benefits and medical expenses, to an undocumented worker. See *Ortiz v. Cement Products Inc.*, No. 201-2525, 2004 WL 2213843 (Neb. Workers' Comp. Ct. Sept. 29, 2004).

38. *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510 (Mich. Ct. App. 2003); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99 (Pa. 2002).

39. Mich. Comp. Laws § 418.361(1) (1985).

40. *Sanchez*, 658 N.W.2d at 510.

David Sanchez and Alejandro Vasquez from the time their unauthorized status became known.⁴¹

As a preliminary matter, the Michigan Court of Appeals found that undocumented immigrants fell within the definition of "employee" for the purposes of the Michigan Worker's Disability Compensation Act.⁴² In reaching its conclusion that Vasquez and Sanchez should nevertheless be denied wage-loss benefits, despite their crippling work-related injuries, the court relied extensively on *Hoffman*. The statute at issue in *Sanchez*, subsection 361(1) of the Michigan Workers' Disability Compensation Act, contains two requirements: first, the employee must have committed a crime, and second, the employee must be unable to obtain or perform work *because* of that crime.⁴³ The court devoted the bulk of its analysis to the first requirement, quoting extensively from *Hoffman* for the proposition that the acquisition and use of fraudulent documentation to obtain employment is a federal crime.⁴⁴ Yet, notably, despite discussing this issue at length, the *Sanchez* court never established that Plaintiffs Vasquez and Sanchez had committed a crime. 8 U.S.C. § 1324c(a)(2), which the Plaintiffs were alleged to have violated,⁴⁵ provides that "[i]t is unlawful for any person or entity *knowingly* . . . to use, attempt to use, possess, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter."⁴⁶ Although a judge had determined that each plaintiff presented false documents to their employer, no evidence as to whether the two men possessed the requisite "knowing" intent was mentioned in the decision.

The court's analysis of the second requirement was only cursory. In essence, the court reaffirmed the lower court's reasoning that Sanchez and Vasquez became "unable to obtain or perform work 'because of' the commission of crime within the meaning of subsection 361(1)," once defendant, Eagle Alloy, learned of their undocumented status and could no longer lawfully retain them as employees or find them alternate work.⁴⁷

In *Reinforced Earth Co. v. Workers' Compensation Appeal Board*,⁴⁸ the Pennsylvania Supreme Court found that an award of temporary total disability

41. *Id.* at 521. In addition, both men had allegedly submitted fraudulent documents—in violation of IRCA—in order to obtain employment. *Id.* at 512, 513.

42. *Id.* at 515–16.

43. MICH. COMP. LAWS § 418.361(1) (1985) ("[A]n employer shall not be liable for compensation . . . for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.").

44. *See Sanchez*, 658 N.W.2d at 519.

45. The Michigan Court of Appeals based its conclusion that Sanchez and Vasquez had each committed a crime on its determination that they had "acquired and presented false documentation in order to obtain employment with [the defendants]." *Id.* at 520. Such conduct, if undertaken knowingly, violates 8 U.S.C. § 1324c(a)(2).

46. 8 U.S.C. § 1324c(a)(2) (2000) (emphasis added).

47. *Sanchez*, 658 N.W.2d at 521.

48. 810 A.2d 99 (Pa. 2002).

benefits to an undocumented worker, Juan Carlos S. Astudillo, could be suspended under a provision allowing a workers' compensation judge to modify benefits upon proof that a claimant's loss of earning power is no longer caused by the work-related injury.⁴⁹ The result in *Reinforced Earth* was within the court's discretion. Employers petitioning for a modification of benefits under Pennsylvania workers' compensation law must generally show that jobs were referred to or are available to the claimant. However, the Pennsylvania Supreme Court held that Mr. Astudillo's employer was relieved from establishing "job availability," because, as an undocumented immigrant, "[Astudillo's] loss of earning power is caused by his status, not his work-related injury."⁵⁰ In addition, though neither party had filed a formal petition, the *Reinforced Earth* court nonetheless exercised discretion in analyzing Mr. Astudillo's case as a petition to suspend benefits.⁵¹

The *Reinforced Earth* and *Sanchez* decisions, while turning on interpretations of state law, adhere closely to the *Hoffman* opinion in spirit, reasoning, and result. Although the Pennsylvania Supreme Court did not expressly rely on federal law to reach its conclusion, the Michigan Court of Appeals openly embraced the *Hoffman* ruling, noting that its own decision "is in accord with the policy of the federal government as set forth in *Hoffman*." According to the court, this justified the denial of wage-loss benefits to both *Sanchez* and *Vasquez*.⁵² Just as the *Hoffman* Court found an undocumented worker was protected by the NLRA yet ineligible for any substantive remedy, the *Sanchez* and *Reinforced Earth* courts found undocumented claimants *Sanchez*, *Vasquez*, and *Astudillo* to be employees under state workers' compensation law yet potentially ineligible for crucial wage-loss benefits. Moreover, the courts' reasoning that the undocumented claimants were unable to work because they lacked work authorization and used false documents, rather than because they were injured, reflects the *Hoffman* Court's reasoning that undocumented employees should be ineligible for backpay because they are not legally authorized to work in the United States.

III.

HOFFMAN DOES NOT RESTRICT UNDOCUMENTED WORKERS' ACCESS TO STATE-BASED WORKERS' COMPENSATION

The *Hoffman* decision has opened the door for employers and insurers to

49. *Id.* at 106–07. The court ultimately remanded to the workers' compensation judge to address the suspension issue.

50. *Id.* at 108.

51. *See id.* at 106 n.10 ("While this is a proceeding on a claim petition, as opposed to a proceeding on a petition to modify, reinstate, suspend, or terminate an award . . . , we have recognized that workers' compensation judges are authorized to render adjudications on claim petitions which incorporate aspects of modification, suspension or termination where the evidence so indicates without the necessity of a formal petition by the employer.") (citations omitted).

52. *Sanchez*, 658 N.W.2d at 521.

challenge longstanding precedent upholding workers' compensation awards to undocumented immigrants.⁵³ However, as I will argue below, the argument that *Hoffman* requires that undocumented immigrants be denied access to workers' compensation, including reimbursement for medical expenses and wage-loss benefits, is misguided. First, federal immigration law does not preempt state workers' compensation law under federal preemption analysis because an award of workers' compensation benefits to an undocumented worker under state law does not contravene the federal IRCA. Second, the denial of benefits to undocumented immigrants makes particularly bad policy in the workers' compensation context, where it threatens a range of important state interests, including the interest in assuring the widespread coverage of all legitimate work injuries regardless of the victim's immigration status.

A. Hoffman Does Not Preempt State Workers' Compensation Law

The *Hoffman* decision does not preclude an award of workers' compensation to an undocumented immigrant under state law. As an initial matter, the task of resolving tension between two federal statutes, such as that undertaken by the Supreme Court in *Hoffman*, is very different from the task analyzed here, which involves resolving tension between state and federal law. In this latter context, principles of federal preemption are what guide the courts in determining whether Congress has intended to invalidate state law.⁵⁴

It is well established that Congress may preempt contrary state law pursuant to its powers under the Supremacy Clause.⁵⁵ This may happen in three ways.⁵⁶ First, Congress may make preemption explicit, typically by including an express preemption clause in federal legislation.⁵⁷ Second, Congress may implicitly preempt an entire field of state legislation, either by regulating that field so extensively "as to make reasonable the inference that Congress left no room for the States to supplement it," or by passing an Act that "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."⁵⁸ Third, Congress can

53. See, e.g., *Earth First Grading v. Gutierrez*, 606 S.E.2d 332 (Ga. Ct. App. 2004); *Cont'l PET Tech., Inc. v. Palacias*, 604 S.E.2d 627 (Ga. Ct. App. 2004); *Wet Walls, Inc. v. Ledezma*, 598 S.E.2d 60 (Ga. Ct. App. 2004); *Medellin*, 17 Mass. Workers' Comp. Rep. 592, No. 03324300, 2003 WL 23100186 (Dep't Ind. Acc. Dec. 23, 2003). See generally National Employment Law Project, "Used and Abused: The Treatment of Undocumented Victims of Labor Law Violations Since *Hoffman Plastic Compounds v. NLRB*" (2003), available at <http://www.nelp.org/docUploads/Used%20and%20Abused%20101003%2Epdf> (detailing post-*Hoffman* employer challenges to undocumented worker access to labor law protections).

54. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990).

55. *English*, 496 U.S. at 78.

56. *Id.*

57. See, e.g., *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-98 (1983).

58. *English*, 496 U.S. at 79 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

implicitly preempt by passing a federal law that actually conflicts with state law, either because compliance with both state and federal regulations is impossible, or because state law frustrates “the accomplishment and execution of congressional objectives.”⁵⁹ Under each of these three analyses, the task is to determine whether Congress *intended* to preempt state law.⁶⁰ Furthermore, the analysis in each case begins with a “presumption against preemption,” which obligates deference to laws enacted pursuant to a state’s police power unless Congress clearly manifests a contrary intent.⁶¹ As I will argue below, IRCA does not preempt state workers’ compensation law under any of these analyses.

1. *Express Preemption*

Nowhere in IRCA are state workers’ compensation statutes expressly preempted. The IRCA provision that the Court in *Hoffman* found irreconcilable with awarding an undocumented worker backpay—8 U.S.C. § 1324a—contains an express preemption clause. The Supreme Court typically construes such clauses in accordance with standard methods of statutory interpretation, focusing on the plain meaning of the language at issue.⁶² To the extent the statute is unclear, the Court may also look to the context of the provision and the legislative history.⁶³ By its plain meaning, § 1324a does not preempt state workers’ compensation laws. It preempts only state employer sanctions regimes (*i.e.*, state statutes that punish employers for employing undocumented workers).⁶⁴ Judicial inquiry need not go any further than this provision to decide that Congress has not expressly preempted state workers’ compensation laws. However, even if a court were to analyze the IRCA’s context or legislative history, it would find no evidence of express preemption. The House Report preceding IRCA’s enactment provides that “[i]t is not the intent of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law . . .”⁶⁵ In

59. *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 509 (1989). *See also Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

60. *English*, 496 U.S. at 78–79 (“[p]re-emption fundamentally is a question of congressional intent”) (citation omitted).

61. *Rice*, 331 U.S. at 230 (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (citation omitted).

62. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002).

63. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 532 (1992) (Blackmun, J., concurring). *See also Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 97–99 (1983) (observing that the Court must give effect to the statute’s plain language “unless there is a good reason to believe Congress intended the language to have some restrictive meaning”).

64. 8 U.S.C. § 1324a(h)(2) (2000) (“The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”). This statutory language was intended to preempt state employer sanctions statutes such as the California statute upheld prior to IRCA’s enactment in *De Canas v. Bica*, 424 U.S. 351 (1976).

65. H.R. Rep. No. 99-682(I), at 58 (1986). Although the *Hoffman* Court dismissed the

addition, although IRCA penalizes immigrants for using false documents to obtain work, it does not make it illegal for an undocumented worker to accept employment in the United States.

2. Implied Field Preemption

As noted above, field preemption occurs in two circumstances. First, a state statute may be field preempted where Congress has legislated so extensively that it becomes reasonable to conclude that Congress intended to displace state regulation in the field.⁶⁶ For example, in *Schneidewind v. ANR Pipeline Co.*,⁶⁷ the Court found that the Natural Gas Act comprehensively occupied the field of regulation of natural gas utilities so as to preempt state law governing the ability of public utilities to issue long-term securities.⁶⁸ The Court reached this conclusion in part because the federal law provided “a number of tools for examining and controlling” the issuance of securities by natural gas companies.⁶⁹

IRCA is quite different from the Natural Gas Act analyzed in *Schneidewind*; it deals with only one narrow aspect of immigrant employment: it simply prohibits the hiring or continued employment of undocumented immigrants. It makes no mention of terms and conditions governing the employment of immigrants who have already been hired.⁷⁰ Thus, the statute hardly can be said to regulate the field of providing workers' compensation benefits to undocumented immigrants so comprehensively as to suggest that Congress had intended to oust the states from the area.

Second, a state statute may be field preempted where there is a dominant federal interest in the subject matter to be regulated.⁷¹ The area of immigration is undoubtedly one of dominant federal interest.⁷² However, as the Supreme Court observed in *De Canas v. Bica*, even though the “[p]ower to regulate

significance of this statement for the purposes of remedies granted under the NLRA, see *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 n.4 (2002), it is still instructive as to whether Congress, by enacting the IRCA, intended to regulate terms and conditions governing immigrant employment.

66. See *English v. Gen. Elec., Co.*, 496 U.S. 72, 79 (1990).

67. 485 U.S. 293 (1988).

68. *Id.* at 300. See also *Pacific Gas & Elec. Co. v. State Estate Conservation and Dev. Comm'n*, 461 U.S. 190, 212 (1983) (“[T]he Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly conceded to the States.”).

69. *Schneidewind*, 485 U.S. at 301.

70. See *supra* part II.A. (describing the IRCA).

71. See *English*, 496 U.S. at 79 (“[S]tate law is pre-empted where an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” *Id.*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

72. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) (“[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, ‘the act of congress . . . is supreme; and the law of the state . . . must yield to it.’”) (citations omitted).

immigration is unquestionably exclusively a federal power, . . . the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power.”⁷³ The Court in *De Canas* held that laws specifically regulating the employment of immigrants were not field preempted under a dominant interest analysis—notwithstanding Congress’ plenary immigration power—where a local regulation had a “purely speculative or indirect impact on immigration.”⁷⁴

Workers’ compensation statutes act primarily to compensate injured workers, to spread the costs of accidents, and to prevent accidents through deterrence.⁷⁵ Any impact workers’ compensation has on immigration is thus indirect, and withstands field preemption under the dominant interest analysis.

3. *Implied Conflict Preemption*

Although IRCA clearly does not expressly preempt state workers’ compensation regimes, and cannot plausibly be said to occupy this field of regulation in such a way as to preempt any state law, there is a stronger argument that IRCA must preempt states’ provision of wage-loss benefits to undocumented workers because a conflict or tension exists between the federal and state laws. Nevertheless, several initial considerations weigh against implying preemption from a supposed conflict or tension. First, as under the two doctrines of preemption considered above, analysis under the theory of implied conflict preemption begins with a “presumption against preemption.” Indeed, in areas traditionally occupied by the states, the Supreme Court has declared that “federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.”⁷⁶ This presumption against preemption is particularly strong in the case of workers’ compensation, an area of law which has always been controlled almost exclusively by state governments.⁷⁷

73. 424 U.S. at 354–55 (citations omitted).

74. *Id.* at 355–56.

75. 1 LARSON & LARSON, *supra* note 16, §§ 1.01, 1.04. Deterrence is not specifically cited by the authors, but clearly follows from the fact that employers do, at least indirectly, shoulder the cost, and through “experience rating,” *i.e.*, “the adjustment of [insurance] premium on the basis of past accident and liability record,” an employer has some incentive to minimize workplace injuries, lest her insurance premiums become “so high that [her] cost of production would not permit [her] to compete.” *Id.* § 1.04.

76. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

77. *See De Canas*, 424 U.S. at 356–57 (“States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum wage and overtime laws, laws affecting occupational health and safety, and workmen’s compensation laws are only a few examples.”); *Appellant v. Respondent*, No. 022258-s, 2002 WL 31304032, at *1 (Tex. Workers’ Comp. Comm’n 2002) (“Workers’ compensation laws and benefits are concerns unique to the States and it is state law that controls the entitlement

Second, this general presumption against preemption is strengthened where, as here, the federal statute contains affirmative evidence that Congress did not intend to preempt state worker-protection laws. As noted above, IRCA contains a clause intended to preempt a certain specific, narrow class of state laws (laws sanctioning the employment of undocumented immigrants).⁷⁸ While Congress' inclusion of an express preemption clause in a statute does not forbid courts from looking beyond that clause to determine the statute's preemptive reach,⁷⁹ it does imply that Congress intended to limit the statute's preemptive reach beyond that which was explicitly stated.⁸⁰ The Court has noted that "[s]uch reasoning is a variant of the familiar [statutory construction] principle of *expressio unius est exclusio alterius*,"⁸¹ which "hold[s] that to express or include one thing implies the exclusion of the other."⁸²

Given these strong reasons to presume Congress's contrary intent, the IRCA should preempt state workers' compensation remedies only if there is an unmistakable showing of conflict—either because compliance with both state and federal regulations is impossible, or because state law frustrates "the accomplishment and execution of congressional objectives."⁸³ Neither of these circumstances applies here. First, it is not impossible for private parties to comply with both the IRCA and state workers' compensation laws. Workers' compensation laws do not require employers to hire workers in violation of the IRCA. They merely require employers provide statutorily determined compensation for workplace injuries, either through self-insurance or by paying into a state insurance fund.⁸⁴ Nor are undocumented workers required to violate the IRCA to receive their award of wage loss compensation. Some states require workers' compensation claimants conduct a job search,⁸⁵ but undocumented claimants can do this without violating the IRCA so long as they do not use false documents. As noted above, undocumented workers are only penalized for accepting work that they use false documents to obtain.⁸⁶

to workers' compensation benefits") (citation omitted). *See also* FISHBACK & KANTOR, *supra* note 20, at 5 ("Workers' compensation is rare among the major social insurance programs in that it was from the beginning legislated at the state level with no federal involvement and has remained a state responsibility ever since."); 1 LARSON & LARSON, *supra* note 16, §§ 2.07, .08 (describing the development of workers' compensation in the United States).

78. *See supra* note 64 and accompanying text.

79. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288–89 (1995) (noting that an express preemption clause supports an inference that Congress did not intend to preempt other matters, but it does not entirely foreclose the possibility of implied preemption).

80. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

81. *Id.* at 518. *See also* *Sure-Tan v. NLRB*, 467 U.S. 883, 892 (1984) ("Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'").

82. BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

83. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989).

84. *See supra* part I (discussing defining characteristics of state workers' compensation laws).

85. *See, e.g., Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003).

86. *See supra* note 34 and accompanying text.

Second, state provision of workers' compensation benefits to undocumented immigrants does not prevent the attainment or execution of congressional objectives under the IRCA. This point is supported by the Court's analysis in *Hoffman*. The Court reasoned that an award of backpay to an undocumented worker would subvert the policies of the federal IRCA.⁸⁷ On its face, an award of wage-loss benefits might seem to condone future IRCA violations. However, because benefit awards under state workers' compensation statutes are fundamentally distinct from backpay under the NLRA, this reasoning is not persuasive in the workers' compensation context. Unlike backpay, which accrues prospectively with each new day that a worker is unemployed and seeking work, the right to workers' compensation insurance, including the costs of medical care and wage-loss benefits under state workers' compensation law, vests during work already performed. As one early commentator explained:

The new obligation of the employer to his employés is rather a wage obligation in the nature of an undertaking thrust upon the employer, as a part of the contract of employment, to become a party to an insurance policy created by law and to be entered into as additional consideration for services rendered by the employé.⁸⁸

In this respect, an award of workers' compensation insurance more closely resembles an award of unpaid minimum wage and overtime under the Fair Labor Standards Act ("FLSA") for work performed, than an award of backpay under the NLRA for work that would have been performed if not for a worker's illegal discharge. And, notably, to date, every federal court to address the issue of eligibility of undocumented workers under FLSA post-*Hoffman* has found that undocumented workers retain their rights to unpaid wages.⁸⁹

Additionally, an argument that workers' compensation is a crucial part of a package of benefits that make working in the United States more attractive

87. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149–50 (2002). In addition, the *Hoffman* court was concerned that an award of backpay to an undocumented immigrant would condone and encourage future violations of federal immigration law. *Id.* at 50. This is arguably true in the backpay context, where a worker, wrongfully discharged, but otherwise capable of working, must show proof of mitigation. However, in the workplace injury context, where a worker or her family are entitled to compensation because of a physical injury which has caused her death or diminished her earning capacity, the issue of mitigation is far more peripheral, so much so that it does not create the kind of tension between workers' compensation law and the federal IRCA as to indicate Congress' intent to preempt state law.

88. JAMES HARRINGTON BOYD, *WORKMEN'S COMPENSATION* § 67 at 155 (1913).

89. *See, e.g., Liu v. Donna Karan Int'l, Inc.*, 207 F.Supp.2d 191, 192 (S.D.N.Y. 2002) (immigration status not relevant to FLSA claims for time actually worked); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) (same); *Flores v. Amigon*, 233 F.Supp.2d 462, 463–65 (E.D.N.Y. 2002) (same); *Flores v. Albertsons, Inc.*, No. CV 01-00515, 2002 U.S. Dist. LEXIS 6171, at *18 (C.D. Cal. Apr. 9, 2002); *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); *Cortez v. Medina's Landscaping*, No. 00 C 6320, 2002 WL 31175471, at *1 (N.D. Ill. Sept. 30, 2002); *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002). *See also Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 n.7 (7th Cir. 1992) (distinguishing between backpay for labor not performed and unpaid wages for work "actually performed").

to undocumented workers is not persuasive in the workers' compensation context. In *Hoffman*, the Court suggested that the availability of backpay might provide an incentive for undocumented immigrants to immigrate to the United States.⁹⁰ This reasoning, speculative even in the NLRA context,⁹¹ borders on absurd in the workers' compensation context where the price a worker pays to receive benefits is physical injury.⁹²

It is also important to recall that the *Hoffman* decision ultimately stood for the proposition that undocumented workers were covered by the NLRA. The *Hoffman* court did not withdraw the protection of federal or state labor laws from undocumented workers. To the contrary, *Hoffman* reaffirmed the Court's holding in *Sure-Tan, Inc. v. NLRB*,⁹³ that undocumented workers are employees within the meaning of the NLRA.⁹⁴ Moreover, the Court noted the continued availability of "traditional remedies" to undocumented victims of unlawful employer action.⁹⁵ Several state courts have found this aspect of the *Hoffman* decision significant and have used it to uphold awards of workers' compensation benefits for undocumented immigrants.⁹⁶

In addition, given the grave nature of the loss suffered by many compensation beneficiaries, it is difficult to infer unequivocally that Congress intended to preempt state workers' compensation laws in passing the federal IRCA. In *Hoffman*, the Court found it easy to infer that Congress intended to withdraw backpay under the NLRA.⁹⁷ The Court strongly suggested that the Act's purpose could ultimately be served without permitting an award of

90. *Hoffman*, 535 U.S. at 150.

91. *Id.* at 155 (Breyer, J., dissenting) ("To permit the Board to award backpay could not significantly increase the strength of [the attractive force of employment], for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally.").

92. *See Dowling v. Slotnick*, 712 A.2d 396, 404 (Conn. 1998) ("Potential eligibility for workers' compensation benefits in the event of a work-related injury realistically cannot be described as an incentive for undocumented aliens to enter this country illegally."). *Cf. Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) ("We doubt . . . that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders").

93. 467 U.S. 883 (1984).

94. *Hoffman*, 535 U.S. at 150 n.4 ("Our first holding in *Sure-Tan* is not at issue here.").

95. *Id.* at 152.

96. *See Cont'l PET Techs., Inc. v. Palacias*, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004) (concluding that IRCA did not preclude benefit awards under state workers' compensation law based on *Hoffman* Court's statement that "traditional remedies" were still available to undocumented workers); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003) ("IRCA is not aimed at impairing existing labor protections"); *Safeharbor Employer Servs. I, Inc. v. Velasquez*, 860 So. 2d 984, 986 (Fla. Dist. Ct. App. 2003) ("[S]ince *Hoffman* found benefits under that backpay to be applicable to illegal aliens, there is no conflict between state and federal law.").

97. *Hoffman*, 535 U.S. at 149 ("There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally.").

backpay to an undocumented worker.⁹⁸ It is significant that backpay serves primarily as a deterrent. Although it also functions practically to replace earnings due to unlawful discharge, a job can ultimately be replaced. In contrast, workers' compensation attempts to compensate workers for physical injuries that may be irreversible, and acts as a substitute for workers' right at common law to sue in tort.⁹⁹

*B. Policy Reasons Why All Workers Should Continue to Be Covered by
Workers' Compensation*

Finally, the denial of workers' compensation benefits to undocumented immigrants makes particularly bad policy in the workers' compensation context because it would eviscerate state law coverage of legitimate work injuries for an increasingly significant segment of the working population,¹⁰⁰ and would undermine other important state interests. State courts and workers' compensation commissions have found that denying benefits to undocumented workers makes bad policy. Echoing the *Hoffman* dissent, the Minnesota Supreme Court found that precluding benefits to undocumented workers in the workers' compensation context would actually undermine the purpose of federal immigration law, because it would create an incentive for employers to hire undocumented workers, since the employers would know that they would not be responsible for the workers' injuries.¹⁰¹ Other decisions have emphasized the important countervailing state interest that all legitimate work injuries be compensated, regardless of a worker's immigration status.¹⁰²

Excluding undocumented immigrants from workers' compensation may also distort the deterrent function of state workers' compensation laws. As the Massachusetts Department of Industrial Accidents observed in *Medellin v.*

98. *Id.* at 152.

99. It is also significant that every state court to consider the preemption issue post-*Hoffman* has found that the IRCA does not preempt state workers' compensation law. *See, e.g., Safeharbor Employer Serv. I, Inc.*, 860 So. 2d at 986; *Cont'l PET Techs., Inc.*, 604 S.E.2d at 627-31; *Correa*, 664 N.W.2d at 329; Appellant v. Respondent, No. 022258-s, 2002 WL 31304032, at *1 (Tex. Workers' Comp. Comm'n Sept. 12, 2002).

100. *See supra* note 22 and accompanying text (discussing escalating injuries and deaths among immigrant workers).

101. *See Correa v. Waymouth Farms*, 664 N.W.2d 324, 331 n.4 (Minn. 2003) ("[T]o the extent that denying unauthorized aliens benefits predicated on a diligent job search gives employers incentive to hire unauthorized aliens in expectation of lowering their workers' compensation costs, the purposes underlying the IRCA are not served.").

102. *Medellin*, 17 Mass. Workers' Comp. Rep. 592, No. 03324300, 2003 WL 23100186, at *5 n.17 (Dep't Ind. Acc. Dec. 23, 2003) ("The policy against illegal immigration is, of course, a strong one, but it is juxtaposed against the policy . . . that ensures that legitimate work injuries are compensated under the contract of workers' compensation insurance, which remedy is an integral component of the contract of employment."). *See also Ortiz v. Cement Prod., Inc.*, No. 201-2525, 2004 WL 2213843, at *7 (Neb. Workers' Comp. Ct. Sept. 29, 2004) ("Industry is not allowed to transfer the cost of employee injuries to the state, be it the state of Nebraska or plaintiff's native country.").

Cashman, “[t]here would be a windfall to the insurer in premiums collected for workers not covered, and a windfall to the employer for a work injury that would not affect its experience modification and increase its policy premiums.”¹⁰³ This is another way in which backpay under the NLRA can be distinguished from workers’ compensation. In *Hoffman*, the Supreme Court found it significant that the employer would not “get[] off scot-free,” and that failure to comply with the NLRA’s order would subject Hoffman to contempt proceedings and other sanctions.¹⁰⁴ The Court ultimately concluded that the purpose of the NLRA could still be served even if the NLRB was restricted from awarding backpay to an undocumented worker. In contrast, the deterrent purpose of workers’ compensation is fundamentally compromised when a large segment of the working population in certain industries is removed from its protections.

The common-law roots of workers’ compensation also militate in favor of preserving access by undocumented immigrants post-*Hoffman*. Workers only gained the right to workers’ compensation by surrendering their right to sue in tort.¹⁰⁵ Historical investigation has shown that workers largely paid for their own workers’ compensation benefits through decreased wages.¹⁰⁶ State court decisions have recognized that the right to workers’ compensation is part of the employment contract.¹⁰⁷ State courts should not permit this contract, and the right to workers’ compensation that goes with it, to be repudiated after the fact. As the North Carolina Court of Appeals observed in a pre-*Hoffman* decision granting workers’ compensation benefits to an undocumented claimant, “defendant-employer received the benefits of plaintiff’s labor up to the time of his injury, and it would be repugnant to now deny plaintiff a benefit of the same agreement.”¹⁰⁸

If courts do hold that *Hoffman* invalidates workers’ compensation coverage of undocumented workers, there is also an important policy interest in ensuring that only unknowing employers are relieved of their compensation responsibilities under state law. The worker in *Hoffman*, as well as the workers in *Sanchez* and *Reinforced Earth*, used false documents to obtain work. As far

103. *Medellin*, 2003 WL 23100186, at *5 n.10.

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

105. See Richard A. Epstein, *The Historical Origins and Economic Structure of Workers’ Compensation Law*, 16 GA. L. REV. 775, 800 (1982); 1 LARSON & LARSON, *supra* note 16 § 1.01(e) (“[T]he employee and his or her dependents, in exchange for these modest but assured benefits, give up their common-law right to sue the employer for damages for any injury covered by the act . . .”).

106. While it is true that some costs of liability were passed along to consumers, Fishback and Kantor have shown how, with the transition from common law negligence to workers’ compensation, increased costs were passed primarily to workers in the form of decreased wages. FISHBACK & KANTOR, *supra* note 20, at 64–69.

107. See, e.g., *Medellin*, 17 Mass. Workers’ Comp. Rep. 592, No. 03324300, 2003 WL 23100186, at *4 (Dep’t Ind. Acc. Dec. 23, 2003) (recognizing workers’ compensation as a right enforceable under contract of hire).

108. *Ruiz v. Belk Masonry Co., Inc.*, 559 S.E.2d 249, 251 (N.C. Ct. App. 2002).

as the records in these cases show, the employers in question only learned about their former employee's immigration status after the employment relationship had ended. Thus, whether the *Hoffman* holding should apply to employers that knowingly hire undocumented workers is an open question.

The policy reasons why *Hoffman* should not relieve knowing employers of their responsibilities under state workers' compensation law are compelling. As it is, *Hoffman* creates incentives for employers to hire undocumented workers. In his dissent, Justice Breyer identified these incentives, stating:

Denial [of backpay to undocumented workers] lowers the costs to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens). It thereby increases the employer's incentive to find and to hire illegal-alien employees . . . Even if limited to cases where the employer did not know of the employee's status, the incentive may prove significant—for . . . the Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, *i.e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations.¹⁰⁹

If the Court's holding in *Hoffman* were applied regardless of whether an employer condoned her employee's lack of work authorization, the incentive to hire undocumented workers would be amplified. As Justice Breyer further notes, "[w]ere the Board forbidden to assess backpay against a *knowing* employer—a circumstance not before us today—this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious."¹¹⁰ Based in part on this reasoning, at least one federal court has found that an undocumented worker retained a claim for retaliation under the FLSA post-*Hoffman*.¹¹¹

IV.

A ROLE FOR STATE LEGISLATURES POST-HOFFMAN

State legislatures may also play a role in preserving access to workers' compensation by undocumented immigrants post-*Hoffman*.¹¹² I will argue that

109. *Hoffman*, 535 U.S. at 155–56 (Breyer, J., dissenting) (citations omitted).

110. *Id.* (citations omitted). See also *Dowling v. Slotnik*, 712 A.2d 396, 404 (Conn. 1998) (identifying identical incentives in workers' compensation context); *Rosa v. Partners In Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005) (identifying same incentives in workplace injury tort context and holding as a result that undocumented worker could recover lost wages based on U.S. wage rates if employer "knew or should have known of his status, yet hired or continued to employ him").

111. *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp.2d 1056, 1061 (N.D. Cal. 2002).

112. Some states have already acted. See CA. CIV. CODE § 3339(a) (West 2005) ("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 [California]."). Other

they should play this role because the same conditions that gave rise to workers' compensation originally—principally, rising workplace injuries and the prospect of unlimited tort liability for employers—also exist today. Advocates can draw attention to these conditions by using education and coalition building to heighten public awareness, particularly among those with an economic interest in mandatory compensation coverage of all workers, such as employers. Even in today's anti-immigrant climate, there is still a good chance that such strategies will succeed, for they have been important components of successful legislative campaigns in both the distant and recent past. Two examples that will be discussed below include the introduction of workers' compensation at the turn of the twentieth century, especially in the state of New York, and the recent amendment of Virginia's workers' compensation statute to cover undocumented workers in 2000.¹¹³

A. Historical Conditions Suggest a Need for Legislative Action

State legislatures enacted workers' compensation statutes at the turn of the twentieth century in response to skyrocketing workplace injuries and employer fears of increased tort liability and rising insurance premiums.¹¹⁴ Around 1900,

states have issued executive statements reaffirming that undocumented immigrants are covered by workers' compensation statutes after *Hoffman*. See Statement from Gary Moore, Director, Wash. State Dep't of Labor and Indus. (May 21, 2002) (on file with author) ("The Department of Labor and Industries is responsible for . . . providing workers with medical care and wage replacement when an injury or an occupational disease prevents them from doing their job. The agency has and will continue to do [this] without regard to the worker's immigration status."); Letter from Paul Trause, Director Wash. State Dep't of Labor and Indus., to Don Benton, Washington State Senator (Feb. 10, 2003) (on file with author); Letter from N.Y. State Workers' Comp. Bd. to the Gov't of Mex., 3 (May 2003) (on file with author).

113. See *infra* parts IV.B–C (discussing the experience in New York at the turn of the twentieth century, and Virginia at the turn of the twenty-first century). According to a recent report in the *Washington Post*, Virginia's General Assembly is considering a bill that would drastically limit the workers' compensation benefits available to undocumented workers. Employers in the state's manufacturing and automobile industries apparently support such legislation because they believe it will help rein in rising costs for medical and wage benefit claims. Chris L. Jenkins, *Va. Illegal Immigrant Benefits Debated Legislation Would Limit Workers' Compensation*, WASH. POST, Feb. 23, 2005, at B1. This turn of events is instructive in that it makes clear that unless employers are reminded of their potential exposure in tort, they will focus on the short-term costs of increased workers' compensation claims and premiums. Nevertheless, it does not ultimately change my thesis as to what strategies have been successful in reforming workers' compensation in the past.

114. See generally Roy Lubove, *Workmen's Compensation and the Prerogatives of Voluntarism*, 8 LAB. HIST. 254, 259–62 (1967) (asserting that employers supported workers' compensation because they expected to benefit economically from the increased predictability of the compensation laws as opposed to the randomness of the negligence liability system); J.E. RHODES, *WORKMEN'S COMPENSATION* 16–19 (2d. ed. 1917) (discussing defects of common-law negligence system, particularly uncertainty as to the amount plaintiff would recover at trial); *Reform in Relation of Employer to Employee*, J COM. & COM. BULL., Oct. 21, 1909, at 8 ("Ought we to stand idly by when our five great industries alone are causing over one accident a minute without attempting to do something to prevent these accidents, or without making some adequate provision for those who are injured in accidents which are not preventable?") (quoting George

industrial accidents were claiming about 35 thousand lives a year and inflicting close to 2 million injuries.¹¹⁵ Given the large number of immigrants living in New York state at that time — approximately two million in 1900 for example, there is no doubt that many of those who were killed or injured were immigrants.¹¹⁶ Indeed, work-place accidents had become identified at the time as chiefly an immigrant problem.¹¹⁷ Workplace disasters such as the Triangle Shirtwaist Fire, in which nearly 150 immigrant garment workers died, provoked public outrage.¹¹⁸ At the same time, due in large part to escalating employee injuries and systematic stripping away of employer defenses at common law,¹¹⁹ employer insurance premiums rose exponentially.¹²⁰ Workers' compensation enjoyed widespread support among employers, who in turn helped push the laws through state legislatures, largely because they offered greater predictability than the negligence system.¹²¹

Gillette, Minnesota Employer's Compensation Commission member).

115. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 422 (1973). See also *Workingmen's Risks*, N.Y. WORLD, May 17, 1910 ("Five hundred thousand toilers are killed or injured yearly in accidents[,] and "[l]ess than 30 per cent. of them get compensation, and those often in trivial sums"); *Reform in Relation of Employer to Employee*, *supra* note 114 ("Industry and transportation in the United States number at least half a million annually as the victims of their accidents.") (quoting George Gillette, member, Minn. Employer's Compensation Comm'n).

116. THE ENCYCLOPEDIA OF NEW YORK STATE 766 (Peter Eisenstadt & Laura-Eve Moss eds. 2005) (totals computed from data in the 1920 United States Census).

117. Crystal Eastman, a progressive reformer and member of the New York Commission on Employer's Liability, noted this tendency in her book, *Work Accidents and the Law*: she explained that "[r]esidents [of] [one American city] generally have an idea that it is foreign laborers, and not Americans who are killed and injured in such numbers every year." CRYSTAL EASTMAN, *WORK ACCIDENTS AND THE LAW* 13 (1969). In reviewing Eastman's book, which it described as the "first systematic and comprehensive attempt" in the United States to study the economic losses inflicted by workplace injuries, the *New York Times* highlighted this observation and the statistics with which Eastman followed it, stating that: "[i]t is noteworthy that nearly half of the [victims of one workplace accident study] (42.5 per cent.) were American born— contrary to the general notion about work-accidents in that region." *Id.*

118. See 141 *Men and Girls Die in Waist Factory Fire; Trapped High Up In Washington Place Building; Street Strewn with Bodies; Piles of Dead Inside*, N.Y. TIMES, March 26, 1911, at 1 ("The victims . . . were almost all girls of from 16 to 23 years of age Most of them could barely speak English."); *Doors Were Locked Say Rescued Girls*, N.Y. TIMES, March 27, 1911, at 3 (describing unlawful conditions in which the victims worked and linking the tragedy to the need for workers' compensation reform).

119. For a comprehensive analysis of the role of organized labor in pushing through legislation stripping employers of their defenses under the common law, see Robert Asher, *Failure and Fulfillment: Agitation for Employers' Liability Legislation and the Origins of Workmen's Compensation in New York State, 1876-1910*, 8 LAB. HIST. 198 (1983).

120. See Lubove, *supra* note 114, at 261 (observing that employer insurance premiums increased from approximately \$200,000 in 1887 to beyond \$35 million by 1912) (citing W.F. Moore, *Employers' Liability Insurance*, in INSURANCE: "A TEXT-BOOK," 929, 929-71) (William A. Fricke ed., 1898)); Thomas I. Parkinson, *Problems and Progress of Workmen's Compensation Legislation*, 1 AM. LAB. LEGIS. REV. 55, 58 (Jan. 1911) (stating that employer's liability laws "caused employers who saw their liability increased and their liability insurance rates mounting higher and higher with each restriction of their common law defenses, to become more hospitable to the compensation idea").

121. See FISHBACK & KANTOR, *supra* note 20, at 5, 6, 12-15, 19, 25.

At the beginning of the twenty-first century, immigrant workplace injuries and deaths have again reached epidemic levels.¹²² Indeed, stories of needless and gruesome deaths among immigrants provoke outrage today just as they did almost a century ago.¹²³ Moreover, as illustrated in the amendment of Virginia's workers' compensation statute described below, the same fear of uncertain liability that drove employer support for workers' compensation at the beginning of the twentieth century may also lead employers to push state legislatures to maintain workers' compensation coverage for undocumented immigrants today.

B. The Origins of Workers' Compensation

The story of workers' compensation in New York is a well-documented illustration¹²⁴ of the political dynamics culminating in the passage of compensation statutes nationwide. Although somewhat unique in its history,¹²⁵ New York is typical in that multiple interest groups, including employers, pushed for the enactment of state workers' compensation legislation.¹²⁶

In May of 1910, the New York state legislature was among the first in the nation to enact workers' compensation legislation, guaranteeing workers in certain hazardous occupations—as well as their families—financial compensation for injuries incurred during the course of employment.¹²⁷

The compulsory law was subsequently held unconstitutional by the New York Court of Appeals.¹²⁸ Ironically, the Court of Appeals issued its decision one day before the Triangle Shirtwaist Fire. As one early commentator observed, “the direct effect was that the decision of the court and this terrible disaster stood out in bold relief and emphasized very strongly the shortcomings of the existing

122. See *supra* note 22 and accompanying text (discussing escalating injuries and deaths among immigrant workers).

123. See, e.g., Barstow, *supra* note 22 (describing deaths of immigrant workers at a California dairy farm).

124. See FISHBACK & KANTOR, *supra* note 20, at 129–31; Robert F. Wesser, *Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890s–1913*, 12 LAB. HIST. 345 (1972).

125. The history of workers' compensation in New York is distinguished by the important role played by organized labor. See *id.*

126. See FISHBACK & KANTOR, *supra* note 20, at 120–142.

127. 1910 N.Y. LAWS 1045–51 (amending labor laws by inserting a workmen's compensation provision for “Certain Dangerous Employments”). See RHODES, *supra* note 114, at 226–27 (stating that the first comprehensive workers' compensation legislation enacted in any state was enacted in New York). In addition to the compulsory law for very hazardous industries, the New York state legislature also adopted a voluntary law for all firms. However, few employers opted for the voluntary law because, among other reasons, the registration and other administrative costs for setting up contracts were high. FISHBACK & KANTOR, *supra* note 20, at 129–30.

128. On March 24, 1911, the New York Court of Appeals unanimously declared the compulsory law for hazardous employment to be unconstitutional. *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911). The court held that the imposition of liability on an employer without an individualized negligence determination was a taking of property without due process in violation of the New York Constitution and the Fourteenth Amendment. *Id.* at 448.

laws . . .”¹²⁹ Within two years the New York electorate had voted overwhelmingly to amend the state constitution to allow for a compulsory workers’ compensation program.¹³⁰ In December 1913, New York legislators passed a second compensation act which was praised by labor leader Samuel Gompers as the best in the world.¹³¹

The success of state-sponsored workers’ compensation in New York, as in other states, was due to the support and involvement of a wide range of interest groups, particularly employers. Indeed, numerous scholars have found that employers were a driving force.¹³² In this respect, New York was no different than other states. Although the role of organized labor in passing workers’ compensation was also particularly pronounced in New York, examples of employer support for the scheme abound.¹³³ Along with representatives of other major interest groups, industry representatives served on the New York State Commission on Employers’ Liability (“Wainwright Commission”) formed in 1909 to investigate the desirability of introducing workers’ compensation laws to replace the existing employers’ liability scheme.¹³⁴ Representatives of small and large businesses spoke at hearings organized by the Wainwright Commission to educate the public about the advantages of compulsory compensation for workplace injuries.¹³⁵ A report on the Commission’s investigations to the National Civic Federation, a New York-based conservative think tank, stated that employers, as well as unions, “show a curious unanimity of *unaccelerated* sentiment” in support of workers’ compensation.¹³⁶

129. RHODES, *supra* note 114, at 230.

130. FISHBACK & KANTOR, *supra* note 20, at 130. *See also Amend Compensation Bill*, N.Y. TIMES, Dec. 12, 1913, at 2.

131. *Praise New York Compensation Law*, N.Y. TIMES, Dec. 14, 1913, at 9.

132. *See* FISHBACK & KANTOR, *supra* note 20, at 5, 6, 12–15, 19, 25 (noting that, among the range of programs supported by reformers, workers’ compensation was adopted because it received widespread support from the economic interest groups, including employers); Lubove, *supra* note 114, at 262 (arguing workers’ compensation was accepted because “employers and insurance companies anticipated advantages in substituting a fixed but limited cost for a variable, unpredictable one”); James Weinstein, *Big Business and the Origins of Workmen’s Compensation*, 8 LAB. HIST. 156, 161 (1967) (arguing business leaders viewed workers’ compensation as a way to solidify their position in society by reducing the need for labor to organize).

133. Wesser argues that the involvement of organized labor was the decisive factor in passing workers’ compensation in New York. However, even Wesser’s account documents substantial employer support for the program. Wesser, *supra* note 124, at 351, 353.

134. Letters from L.W. Hatch to John R. Commons (Jan. 22, Feb. 15, & Mar. 20, 1909) (on file with the Kheel Center, Cornell University).

135. Wesser, *supra* note 124, at 353.

136. J.P. Cotton, Jr., Address at the National Civic Federation Annual Meeting 5 (Nov. 22, 1909) (emphasis in original). *See also Hearing before New York State Commission on Employers’ Liability, etc., at Syracuse, N.Y.*, (Dec. 2, 1909) (Brief from H.H. Franklin, President, H.H. Franklin Mfg. Co.) (New York manufacturer supporting mandatory compensation for workplace injuries); *Union Men Pelt Wainwright Law*, N.Y. TIMES, May 26, 1910, at 3 (“While the labor representatives were demanding an adequate Workmen’s Compensation act manufacturers and employers . . . were trying to determine how a constitutional and practical Workmen’s Compensation act could be drafted.”); Letter to Senator Wainwright (Nov. 27, 1909) (on file with

Of course, the support expressed and acted upon by New York employers was not altruistic. Indeed, various scholars have shown that employers backed workers' compensation because it served their economic interests, *i.e.*, they preferred mandatory, but ultimately limited, compensation of workplace injuries to the uncertainty of the existing negligence system.¹³⁷ Accordingly, employers sought and, in many important respects, obtained the workers' compensation scheme that best served their interests. More specifically, they insisted that the right to compensation be exclusive,¹³⁸ and that coverage be as broad as possible, so as to minimize the number of workers that retained the right to sue in tort.¹³⁹

It is also notable that employer support for workers' compensation grew out of years of work by progressive advocates towards educating the public, particularly employers, regarding the advantages of workers' compensation over the existing negligence system. Studies published by the Pittsburgh Survey, including Crystal Eastman's classic 1910 indictment of the negligence system, *Work-Accidents and the Law*, provided critical information to the middle- and upper-class public about exploitative conditions in the workplace.¹⁴⁰ Similarly, employer involvement in the educational efforts of the Wainwright Commission and outreach efforts to groups such as the National Civic Federation were clearly targeted at enlisting employer support for the compensation cause.

the New York Historical Society) (referring to a list of companies that support compensation, but suggesting that it would be better for the compensation suggestion to come from labor).

137. See FISHBACK & KANTOR, *supra* note 20, at 6 (noting that among the wide range of programs supported by progressive reformers, workers' compensation was adopted because "it received widespread support from the economic interest groups," including employers); Lubove, *supra* note 114, at 262; Weinstein, *supra* note 132, at 161.

138. See letter from Sylvester C. Dunham, President, The Traveler's Ins. Co., to George Sutherland, Chairman, Comm. on Unif. State Legislation, Nat'l Civic Fed'n, N.Y. (Nov. 20, 1914) (on file with New York Public Library) (The "remedies of a compensation act should be substituted as far as possible for the right to recover damages" in tort.). See also Louis Schram, Address at the Annual Meeting of National Line Manufacturers (1916) (on file with the New York Public Library) ("The keystone of workman's compensation is prompt [sic] and evenhandedness. That is possible only if the Compensation as distinguished from liability is the first, sole and adequate resort of employer and employee in compensating and receiving compensation for injuries received during the course of employment"); Ferd C. Swedtmann, *Voluntary Indemnity for Injured Workmen*, 1 AM. LAB. LEGIS. REV. 49, 52 (1911) ("[A] single liability is essential to satisfactory operation of the compensatory principle, and its adoption should be accompanied by the repeal, so far as possible, of all other remedies within the limit of its application.").

139. See letter from Howell Cheney to George Sutherland, Nat'l Civic Fed'n (Nov. 25, 1914) (on file with the N.Y. Pub. Libr.) ("[T]he remedy should be exclusive of all other remedies; the act should be universal in its application to all employments and should apply only to injuries and death arising out of and in the course of employment."); letter from Sylvester C. Dunham, President, Travelers Ins. Co., to George Sutherland, Chairman, Comm. on Unif. State Legislation, Nat'l Civic Fed'n (Nov. 20, 1914) (on file with the N.Y. Pub. Libr.) ("I am especially pleased with the proposal that all employments shall be covered, for no good reason can be given to attempt to distinguish between those that are hazardous and those that are not. The remedies of the compensation act should be substituted as far as possible for the right to recover damages.").

140. See Lubove, *supra* note 114, at 255.

C. The Virginia Experience

In January 1999, the Virginia Supreme Court decided *Granados v. Windsor Development Corp.*¹⁴¹ In that decision, the court held that an undocumented worker was not an employee under state workers' compensation law, reasoning that the worker's lack of work authorization rendered the underlying contract unenforceable.¹⁴² Like *Hoffman*, the *Granados* decision threatened to devastate undocumented workers. Yet, a little over a year after the decision, worker advocates and their allies, the Virginia Trial Lawyers Association ("VTLA"), insurers, and employers wary of uncertain tort liability, had extracted from a Republican-controlled legislature all the benefits lost under *Granados*. More specifically, over the veto of a Republican governor, the Virginia state legislature amended the definition of employee under Virginia workers' compensation law to include "[e]very person, including aliens or minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed . . ."¹⁴³ As in the past, this expansion of workers' compensation law was due to increased employer awareness about the consequences of excluding immigrants from compensation coverage and the support of a coalition of diverse interests, in this case worker advocates, employers, insurers, and other industry groups.

Soon after the *Granados* decision, worker advocate Mary Bauer from the Virginia Justice Center approached the Virginia Trial Lawyers Association ("VTLA"), many of whose members' livelihoods were undoubtedly impacted by the decision, with the objective of changing the law.¹⁴⁴ Bauer and the VTLA then approached members of the Governor's Migrant and Seasonal Worker Board ("Governor's Board"), a group dominated by agricultural employers.¹⁴⁵ At a public meeting of the Governor's Board, VTLA representative Geoff McDonald testified that the trial lawyers were committed to representing undocumented workers in personal injury cases arising out of workplace injuries and would represent those workers in suits against growers unless the workers' compensation statute was changed.¹⁴⁶ McDonald also informed the Governor's Board that the VTLA was prepared to bring actions for insurance fraud against insurance companies based on premiums deceptively solicited to insure workers ineligible for coverage.¹⁴⁷

141. 257 Va. 103 (1999).

142. *Id.* at 108–09.

143. VA. CODE ANN. § 65.2-101 (2002).

144. Telephone Interview with Mary Bauer, formerly of the Va Justice Center (Mar. 5, 2003).

145. Telephone Interview with Kenny Annis, former Chair of Va. Governor's Migrant and Seasonal Farmworkers Bd. (March 5, 2003); Telephone Interview with Mary Bauer, *supra* note 144; Telephone Interview with Geoff McDonald, Va Trial Lawyers Assoc. (Mar. 24, 2003).

146. Telephone Interview with Geoff McDonald, *supra* note 145.

147. *Id.*

Having been apprised of the status of undocumented workers under the law and the specter of uncertain liability, advocates for agricultural employers on the Governor's Board arranged for a meeting between Geoff McDonald and the Virginia Growers Association.¹⁴⁸ At that meeting, in the words of former Governor's Board Chair Kenny Annis, "Mr. McDonald told the growers why they needed to work to change the law."¹⁴⁹ McDonald made it clear that unless the law was changed, the VTLA was prepared to represent undocumented workers in tort claims against growers for at-work injuries.¹⁵⁰ He also pointed out that many growers were "paying for something they weren't getting"; they were paying workers' compensation premiums to insure workers who they would nevertheless be liable to compensate in tort.¹⁵¹

Once the growers were convinced they needed to back the legislation, as Kenny Annis recalls, "they asked their labor committees to send letters to the farm bureau to ask for its help."¹⁵² At the same time, the Governor's Migrant and Seasonal Agricultural Board Conference met with the Board's policy committee to find out how to get the law changed, and then contacted legislators. Ultimately, growers and their advocates were able to get a bill introduced into the General Assembly to amend Virginia's workers' compensation law to cover undocumented workers. As Geoff McDonald remembers it, "[o]nce we told [the growers] what was going on, they were 100% behind us," and they made the language even harder.¹⁵³ Indeed, when Governor Jim Gilmore vetoed the bill on the same day as a Governor's Board meeting, Board members lobbied legislators and were able to overturn the veto.¹⁵⁴

Consistent with the development of workers' compensation at the beginning of the twentieth century, the circumstances surrounding the Virginia state legislature's decision to expand compensation law to cover undocumented workers shows that the involvement of a broad coalition of interest groups, particularly employers,¹⁵⁵ was crucial to the successful amendment of Virginia's workers' compensation law to cover undocumented workers. Worker advocates and their allies, the state trial lawyers association, were able to highlight employers' interest in amending state workers' compensation law,¹⁵⁶ and succeeded in advancing worker interests.

148. *Id.*

149. Telephone Interview with Kenny Annis, *supra* note 145.

150. Telephone Interview with Geoff McDonald, *supra* note 145.

151. Telephone Interview with Kenny Annis, *supra* note 145.

152. *Id.*

153. Telephone Interview with Geoff McDonald, *supra* note 145.

154. The vote to override the governor's veto was 78-22 in the House and 36-3 in the Senate. *Virginia Legislators Override Veto of Workers' Comp Bill*, FED. & ST. INS. WKLY., April 24, 2000.

155. Contemporaneous accounts show that insurers also supported the legislation. See *Virginia Expands Workers-Comp Coverage*, J. COM., Apr. 27, 2000, at 10; *Virginia Legislators Override Veto of Workers' Comp Bill*, *supra* note 154.

156. Of course, employers need only fear uncertain tort liability for injuries suffered by their undocumented employees to the extent that those employees retain a right to sue in tort after

V. CONCLUSION

In short, during the years preceding the *Hoffman* decision, state courts and legislatures had determined overwhelmingly that immigration status should have no bearing on whether an injured worker was protected by workers' compensation. With the *Hoffman* decision, however, employers have argued—and courts in Michigan and Pennsylvania have agreed—that immigrant workers should be ineligible for crucial wage-loss benefits based on their immigration status alone. Such expansive interpretations of the *Hoffman* decision are seriously flawed. Any determination that the *Hoffman* decision stands for the proposition that the Federal IRCA supplants state workers' compensation law is unsupported by the Court's preemption analysis. Moreover, any blanket exclusion of undocumented workers from workers' compensation protections would undermine important social policy goals of deterring employers from tolerating unsafe working conditions, and, additionally, would in fact likely encourage illegal immigration, by making undocumented workers more attractive to unscrupulous employers. In addition to making these arguments, immigrant worker advocates may also pursue a legislative response to the questions raised by the *Hoffman* decision: pushing state legislatures to pass legislation affirmatively including undocumented immigrants among those protected by workers' compensation laws.

Hoffman. Many of the same arguments as to why such workers should retain their rights to receive workers' compensation also apply in the common-law tort context. And, no court to date has found that *Hoffman* precludes the rights of undocumented workers to recover in tort. See *Cano v. Mallory Management*, 760 N.Y.S.2d 816 (Sup. Ct. 2003) (rejecting argument that *Hoffman* precluded undocumented immigrant from bringing a common law tort claim). Nevertheless, a federal district court in Kansas and an intermediate appellate court in New York State have limited the amount that an undocumented worker may recover with respect to lost income, denying U.S. wages, but permitting instead wage rates that the individual could earn by working in her native country. See *Hernandez-Cortez v. Hernandez*, No. Civ.A 01-1241-JTM, 2003 WL 22519678, at *6 (D. Kan. Nov. 4, 2003); *Santiago v. 200 E. 16th St. Hous. Corp.*, 788 N.Y.S.2d 314, 321 (App. Div. 2004). Notably however, both courts confirmed that undocumented workers are entitled to damages for injuries and related damages (including pain and suffering and medical expenses) after *Hoffman*. *Hernandez-Cortez*, 2003 WL 22519678, at *7; *Santiago*, 788 N.Y.S.2d at 818. Thus, even if an employer's liability for injuries suffered by its undocumented workers were based on a diminished award for lost wages, the employer's total liability would still be uncertain.