

Are Undocumented Workers Entitled to Workers' Compensation Benefits?

By Christopher P. Butler

The recent proliferation of undocumented workers in the United States is a hot button issue. It has been estimated that one in 20 of the country's workers is undocumented. *See Illegal Aliens and State Workers' Compensation Benefits*, American

Educational Institute (2006).

In everyday parlance, "undocumented workers" are often referred to as "illegal aliens," which is only correct to the extent that an illegal alien actually holds a job. Within the immigration vernacular, an "alien" is simply an individual who was born outside the United States and who has not been naturalized. By contrast, an "illegal alien" is an individual who has *unlawfully* entered the United States. Generally speaking, in order to perform work legally within the United States, an alien must be a permanent resident or must hold an employment visa expressly authorizing him or her to perform work. Plainly stated, where a working alien cannot prove an express authorization to work in the United States, he or she is deemed to be an "undocumented worker."

(Where appropriate, undocumented workers and illegal aliens shall bear the same meaning within this article and will be referenced interchangeably.)

Undocumented workers are omnipresent throughout the United States. In fact, some sources estimate that undocumented workers comprise nearly 10 percent of the total American workforce. *See Peter Rousmaniere, Number of Undocumented Workers by State and Their Workforce Share* at <http://www.workingimmigrants.com/> (2006) (extrapolating data from Pew Hispanic Center's 2005 estimates). Undocumented workers are found in staggering numbers within Arizona, California, District of Columbia, Florida, Nevada and Texas, to name a few, where they comprise an estimated 13–21 percent of the workforces. *Id.* In several other states, such as Georgia, Massachu-

setts, New Jersey, New Mexico, New York, North Carolina, Oregon and Washington, they comprise an estimated 7–11 percent of those states' workforces. These workers typically perform construction, agricultural, and industrial jobs, and other forms of manual, unskilled labor. Many of those jobs carry the inherent, and often escalated, risk of accidental injuries, oftentimes with catastrophic results. Therefore, the question arises: Should undocumented workers who suffer on-the-job injuries be allowed to receive workers' compensation benefits? Viewed another way: Should an undocumented worker who suffers an on-the-job injury be denied workers' compensation benefits merely because of his or her illegal status?

The debate rages on both sides of the fence. Those who advocate extending workers' compensation benefits to undocumented workers commonly argue that it serves humanitarian interests. Others in favor argue that, without including undocumented workers within the benefit scheme, employers would ignore workplace safety requirements and take advantage of those who have no voice to complain. Oth-



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ers argue that precluding undocumented workers from availing themselves of workers' compensation benefits would cause the employer to lose the protection of the exclusive remedy typically provided by workers' compensation, exposing it to tort liability. And, others argue that relieving employers from workers' compensation obligations inevitably places the burden on public healthcare, driving up costs and expending limited resources.

Conversely, those who oppose extending workers' compensation benefits to undocumented workers raise the argument that it taxes an already overburdened insurance and healthcare industry. Others argue that it is unfair to reward those who break the law, while depriving American taxpayers and diverting public resources. And, others argue that the availability of workers' compensation benefits serves as an incentive to draw illegal aliens across our borders.

Notwithstanding the merits of those arguments, with few exceptions, the national trend has recently leaned in favor of extending workers' compensation coverage to all workers, regardless of documented status. That said, this article is not intended to advocate in favor or against extending workers' compensation benefits to undocumented workers. Instead, it is intended only to provide a thumbnail sketch of recent developments that address illegal immigration and its impact on workers' compensation. Nothing more, nothing less.

The Immigration Reform and Control Act (1986)

Over 20 years ago, in response to a large-scale influx of illegal aliens, Congress resolved that the most humane, credible, and effective way to respond to the problem was to penalize those employers who hire them. From that objective emerged the Immigration Reform and Control Act of 1986 (IRCA), which renders it unlawful for employers to hire illegal aliens knowingly. To safeguard against hiring illegal aliens, IRCA mandates employer verification of the legal status of each person hired. Employers who fail to verify their workers' immigration status, or who fail to maintain eligibility records, face civil fines. Moreover, those employers who engage in a pattern or practice of knowingly employing illegal aliens are subject to criminal penalties.

Hoffman Plastic Compounds, Inc. v. National Labor Relations Board (2002)

In 2002, the United States Supreme Court held in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* that undocumented workers who were terminated in violation of the NLRA in retaliation for participating in union organizing activities were not entitled to receive back pay dam-

Whether IRCA or *Hoffman* preempt or otherwise wield any control over state workers' compensation law has not been uniformly resolved.

ages. See 535 U.S. 137; 122 S. Ct. 1275; 152 L. Ed. 2d 271 (2002). The Supreme Court observed that, under IRCA, "[i]t is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations."

The Supreme Court further reasoned that: "[A]llowing the [National Labor Relations Board] to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in [IRCA]. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."

As discussed below, whether IRCA or *Hoffman* preempt or otherwise wield any control over state workers' compensation law has not been uniformly resolved.

State Workers' Compensation Laws

Largely independent of federal intervention, the American concept of workers' compensation is a by-product of state law arising

nearly a century ago from what were often poor, industrial working conditions. In fact, all 50 states and the District of Columbia now maintain intricate workers' compensation benefit systems, generally designed to provide medical, disability income, and rehabilitation benefits to workers who have suffered on-the-job injuries. Although the laws and benefit schemes vary from state to state, the basic premise remains the same—to provide benefits to an injured "employee" whose "compensable" injury is "causally connected" to the employee's job, without regard to fault or negligence. In theory, the arrangement mutually benefits both employer and employee, since the employee typically waives the right to sue his or her employer in exchange for workers' compensation benefits. In most jurisdictions, workers' compensation represents an employee's exclusive remedy for seeking remuneration for negligent acts by an employer, fellow employees, and in some cases, third parties.

Eligibility for workers' compensation benefits is primarily driven by state law, and the United States Supreme Court has not addressed head on the question of whether illegal aliens may receive workers' compensation benefits. Traditionally, most states' workers' compensation laws failed to contemplate the emergence of undocumented workers. However, given the recent change in the landscape, the issue frequently arises whether undocumented aliens are equally entitled to workers' compensation benefits.

One common inquiry is whether the particular state's workers' compensation law includes undocumented workers within the definition of "employee." As a threshold matter, the state legislatures of California, Florida, Idaho, Nevada, New York and Wyoming have enacted workers' compensation statutes that directly address coverage for undocumented workers. See Jeffrey Klamut, *The Invisible Fence: De Facto Exclusion of Undocumented Workers from State Workers' Compensation Systems*, KAN. J. LAW & PUB. POL. (2006/2007); Thomas R. Lee and Dennis V. Lloyd, *Workers' Compensation and the Undocumented Worker*, American Assoc. of State Compensation Ins. Funds (2007); and LARSON'S WORKERS' COMPENSATION, §66.03 *Employment of Illegal Aliens* (2007). Among these states,

only Idaho and Wyoming expressly exclude undocumented workers from coverage, whereas the remaining states expressly include them. *Id.*

On the other hand, the state legislatures of Alabama, Arizona, Colorado, Illinois, Michigan, Montana, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, South Carolina, Texas and Virginia have enacted workers' compensation statutes that expressly include "aliens." *Id.* But, some of those statutes make no distinction between an alien's legal or illegal status, whereas others only extend coverage to aliens legally authorized to work in the United States. *Id.* Notwithstanding, the courts of these states have interpreted those statutes to apply to both legal and illegal aliens. *Id.*

Moreover, the state legislatures of Alaska, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Washington, Wisconsin and Vermont have enacted workers' compensation statutes that broadly define "employee" so as to include aliens. *Id.* Many of these states have interpreted the definition to include both legal and illegal aliens. *Id.*

In determining whether undocumented workers are entitled to coverage, some states have drawn a distinction between work that is unlawful and work that is lawful, but for which the worker is under a legal disability to perform. Other states have held that public policy concerns warrant extending workers' compensation benefits to all workers, regardless of his or her legal status. And yet another common inquiry is, if the undocumented worker is deemed to be an "employee" under the particular state's workers' compensation law, does his or her illegal status preclude the receipt of benefits as a matter of state law? This argument often plays out in an employer's attempt to invalidate an "employment contract" with an undocumented worker, where "contract" is interpreted loosely. Even so, the illegality of contract argument had seldom precluded an undocumented worker from receiving benefits. In fact, most states that have considered an undocumented worker to be an employee for purposes of work-

ers' compensation have held that the alien is entitled to receive some manner of benefits, even if only medical treatment.

The issue of whether either IRCA or the *Hoffman* decision preempts a state's workers' compensation laws has been hotly litigated within the past eight years. But, most courts have generally held that federal law does not preempt a state's workers' compensation scheme, to the exception of perhaps vocational rehabilitation and job placement.

Recent National Trend— Are Undocumented Workers "Employees"?

While by no means exhaustive, the following decisions illustrate the recent trend concerning whether undocumented workers are entitled to workers' compensation benefits.

In 1999, the Wyoming Supreme Court held in *Felix v. State ex rel. Safety & Compensation Division* that an alien unauthorized to work in the United States was not an "employee" under the state workers' compensation act and, therefore, was precluded from receiving benefits. *See* 986 P.2d 161 (Wyo. 1999).

Also in 1999, the Virginia Supreme Court in *Granados v. Windson Development Corporation* interpreted the state's workers' compensation act to require legal employment and held that IRCA precluded coverage for undocumented workers. *See* 509 S.E.2d 290 (Va. 1999). However, the state legislature quickly modified the Virginia workers' compensation act expressly to include undocumented workers.

In 2003, the Michigan Court of Appeals held in *Sanchez v. Eagle Alloy, Inc.* that an undocumented worker who secured employment by fraudulent means was nevertheless entitled to receive workers' compensation benefits. *See* 658 N.W.2d 510 (Mich. Ct. App. 2003). In 1997, David Sanchez, a Mexican immigrant, purchased a fake social security card in California and thereafter obtained a California driver's license. Upon his arrival in Michigan, Sanchez presented his employer, Eagle Alloy, with the false documentation and signed an employment application averring that he was legally present in the United States. In 1998, Sanchez suffered an on-the-job injury to his right hand. Following

repeated surgeries and physical therapy, Sanchez was released to restricted work in early 1999, and then unrestricted work later in the year. Eagle Alloy then terminated Sanchez's employment because he was unable to refute a Social Security Administration notice indicating that his Social Security number was invalid. Eagle Alloy informed Sanchez that it would rehire him if he became a documented worker. Coincidentally, the Michigan workers' compensation act defines "employee" to include "every person in the service of another, under any contract of hire, express or implied, including aliens."

Examining the state statute on appeal, the *Eagle Alloy* court held that including undocumented aliens within the act's definition of "employee" was in accordance "with the language and [Michigan's] apparent legislative intent." In reaching its decision, the court further remarked: "While we can appreciate [Eagle Alloy's] frustration at having employed [Sanchez] under a false belief arising from his misrepresentation, and now being held liable for his workers' compensation benefits, as well as [Sanchez's] compulsion to misrepresent in order to secure a livelihood, the fact of the matter is that [the act] does not permit the employer to avoid compensation payments." However, the court also threw a bone to the employer by holding that, due to Sanchez's criminal conduct in presenting fraudulent documents, he was precluded from receiving wage-loss benefits beyond the date upon which his illegal employment status had been discovered.

Also in 2003, the Massachusetts Department of Industrial Accidents Reviewing Board held in *Medellin v. Cashman KPA* that an undocumented worker was entitled to workers' compensation benefits, even though he admitted to being an illegal alien and to working under a false Social Security number. *See* Board No. 03324300, Massachusetts Dept. of Industrial Accidents, Reviewing Board Decision, Dec. 23, 2003. Guillermo Medellin, a Mexican laborer, worked for Cashman KPA until he sustained work-related injuries from falling into an eight-foot hole while operating a jackhammer. Cashman's insurer contested Medellin's workers' compensation claim under the theory that, as an undocumented worker, the United States' Supreme Court



holding in *Hoffman* precluded his receipt of benefits. Carefully analyzing *Hoffman*, the board reasoned that the holding did not extend to interpretation of employment contracts nor did it preclude a state from enforcing an employment contract between an undocumented worker and an employer. Relying on Massachusetts precedent, the board recognized the practice of including undocumented workers within the statute's definition of "employee" and held that it was "an integral part of the policy relationship between the insurer and the insured...."

In 2004, the Ohio Court of Appeals held in *Rajeh v. Steel City Corporation* that an illegal alien who was subject to deportation was nevertheless entitled to recover workers' compensation benefits. See 813 N.E.2d 697 (Ohio Ct. App. 2004). Ghassan Rajeh, a Lebanese immigrant, was granted lawful permanent resident status shortly after arriving in the United States in 1980. However, in 1988, Rajeh was convicted in federal court for conspiracy to distribute heroin. After serving several years in prison, Rajeh was ordered to be deported to Lebanon in 1993. Rajeh was later arrested after he violated two orders to appear for deportation in 1995 and 1999, respectively. He petitioned the Board of Immigration Appeals for relief from deportation, and his deportation was deferred in 2001. However, while Rajeh's deportation order was active, he secured employment with Steel City. Soon thereafter, he sustained an injury while moving a skid and filed a claim for workers' compensation benefits. Learning of Rajeh's illegal status, Steel City successfully denied him temporary total disability benefits while he was out of work on the grounds that he could not be legally employed under federal law. On review, the court examined whether Rajeh fit the statutory definition of "employee" under the state workers' compensation act, and whether federal law precluded his participation in the benefit scheme.

Finding that neither federal law nor the Ohio legislature expressly excluded illegal aliens from coverage, and that public policy warranted their inclusion, the *Steel City* court held that illegal aliens were entitled to receive workers' compensation benefits. In its closing remarks, the court reasoned that: "[A] main purpose of the workers' compen-

sation system is to promote a safe and injury-free workplace. Since employers are ultimately responsible for paying workers' compensation claims, through insurance premiums or self-insuring payments, they are more likely to keep their workplaces safe for all employees. To refuse to allow illegal aliens injured on the job to recover from the Workers' Compensation Fund, would be to

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encourage the hiring of illegal aliens and downgrade workplace safety."

In 2004, the Georgia Court of Appeals determined in *Earth First Grading v. Gutierrez* that an undocumented worker was entitled to workers' compensation benefits, despite his fraudulent conduct in securing employment. See 606 S.E.2d 332 (Ga. Ct. App. 2004). Ancelmo Gutierrez, an illegal alien, presented fraudulent documents to his employer in order to secure employment as a laborer. Gutierrez later sustained a work-related back injury. His employer, Earth First, then discovered that Gutierrez was an illegal alien and challenged his award of workers' compensation benefits by arguing that an undocumented worker was not an "employee" under the state act, and that federal immigration law preempted the act. The Georgia workers' compensation act defines an "employee" to include: "...every person in the service of another under any contract of hire or apprenticeship." The court determined that "every person" included illegal aliens, and held that Earth First could not avoid paying Gutierrez's benefits merely because he was an illegal alien.

In 2005, the Maryland Court of Appeals held in *Design Kitchen & Baths v. Lagos* that an undocumented worker who was not legally permitted to perform work in the United States was nevertheless entitled to

receive workers' compensation benefits. See 882 A.2d 817 (Md. 2005). Diego Lagos, an illegal alien, sustained an injury to his left hand and thereafter sought workers' compensation benefits. On review, the court examined the Maryland workers' compensation act, which states in part that an individual working "under an express or implied contract of apprenticeship or hire" is entitled to workers' compensation benefits. The court reasoned that the workers' compensation scheme was remedial in nature and should be construed in favor of an injured worker. The court further determined that public policy was best served by extending workers' compensation benefits to include illegal aliens. Lastly, the court concluded that because IRCA does not specifically prohibit undocumented workers from seeking employment, the underlying employment contract was not illegal. Finally, the court rationalized that to hold otherwise would permit employers to take advantage of undocumented workers by exposing them to unsafe working conditions without consequence.

For a similar result, see *Farmer Brothers Coffee v. Workers' Compensation Appeals Board*, where the California Court of Appeals rejected an IRCA preemption challenge to state workers' compensation benefits, explaining that "California law has expressly declared immigration status to be irrelevant to the issue of liability to pay compensation to an injured employee." See 133 Cal. App. 4th 533 (Cal. Ct. App. 2005) (any fraud on the part of the illegal alien was for the purposes of obtaining employment, not recovering workers' compensation benefits).

In 2006, the Arizona Court of Appeals in *Gamez v. Industrial Commission* wrestled with the wording of the state workers' compensation act in assessing whether its definition of "employee" included undocumented workers. See 141 P.3d 794 (Ariz. Ct. App. 2006). Jose Gamez, an illegal alien, entered the United States using a false name and Social Security number, ultimately using those documents to obtain employment with Thunderbird Furniture in 2001. Gamez subsequently sustained a work-related injury to his back. Gamez filed a workers' compensation claim under a false name, in which at least five separate workers' compensation claims had

been filed within the previous two years. On review, the court reasoned that, “While there is a general policy goal of compensating persons injured during employment, the objectives of compensating injured persons and reducing public dependency must be read together. The extent to which providing compensation awards to illegal aliens would further the goal of preventing injured employees and dependents from becoming public charges is limited because, other than emergency medical services, illegal aliens do not generally have a claim to public welfare assistance.” However, in a rare victory for employers, the court elected to *deny* Gamez workers’ compensation benefits due to a simple matter of statutory construction. More particularly, the Arizona act defined employees eligible for benefits to include “aliens and minors legally or illegally permitted to work for hire.” Given the mere absence of a comma between the words “minors” and “legally,” the court concluded that “...the legislature has not provided that an undocumented immigrant is an ‘employee’ under the Act... [f]or that reason, the award denying benefits in this matter is appropriate.”

Also in 2006, the Georgia Court of Appeals in *Martines v. Worley & Sons Construction* revisited the issue of whether an illegal alien was entitled to receive workers’ compensation benefits. *See* 628 S.E.2d 113 (Ga. Ct. App. 2006). Merced Martines, a native of Mexico, entered the United States illegally and subsequently sustained a work-related injury to his left foot while working as a laborer for Worley & Sons Construction. Martines’s physician eventually released him to return to work with restrictions. His employer then offered him a job as a delivery truck driver. However, when Martines was asked to produce a driver’s license and documentation proving that he was legally inside the country, he admitted his illegal alien status. Martines’s employer controverted his workers’ compensation claim upon the ground that he was an illegal alien. However, the court held that Martines was nevertheless entitled to workers’ compensation coverage under the rationale that “illegal immigration status does not bar an employee from receiving workers’ compensation benefits,” and that to hold otherwise “would reward employers for hiring illegal aliens.”

Notably, the courts of Connecticut, Florida and Tennessee have reached similar conclusions. *See, e.g., Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998) (workers’ compensation act protects illegal aliens); *Safeharbor Employer Svcs., Inc. v. Cinto Velazquez*, 860 So. 2d 984 (Fla. 2003) (workers’ status as illegal alien does not preclude receipt of workers’ compensation benefits); and *Silva v. Martin Lumber Co.*, 2003 Tenn. LEXIS 1047 (Tenn. 2003) (state workers’ compensation act does not expressly exclude illegal aliens from coverage).

Recent National Trend—Does Federal Immigration Law Preclude the Extension of Workers’ Compensation Benefits to Undocumented Workers?

Among those states permitting undocumented workers to receive some manner of workers’ compensation benefits, none are believed to have outright precluded the receipt of reasonable and necessary medical benefits. For example, the courts of New Jersey and Pennsylvania have expressly allowed an undocumented worker to obtain medical benefits without regard to his or her illegal status. *See Reinforced Earth Co. v. Workers’ Comp. Appeal Bd.*, 810 A.2d 99 (Pa. 2002) (holding that claimant’s illegal status did not preclude receipt of medical benefits) and *Mendoza v. Monmouth Recycling Co.*, 672 A.2d 221 (N.J. Super. Ct. App. Div. 1996) (holding that illegal alien’s “need for medical treatment and his right thereto as an incident of his employment do not derive from or depend upon his immigration status”).

In contrast, whether rehabilitation and retraining benefits are legally permissible presents an interesting issue. Obviously, the question arises whether an employer’s knowing facilitation of an undocumented workers’ rehabilitation or retraining violates federal immigration law—in particular, IRCA—by seeking to return an illegal alien to the workforce. Notwithstanding the fact that state law may deem an undocumented worker eligible to receive workers’ compensation benefits, IRCA may preempt those state laws. Congress designed IRCA to establish procedures to make it more arduous for and, thereby, to punish employers who knowingly hire illegal aliens. IRCA not only precludes employers from hiring undocumented workers, but also from con-

tinuing to employ them once the employer becomes aware of their illegal status.

In 2000, the California Court of Appeals in *Del Taco v. Workers’ Compensation Appeals Board* denied an award of vocational rehabilitation benefits to an illegal alien who had fraudulently used a Social Security number to obtain employment. *See* 79 Cal. App. 4th 1437 (Cal. Ct. App. 2000). Jorge Gutierrez worked at Del Taco until he suffered an on-the-job back injury. Gutierrez made a claim for workers’ compensation benefits, was awarded temporary disability benefits, and then accepted modified work offered by his employer. Del Taco then fired Gutierrez upon learning that he was an illegal alien. Gutierrez subsequently sought vocational rehabilitation benefits. Del Taco argued that it was denied equal protection of the laws when it was required to provide those benefits. On review, the court held that illegal aliens were covered under the state’s workers’ compensation act, but nevertheless found that the vocational rehabilitation requirement resulted in more extensive and costly benefits being awarded to an illegal worker than those that could be awarded to a legal worker, and that it was a violation of equal protection to require Del Taco to pay such a benefit to an illegal alien who was otherwise prohibited from accepting such an offer. The court further reasoned that, “Here, Del Taco was obeying the law by not retaining worker after it learned that he was not legally permitted to reside or work in the United States of America. At the same time, [the] worker was violating federal law by remaining in the United States of America. Simple fairness dictates that Del Taco should not be penalized for obeying the law and worker should not be rewarded for disobeying the law.”

In 2001, the Nevada Supreme Court in *Tarango v. State Industrial Insurance System* analyzed whether an undocumented worker was entitled to vocational rehabilitation under the state workers’ compensation scheme if those benefits would technically violate federal immigration law. *See* 25 P.3d 175 (Nev. 2001). Angel Tarango, an illegal alien, sustained a back injury in 1996 when he fell from an eight-foot ladder while installing drywall for his employer, Champion Drywall. Significantly, Tarango received medical and disability benefits

without opposition. However, in order to receive vocational benefits, Tarango was required to produce an Immigration and Nationalization Form I-9—required by federal law to prove an alien’s right to work in the United States. Tellingly, Tarango was unable to produce the verification, resulting in the suspension of his benefits. On appeal, the court observed that the Nevada workers’ compensation act defined a covered employee or worker as “every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.” The court surmised that Tarango was, by law, entitled to receive to workers’ compensation benefits. However, in another rare victory for employers, the court held that Nevada workers’ compensation law was preempted by IRCA to the extent that the benefit scheme sought to provide undocumented workers with *vocational training or employment* within the United States.

In 2003, in the wake of *Hoffman*, the Oklahoma Court of Appeals in *Cherokee Industries, Inc. v. Alvarez* addressed the issue of whether an undocumented worker was entitled to receive *all* benefits otherwise available under the state workers’ compensation act. See 84 P.3d 798 (Okla. Civ. App. 2003). Isac Alvarez, an illegal alien, worked as a cleaner for Cherokee Industries until he sustained an initial work-related back injury in 2001 and two re-injuries in 2001 and 2002. Alvarez sought temporary total disability benefits, which are primarily dependent upon an injured worker’s ability to find and *hold a job* rather than his or her physical condition. Following Alvarez’s workers’ compensation claim, it was discovered that he had been falsely documented. Cherokee Industries then challenged Alvarez’s claim, namely upon the grounds that Alvarez had submitted false documents to secure his employment in violation of IRCA, rendering his employment “contract” void under the state workers’ compensation act defining “employee” as “any person under an agreement to work.” Finding a similar Minnesota Supreme Court case to be persuasive, *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 (Minn. 2003) (IRCA does not preclude illegal aliens from receiving temporary total disability benefits), the *Cherokee Industries* court held that the Oklahoma

workers’ compensation statute did not expressly exclude undocumented workers from coverage. Notably, however, the court acknowledged that IRCA may preclude an undocumented worker from receiving “vocational rehabilitation” benefits. Notwithstanding its conclusion, the court declined to disturb the trial court’s award of temporary total disability benefits.

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In 2004, the Georgia Court of Appeals held in *Continental Pet Technologies, Inc. v. Palacias* that IRCA did not preempt its state workers’ compensation act. See 604 S.E.2d 627 (Ga. Ct. App. 2004). Similarly, in 2006, the New York Court of Appeals in *Balbuena v. IDR Realty LLC* determined that IRCA did not preclude undocumented workers from recovering lost earnings for employer violations of state labor laws. See 845 N.E.2d 1246 (N.Y. 2006). The court contemporaneously examined two distinct but similar cases involving on-the-job injuries incurred by illegal aliens. More particularly, in 2000, Gorgonio Balbuena, a Mexican illegal alien, fell from a ramp while pushing a wheelbarrow, sustaining severe head trauma and other debilitating injuries that incapacitated him from working. Also in 2000, Stanislaw Majlinger, a Polish alien who had overstayed his travel visa, was seriously injured after he fell 15 feet from a scaffold. Both Balbuena and Majlinger sued their respective employers for lost earnings caused by alleged violations of state labor laws. The court concluded that neither undocumented worker was precluded from recovering lost earnings, despite the fact that they both were aliens unauthorized to work in the United States. The court also determined that IRCA

was not intended to undermine or diminish labor protections in existing law, remarking that: “Limiting a lost wages claim by an injured undocumented alien would lessen an employer’s incentive to comply with the Labor Law and supply all of its workers the safe workplace the Legislature demands. Although plaintiffs’ presence in this country without authorization was impermissible under federal law, this transgression was insufficient to justify denying them a portion of the damages to which they were otherwise entitled.”

For a similar conclusion, see *Affordable Housing Foundation, Inc. v. Silva*, where the Second Circuit Court of Appeals held that no provision in IRCA expressly preempts state law permitting injured undocumented workers to recover workers’ compensation benefits, compensatory damages or lost earnings. See 469 F.3d 219 (2d Cir. 2006). However, for opposing viewpoints, see *Crespo v. Evergo Corporation*, where the New Jersey Superior Court held that IRCA precludes economic damage awards to undocumented workers for employment-based discrimination claims. See 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004). And, see *Marboah v. Ackerman*, where the District of Columbia Court of Appeals refused to allow an undocumented Dutch worker to profit from his own fraud and intentional misrepresentation in securing employment. See 877 A.2d 1052 (D.C. 2005).

Furthermore, in 2007, the California Court of Appeals held in *Reyes v. Van Elk, Ltd.* that neither IRCA nor *Hoffman* prohibited undocumented workers from having standing to raise prevailing wage (minimum wage) claims, where those claims are for work already performed. See 148 Cal. App. 4th 604 (Cal. Ct. App. 2007). Resting its rationale upon federal precedent, the court noted that: “As one federal circuit court reasoned, ‘We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, 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. By reducing the incentive to hire such workers the FLSA’s coverage of undocumented aliens helps discourage illegal immigra-

tion and is thus fully consistent with the objectives of the IRCA.’ (citing *Patel v. Quality Inn South*, 846 F.2d 700; *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); and *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002)). Hence, IRCA does not preempt California’s prevailing wage law as the prevailing wage law removes a major incentive to hiring undocumented workers.”

Also in 2007, the Kansas Supreme Court held in *Coma Corporation v. Kansas Department of Labor* that an undocumented worker’s “employment contract” was not illegal under IRCA, and thus, did not preclude a claim for unpaid wages under state law. See 154 P.3d 1080 (Kan. 2007). Cesar Corral, an illegal alien, worked as a cook for Burrito Express until he was fired in 2004. Following his termination, Corral filed a claim against his employer for earned, but unpaid, wages. Burrito Express challenged his wage claim on the theory that his employment was illegal under both Kansas state law and IRCA. However, finding in Corral’s favor, the court held that: “[T]o deny or to dilute an action for wages earned but not paid on the ground that such employment contracts are ‘illegal,’ would thus directly contravene [Kansas] public policy.” See also *Gomez v. Falco*, 792 N.Y.S.2d 769 (N.Y. App. Term 2004) (state wage payment act applicable to illegal aliens).

At the end of 2007, the South Carolina Supreme Court held in *Curiel v. Environmental Management Services* that illegal aliens were entitled to recover workers’ compensation benefits without running afoul of IRCA. See 2007 S.C. LEXIS 421 (S.C. 2007). Curiel, a native of Mexico, used fraudulent documents to obtain employment with Environmental Management Services in 1997. In 2000, Curiel suffered a detached retina while working a demolition job and sought workers’ compensation benefits from his employer, Environmental Management Services. Curiel’s employer controverted his claim, contending that IRCA prohibited the hiring of illegal aliens as well as the usage of fraudulent documents to obtain employment. On review, the court observed that the state workers’ compensation statute

defined “employee” to include: “Every person engaged in an employment... including aliens and also including minors, whether lawfully or unlawfully employed.” Deliberating whether the statute included undocumented workers, the court recognized that the workers’ compensation law of its sister state, North Carolina, contained identical language, and that the North Carolina Court of Appeals had already addressed the precise issue in *Ruiz v. Belk Masonry Company*, 559 S.E.2d 249 (N.C. App. 2002). See also *Safeharbor Employer Servs. I, Inc. v. Velazquez*, *supra*; *Earth First Grading v. Gutierrez*, *supra*; *Design Kitchen and Baths v. Lagos*, *supra*; and *Correa v. Waymouth Farms, Inc.*, *supra*.

The *Curiel* court also observed that IRCA contains “no specific provision forbidding workers’ compensation benefits to illegal alien workers.” Concluding that IRCA neither conflicted with nor preempted the South Carolina benefit scheme, the court opined that: “[A]llowing benefits to injured illegal alien workers does not conflict with IRCA’s policy against hiring them. Disallowing benefits would mean unscrupulous employers could hire undocumented workers without the burden of insuring them, a consequence that would encourage rather than discourage the hiring of illegal workers.”

How Far Will It Go?

Conceivably, the domino effect is likely to pressure other states to adopt similar approaches to the undocumented worker problem. With illegal border crossings at an all-time high, coupled with America’s perceived promise of economic opportunity, the number of undocumented workers is likely to increase exponentially. The clear and present reality is that undocumented workers are already here in great numbers, and the country’s infrastructure is poorly equipped to respond at its current pace. Absent federal preemption of the field, the individual states will continue to correlate their respective workers’ compensation acts with unsettled federal immigration law as they see fit.

In spite of itself, even federal law appears to be softening its approach to the rights of illegal aliens. This is a somewhat curious development in light of the aftermath of the September 11, 2001, attacks and the resulting spotlight on federal immigration law. For example, in early 2008, the United States Court of Appeals for the District of Columbia analyzed in *Agri Processor Company v. National Labor Relations Board* whether a union election at a kosher meat company should be deemed invalid because most of those employees voting to unionize were later discovered to be undocumented workers. See 2008 U.S. App. LEXIS 101 (D.C. Cir. 2008). The court held that undocumented workers were covered by the broad definition of “employee” under the National Labor Relations Act, irrespective of their legal status, reasoning that: “While undocumented aliens may face penalties for violating immigration laws, they receive the same wages and benefits as legal workers, face the same working conditions, answer to the same supervisors, and possess the same skills and duties.”

Inasmuch as all workers, whether legal or illegal, are protected by federal discrimination law—particularly, Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act, and the Fair Labor Standards Act—the *Agri Processor* decision signifies a yet another step in the direction of affording the same level of protection to undocumented workers as American citizens. See Rebecca Bruch and Brent L. Ryman, *Illegal Aliens Have Civil Rights, Too*, FOR THE DEFENSE (DRI 2006).

To ask how far it will go requires only a rearview glance at how far it has already gone. The bottom line for employers is that federal and state governments are drawing less and less of a distinction between documented and undocumented workers when employee protections are at stake. It is this author’s opinion that, absent federal preemption to the contrary, all employers will inevitably be compelled to extend workers’ compensation coverage to all employees, regardless of legal status. 