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Christine N. Cimini

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UNDOCUMENTED WORKERS AND CONCEPTS OF FAULT: ARE COURTS ENGAGED IN LEGITIMATE DECISION MAKING?

Christine N. Cimini*

INTRODUCTION

The national debate about effective immigration policy reform continues to provoke emotional dialogue on all sides. The absence of federal legislation to remedy the readily apparent problems with the existing immigration system has left a void that states are stepping in to fill.1 These state policies, coupled with anti-immigrant sentiments in many areas of the county, result in the passage of laws such as Arizona’s Senate Bill 1070, which may be the harshest state immigration law in history.2 Despite these policies, and even in the face of deep hostility, immigrants continue to enter the United States seeking better lives.

Upon entering the country, many immigrants work as a way to improve their economic circumstances and contribute to their communities. While federal law mandates that employers verify employment authorization prior to hiring an employee and prohibits employees from utilizing false immigration papers to obtain work, at times both employers and employees violate these statutory provisions. Thus, regardless of how employment is obtained, undocumented workers make up a considerable percentage of the American workforce.3

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1 President Obama, Naturalization Ceremony for Active-Duty Service Members, (April 23, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-naturalization-ceremony-active-duty-service-members (“Indeed, our failure to act responsibly at the federal level will only open the door to irresponsibility by others. And that includes, for example, the recent efforts in Arizona, which threatened to undermine basic notions of fairness that we cherish as Americans, as well as the trust between police and their communities that is so crucial to keeping us safe.”).

2 2010 Ariz. Sess. Laws 113 (expanding the definition of trespassing to include an undocumented immigrant’s mere presence in the state; requiring local law enforcement officers who have “reasonable suspicion” about someone’s immigration status to demand documentation and making it a misdemeanor to fail to carry paperwork that proves legal status); see United States v. Arizona, 703 F. Supp. 2d 980, (D. Ariz. 2010) (enjoining the State of Arizona and Governor Brewer from enforcing Sections of Senate Bill 1070 including Section 2(B) creating A.R.S. §11-1051(B); Section 3 creating A.R.S. § 13-1509; the portion of Section 5 creating A.R.S. §13-2928(c); and Section 6 creating A.R.S. §13-3883(A)(5)).


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Undocumented workers often undertake dangerous or unwanted jobs and legal disputes regarding issues that arise in the workplace are common. While not every undocumented worker is willing to seek legal relief given the precarious nature of their presence in the United States, there is, nonetheless, a growing body of case law examining the rights of undocumented workers in the workplace.

The increase in the number of labor and employment cases involving undocumented workers is attributable, in part, to legislative changes and the 2002 Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB*[^5]. Prior to the passage of the Immigration Reform and Control Act (IRCA) in 1986, labor and employment and immigration were discrete areas of law designed to regulate different issues; labor and employment laws focused on conditions and treatment of workers in the workplace while immigration laws focused on the terms under which aliens were permitted to enter and remain in the United States. This changed when Congress passed IRCA. IRCA sought to limit the growth of undocumented workers in the United States through the creation of a sanction system for both employers who hired undocumented workers and employees who used false documents to obtain employment.[^6]

The impact of IRCA’s passage upon the “legal landscape”[^7] became apparent in 2002 when the Supreme Court held in *Hoffman* that undocumented workers were not entitled to backpay for violations of the National Labor Relations Act (NLRA).[^8] In *Hoffman*’s wake, attorneys representing employers began to argue that *Hoffman*’s force applies with equal vigor to workplace cases outside of the NLRA statutory scheme and to remedies beyond the NLRB’s backpay remedy. Conversely, immigrant-rights advocates argued that *Hoffman*’s application should be confined to undocumented workers claims for backpay under the NLRA.[^9] In the middle trying to balance two competing policy priorities – upholding labor and employment laws designed to protect all workers and immigration laws


[^7]: *Hoffman*, 535 U.S. at 147 (relying upon the changed “legal landscape” created by IRCA’s passage as part of their decision).


[^9]: Arguably, at its narrowest point, the Hoffman decision could stand for the proposition that only undocumented workers who submit fraudulent documentation to unknowing employers are foreclosed from receiving backpay awards under the NLRA when an employer engages in an unfair labor practice.
designed, in part, to deter the employment of undocumented workers - are courts. The body of law they are developing is less than coherent.

Within the sometimes erratic patterns of decision-making that form Hoffman’s progeny, this article names, identifies and categorizes “fault-based” decision-making, a line of judicial reasoning utilized by courts to resolve disputes between undocumented workers and their employers. Concepts of fault are not novel in our legal system and courts’ reliance upon such concepts to reach decisions is often appropriate. In many cases involving undocumented workers, however, courts fail to examine fault as it relates to the underlying claims, but instead evaluate the facts and circumstances of unlawful immigration or IRCA violation when ascribing and then analyzing the respective fault of the parties to the litigation. This fault-based analysis forms the subject of this article.

Using the taxonomy rooted in the Hoffman decision, courts employ two constructs to help resolve cases involving undocumented workers: past fault as it relates to unlawful immigration, continued unlawful presence in the country or IRCA violations; and future fault as it relates to the potential for prospective illegal acts. In terms of past fault, courts tend to explore which party in the employment relationship may have committed a violation of IRCA, and base their decisions, at least in part, on the result of that inquiry. Consistent with the structure of IRCA sanctions, courts generally consider whether the employee submitted fraudulent documents in contravention of IRCA, whether the employer failed to verify the worker’s eligibility documents in contravention of IRCA, or whether the employer knew or should have known that the worker was an undocumented worker and nonetheless hired the worker or refused to fire the worker in contravention of IRCA. A smaller number of courts examine the facts of unlawful immigration by the worker as part of their past fault analysis.

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10 Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 254 (2d Cir. 2006) (Walker, C.J., concurring) (“In the four years since the Supreme Court decided Hoffman Plastic Compounds, Inc. v. NLRB, . . . courts have struggled to reconcile workplace safety and employment laws, at both the state and federal level, with federal immigration policy - to little avail.”).

11 Hoffman, 535 U.S. at 148-49, 150-52. In terms of fault as it relates to the employment relationship, roots of this reasoning can be found in the following Hoffman language “Under the IRCA regime, it 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 I.D., which subverts the cornerstone of IRCA’s enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.” In terms of fault as it relates to the potential for future illegal acts, roots of this reasoning can be found in the following Hoffman language “Indeed awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.” Id. at 150.

12 There are some courts that examine immigration law violations prior to employment. See, e.g., Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992) (finding that to provide a remedy to the undocumented worker would reward the worker for entering the United State illegally).
In terms of future fault, courts often examine whether the way in which they rule in a particular case will likely lead to future violation of the law or other misconduct. Courts specifically analyze whether the decision will discourage or encourage future immigration violations or future violations of safety and labor laws. Where the remedy will likely result in a future illegal immigration act or discourage compliance with workplace safety and labor laws, courts are inclined to deny such remedies. Where the remedy will not result in a future illegal immigration act or will encourage compliance with safety and labor laws, courts are inclined to award undocumented workers relief.

The temptation to adopt fault-based decision making in employment cases involving undocumented workers is attributable, at least in part, to conflicting legislative priorities and the lack of legislative clarity about how the policy priorities should interact. On the federal level, statutes such as the NLRA, FLSA and Title VII are designed to protect workers from workplace misconduct, regardless of status, while IRCA is designed to prohibit undocumented workers from employment. Persuasive arguments can be made on both sides about which of these legislative priorities should trump, but in the absence of clear guidance from Congress courts are left to navigate the divide. On the state level, competing legislative priorities also exist. The state’s desire to protect workers against wage theft, discrimination or workplace injury is contrasted with the federal desire, through IRCA, to prohibit the employment of undocumented workers. When state laws are involved, the tension between immigration and labor and employment policies gets played out through preemption arguments. Arguments can be made on both sides, either IRCA conflicts with state laws and should override state police powers, or there is an absence of conflict between the two laws and both can be effectively enforced. In this context, and without definitive guidance from Congress, courts are left to step into this murky area and sort out the conflicts.

In assessing the legitimacy of fault-based decision-making, judicial decisions fall into several categories: future fault-based reasoning; past fault-based reasoning tied to an existing doctrine; and past fault-based reasoning not rooted in any existing doctrine. At the center of the potential problems are concerns about separation of powers and the respective roles of courts and legislatures. At the least troubling end of the spectrum are courts that adopt future fault-based decision making. These courts examine the potential impact of their decision upon future behavior as a way to give effect to, or support, the policy decisions enacted by legislative bodies. As
such, this line of reasoning is consistent with the principles under the separation of powers doctrine and represents a judicially sound way to attempt resolution of competing policy objectives.

In the middle are those courts that use past fault-based decision making tied to existing doctrine. Each of the most common workplace cases involving undocumented workers have doctrines or statutory provisions that are designed to bar remedies based on underlying misconduct. For example, the doctrine of unclean hands or estoppel can apply in the wage and hour context; the after-acquired evidence doctrine can apply in the Title VII/state anti-discrimination context; statutory bars on willful misconduct can apply in the workers’ compensation context; and the outlaw or serious misconduct doctrine can apply in the torts context. Courts’ decision making that analyzes fault in the context of existing doctrines is less problematic in that discretion is cabined by the application of an existing common law doctrine or statutory provisions. However, the existing fault doctrine often does not apply to undocumented worker immigration or work status fault. Thus, while courts are at least adhering to an existing doctrine, the doctrine often is improperly applied.

On the most problematic end of the continuum are courts that employ past fault-based decision making untied to any existing doctrine. These courts examine concepts of immigration or work status fault, which are unrelated to the underlying action, and use this factual information to help reach a decision. In these cases, courts are not looking at which party to the action caused the injury (tort cases), whether the employer discriminated against a protected employee (discrimination cases), whether the employer failed to pay the employee (wage and hour cases); or whether the worker suffered a workplace injury (workers’ compensation cases). Instead, courts are examining if the worker provided false documents and whether the employer knew about the employee’s status. When courts use immigration or work status fault to reach decisions, without connection to any existing doctrine, courts appear to be engaged in judicial policy making.

The article begins in Section I with an exploration of the evolving link between immigration and employment laws which laid the foundation for the importation of fault into workplace claims by undocumented workers. Section II then traces the judicial beginnings of fault-based decision making. A series of pre-\textit{Hoffman} cases and the \textit{Hoffman} decision itself create the underpinnings of fault-based decision making now being used by

\footnote{While the same can be said for past “fault-based” decisions which are tied to an existing doctrine, the application to an existing doctrine at least holds the potential to cabin some judicial discretion.}
courts. Section III then creates a framework to explain the different ways in which courts utilize concepts of immigration and work status fault in their decision making. Judicial decisions are then explored and distinguished along the two constructs of past fault related to the employment relationship and fault related to future illegal conduct. Section IV then separates fault-based decision making into three different categories: future fault, past fault rooted in existing doctrine and past fault not tethered to an existing doctrine. The article concludes by examining whether these fault-based constructs are valid bases upon which to make judicial decisions. Identifying those areas where fault-based decision making is problematic will provide a roadmap for courts confronting these difficult questions in the future.

I. THE EVOLVING LINK BETWEEN EMPLOYMENT AND IMMIGRATION: CREATING FERTILE GROUND FOR DEVELOPMENT OF FAULT-BASED DECISION MAKING

Through much of recent history, immigration and labor and employment laws were separate and distinct from one another allowing courts to easily navigate the respective policy objectives of each area of law. This all changed in 1986 with the passage of IRCA, as the two previously discrete areas became entwined and courts struggled to find the right balance between the two underlying competing policies: enforcing immigration laws which were designed to deter unlawful immigration through employer sanctions; and enforcing labor and employment laws which were designed to prohibit unfair practices against employees, including undocumented workers, in the workplace.

The current inextricable link between immigration and employment laws is a relatively new development. Between the time the Immigration and Nationality Act (INA) passed in 1952 and the passage of IRCA in 1986, immigration laws regulated only the terms and conditions upon which foreigners would be classified and admitted into the United States. Prior to IRCA’s passage, there was no express prohibition on the hiring of undocumented workers. While there was a prohibition against “harboring”

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14 A federal statute enacted in 1885 providing that any contract of employment with an undocumented alien was void, was repealed in 1952 with the passage of the Immigration and Nationality Act. See Gates v. Rivers Constr. Co., 515 P.2d 1020, 1023 (Alaska 1973) (“Congress determined that the exclusion of certain aliens from admission to the United States was a more satisfactory sanction than rendering their contracts void and thus unjustifiably enriching employers of such alien laborers.”).

undocumented workers, Congress expressly exempted employment from the definition of harboring. In fact, an attempt to amend the bill to include penalties for the knowing employment of undocumented workers was overwhelmingly rejected. Thus, prior to 1986, employers suffered no legal consequences when hiring undocumented workers.

In the absence of a prohibition on hiring undocumented workers, courts examining the rights of undocumented workers had no difficulty harmonizing immigration and labor and employment laws, often finding in favor of the undocumented worker. While some employers challenged the extension of statutory protections to undocumented workers in the workplace, prior to IRCA’s passage, federal courts routinely found that workplace protections covered undocumented workers.

In 1984, in *Sure-Tan Inc. v. NLRB*, the Supreme Court issued its first decision expressly addressing the legal status of undocumented workers under federal law and found that undocumented workers were employees

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17 Immigration and Nationality Act § 274(a), 8 U.S.C. § 1324(a) (1976) (known as the “Texas Provisos,” this provision effectively made it lawful for employers to hire undocumented workers).


19 Correales, *supra* note 16, at 117 (stating, “Thus, though not explicitly, the Texas proviso essentially legalized the labor of undocumented immigrants, at least with respect to employers. That was true, even as immigration law became more restrictive. The Texas proviso was in effect from 1952 until the passage of the Immigration Control Reform Act of 1986.”); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 499-500 (2004) (explaining that while employers could hire or employ undocumented workers, the undocumented worker was still subject to arrest and deportation and the INS used worksite raids to enforce immigration laws).

20 Moreau v. Oppenheim, 663 F.2d 1300, 1307-08 (5th Cir. 1981) (“Even assuming that violations of the immigration laws by the [plaintiffs] occurred, the remedy for these violations is . . . criminal sanctions, not denial of access to court. We seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability.”); In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (finding that the status of an alien as undocumented is irrelevant to FLSA protections); Donovan v. Burgett Greenhouses, Inc., 759 F.2d 1483, 1485-86 (10th Cir. 1985) (affording FLSA protections to undocumented workers); NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183 (9th Cir. 1979) (finding that undocumented workers are protected under the NLRRA). *See also* Wishnie, *supra* note 21, at 501 (explaining that lower federal courts uniformly rejected the suggestion that Congress intended to exclude workers from statutory labor protections based on immigration status reasoning that to do so would leave the most vulnerable subject to exploitation).
protected under the National Labor Relations Act (NLRA). In reaching its conclusion, the Court did not find a conflict between the INA and the NLRA reasoning instead that “[t]he central concern with the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens,” and the INA “evinces at best evidence of a peripheral concern with employment of illegal entrants.” The Court reasoned that since Congress had not made the hiring of undocumented workers a violation of the INA, no conflict existed between the INA and the protection of undocumented workers under the NLRA.

Two years later, Congress passed IRCA in an attempt to “close the back door on illegal immigration.” The legislation consisted of several schemes, each designed to retard the growth rate of undocumented workers within U.S. borders. Among them, Congress made it illegal for a U.S. employer to knowingly hire, retain, or refer an undocumented worker and

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21 Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 886-87 (1984) (involving five undocumented workers who were reported to the Immigration and Nationality Service (INS) in retaliation for having voted in favor of a union). A full discussion of Sure-Tan, the Supreme Court’s only other case (pre-IRCA) to consider the appropriateness of backpay for undocumented workers (or to even discuss the legal status of undocumented workers under federal law), is beyond the scope of this paper. In Sure-Tan, the Court held that undocumented workers are not entitled to backpay for periods during which they are “unavailable” for work. Sure-Tan, 467 U.S. at 903. Most Circuits had narrowly interpreted the Sure-Tan decision to bar backpay only for undocumented plaintiffs who (at the time of judgment) are outside the United States and who could not lawfully re-enter the country (i.e., are “unavailable”). See Christopher Ho & Jennifer C. Chang, Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond, 22 HOFSTRA L.A. & EMP. L.J. 473, 480, n. 29 (2005) (discussing Circuit decision interpreting Sure-Tan). Nonetheless, the Court did not rely extensively on Sure-Tan, expressing as it did that the question in Hoffman was better analyzed “through [the] wider lens” of IRCA. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002).

22 Sure-Tan, 467 U.S. at 892 (1984) (citing DeCanas v. Bica, 424 U.S. 351, 359 (1976)). In Sure-Tan, Justice O’Connor explained that “[f]or whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization.” Id. at 892-93.

23 Id. at 893-94 (“Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the same standards of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer reasons for aliens themselves to enter in violation of the federal immigration laws. The Board’s enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws . . .”). Despite its finding that undocumented workers were considered employees protected under the NLRA, the Court concluded that the workers could not claim backpay “during any period when they were not lawfully entitled to be present and employed in the United States.” Id. at 903. This part of the Court’s decision was based upon the NLRB’s practice of tolling backpay when the employee is physically unavailable to work. Id. Since the employees in this case were no longer in the U.S., the Court determined they were ineligible for backpay. Id.


26 Richard A. Johnson, Twenty Years of IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States, 21 Geo. IMMIGR. L.J. 239, 244-45 (2007) (explaining that IRCA called for a one-time amnesty program that granted citizenship status to undocumented workers who had both resided continuously in the United States prior to 1986 and who had already applied for temporary resident status).

27 8 U.S.C. § 1324a(a)(1) (2006). As originally enacted, IRCA did not make it unlawful for undocumented aliens to accept employment in the United States. It was not until IRCA was amended in 1990 that Congress created penalties and sanctions for undocumented workers who sought employment in the U.S. See Immigration
it developed an employer sanction scheme designed to give force to these prohibitions. IRCA included a new verification system, mandating that employers request and verify eligibility documents and fill out an I-9 form within three days of hire. Employers who violate IRCA by “knowingly” hiring an undocumented worker or by failing to comply with the verification requirements are subject to civil and criminal penalties. Although the penalties are aimed primarily at the employer, undocumented workers also face serious civil and criminal penalties for any fraud (IRCA or otherwise) they may commit upon an employer during the employment process, including the act of handing over fraudulent documents to satisfy the verification requirements.

Congress intended employer sanctions to be the primary method of deterring unlawful immigration. The legislation was based on the
assumption that employment is the “magnet” that attracts aliens to the U.S. and that employers would be deterred from hiring undocumented immigrants by threat of penalty, 33 which in turn, would deter immigrants from entering illegally. 34 While this created overlap between immigration and labor and employment laws, IRCA did not expressly address the effect that a violation of IRCA’s provisions is to have on other laws, including labor laws. 35 Although the statute is silent, the legislative history surrounding IRCA’s passing unequivocally indicates that Congress intended IRCA provisions should not be construed as excluding undocumented workers from extant labor protections. 36 Instead, the use of employer sanctions and continued enforcement of labor laws was intended to broadly combat illegal immigration by decreasing employer incentives to hire undocumented workers in the first place. 37

II. THE EMERGENCE OF FAULT-BASED DECISION MAKING IN JUDICIAL DECISIONS

With federal legislation creating an overlap between immigration and labor and employment laws courts faced new dilemmas in trying to balance the competing policy objectives. However, despite IRCA’s new prohibitions on the employment of undocumented workers and the availability of employer sanctions, there was no question that undocumented workers were still considered “employees” for purposes of protections afforded under federal labor and employment statutes. 38 While

34 Id.
36 The Judiciary Committee accompanying IRCA stated: “It is not the intention 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, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees.” HR. Rep. No. 99-682(I), at 58. Despite the clarity of the Judiciary Committee’s assertion, The Hoffman majority dismissed the force of this statement as an indicator of legislative intent, calling it a “rather slender reed.” Hoffman, 535 U.S. at 149-50 n.4.
37 Similar to the Judiciary Committee’s report, the House Education and Labor Committee reported that to reduce labor protections for undocumented immigrants would “be counter-productive of [the] intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.” IRCA, 99th Cong., 2d. Sess. 9 (1986), as reprinted in 1986 U.S.C.C.A.N. 5757, 5758.
38 See Wishnie, supra note 30, at 204.
many decisions after Sure-Tan limited the denial of backpay to employees who were not physically present in the U.S., a split eventually developed among lower courts regarding the damages that undocumented workers were entitled to under federal labor and employment laws.

In Del Rey Tortilleria, Inc. v. NLRB, the Court of Appeals for the Seventh Circuit held that undocumented workers who are discharged in violation of the NLRA are not entitled to backpay or reinstatement because the NLRA is remedial, not punitive in nature and as such should be awarded only to individuals who have suffered harm. The court characterized the NLRA as remedial, not punitive, in nature and as such should be awarded only to individuals who have suffered harm. According to the court, undocumented workers were not harmed in the “legal sense” in that they had no entitlement to be present or employed in the United States.

By contrast, in NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., the Court of Appeals for the Second Circuit affirmed an award of backpay and conditional reinstatement to undocumented workers where the employer hired them knowing that they were undocumented and thereafter retaliated

39 See NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 54 (2d Cir. 1997); EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989); Rios v. Enter. Ass’n Steamfitters Local Union 638 of U.A., 860 F.2d 1168, 1173 (2d Cir. 1988); NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 1393 (9th Cir. 1986); Local 512 Warehouse and Office Workers’ Union v. NLRB, 795 F.2d 705, 717 (9th Cir. 1986) (finding that the “speculative” nature of the damages focused upon in the Sure-Tan case did not exist when Plaintiff remained in the U.S. and that such undocumented workers might still be entitled to backpay).

40 Compare NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997) (holding that undocumented workers were eligible for backpay under the NLRA), and Local 512, Warehouse and Office Workers’ Union v. NLRB, 795 F.2d 705, 719-20 (9th Cir. 1986) (same) , with Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1122 (7th Cir. 1992). Compare also Memorandum GC 87-8 from Office of General Counsel, NLRB, The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented Discriminates, 1987 WL 109409 (Oct. 27, 1988) (reasoning that undocumented workers could not be awarded backpay because of IRCA), with Memorandum GC 98-15 from Office of General Counsel, NLRB, Reinstatement and Backpay Remedies for Discriminates Who May Be Undocumented Aliens in Light of Recent Board and Court Precedent, 1998 WL 1806350 (Dec. 4, 1998) (reasoning that undocumented workers could be awarded backpay notwithstanding IRCA). There were a couple of post-IRCA decisions involving pre-IRCA conduct. These cases relied upon Sure-Tan in reaching their decisions in the context of Title VII claims. See EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989); Rios v. Enter. Ass’n Steamfitters Local 638 of U.A., 860 F.2d 1168, 1171-72 n.2 (2d Cir. 1988).

41 Compare NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997) (holding that undocumented workers were eligible for backpay under the NLRA), and Local 512, Warehouse and Office Workers’ Union v. NLRB, 795 F.2d 705, 719-20 (9th Cir. 1986) (same) , with Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1122 (7th Cir. 1992). Compare also Memorandum GC 87-8 from Office of General Counsel, NLRB, The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented Discriminates, 1987 WL 109409 (Oct. 27, 1988) (reasoning that undocumented workers could not be awarded backpay because of IRCA), with Memorandum GC 98-15 from Office of General Counsel, NLRB, Reinstatement and Backpay Remedies for Discriminates Who May Be Undocumented Aliens in Light of Recent Board and Court Precedent, 1998 WL 1806350 (Dec. 4, 1998) (reasoning that undocumented workers could be awarded backpay notwithstanding IRCA). There were a couple of post-IRCA decisions involving pre-IRCA conduct. These cases relied upon Sure-Tan in reaching their decisions in the context of Title VII claims. See EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989); Rios v. Enter. Ass’n Steamfitters Local 638 of U.A., 860 F.2d 1168, 1171-72 n.2 (2d Cir. 1988).

42 Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119-21 (7th Cir. 1992) (7th Cir. 1992) (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984); Local 512, 795 F.2d at 725 (Beezer, J., dissenting in part)).

43 Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119-21 (7th Cir. 1992) (7th Cir. 1992) (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984); Local 512, 795 F.2d at 725 (Beezer, J., dissenting in part)).

44 Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119-21 (7th Cir. 1992) (7th Cir. 1992) (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984); Local 512, 795 F.2d at 725 (Beezer, J., dissenting in part)).
against them for union activities.\textsuperscript{44} Based upon IRCA’s legislative history, the court found that IRCA’s structure of employer sanctions made it clear that Congress’ “intent was to focus on employers, not employees, in deterring unlawful employment relationships.”\textsuperscript{45} At the same time, IRCA did not limit the protections afforded undocumented workers nor curtail the Board’s ability to provide remedies under the NLRA.\textsuperscript{46} Thus, the court found that conditional reinstatement (upon verification of eligibility requirements) and backpay (from the date of unlawful discharge until the earliest of either reinstatement or failure within a reasonable time to produce verification documents), promoted the shared policy goals of IRCA and the NLRA and allowed the employer to avoid conflicts with the sanction provisions of IRCA.\textsuperscript{47}

Despite divergent results, both cases emphasize the respective fault of one of the involved parties. The \textit{Del Rey} court focused on the wrongdoing of the undocumented worker, characterizing the award of backpay and reinstatement as a reward for the violation of immigration laws.\textsuperscript{48} By contrast, the court in \textit{A.P.R.A. Fuel} focused on the wrongdoing of the employer who knowingly hired the undocumented workers, encouraged them to provide false documentation, and then, only after those workers engaged in union activity, fired them.\textsuperscript{49}

The Supreme Court decided to resolve the circuit split in \textit{Hoffman}. The

\textsuperscript{44} NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 58 (2d Cir. 1997). For other circuits finding undocumented workers eligible for backpay see Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639, 650 (D.C. Cir. 2001) (en banc) (supporting an award of backpay to an undocumented worker who was in the United States), rev’d, 535 U.S. 137 (2002); Local 512, Warehouse and Office Workers’ Union v. NLRB, 795 F.2d 705, 717 (9th Cir. 1986) (finding that undocumented workers who remain in the United States are eligible for backpay). The Second Circuit had earlier decided in \textit{Montero v. INS} that an undocumented worker is fully eligible for federal labor law remedies if “the alien is permitted by the INS to remain in the United States.” 124 F.3d 381, 384-85 (2d Cir. 1997).

\textsuperscript{45} A.P.R.A. Fuel, 134 F.3d at 56.

\textsuperscript{46} A.P.R.A. Fuel, 134 F.3d 50, 58 (2d Cir. 1997) (concluding that an NLRB backpay award to an undocumented worker did not violate the principles underlying IRCA because the award was simply compensation for economic injury caused by the employer’s unlawful conduct; it did not reestablish an illegal working relationship between the employer and any undocumented alien).

\textsuperscript{47} A.P.R.A. Fuel, 134 F.3d at 56-57 (2d Cir. 1997) (stating, “[a]fter considering the many complexities of the policies underlying both statutes, we conclude that the most effective way for the Board to accommodate – and indeed to further – the immigration policies IRCA embodies is, to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees. To do otherwise would increase the incentives for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting form their own wrongdoing with relative impunity. Thus, these employers would be free to flout their obligations under the Act, secure in the knowledge that the Board would be powerless fully to remedy their violations.”).

\textsuperscript{48} Del Rey Tortilleria, 976 F.2d at 1119. See also, Correales, \textit{supra} note 16, at 121 (arguing that the \textit{Del Rey} decision ignores the culpability of the employer and fails to recognize the causal connection between the injury inflicted and the remedy awarded. Specifically, the undocumented workers in question received an award of backpay because they were discharged in violation of the NLRA as opposed to being paid for entering the country without lawful authorization.).

\textsuperscript{49} A.P.R.A. Fuel, 134 F.3d at 52 (framing the issue as “whether an employer who knowingly hires undocumented aliens can use the immigration laws as a shield to avoid liability for the employer’s later retaliatory discharge of the employees in violation of the [NLRA].“).
case arose out of an unfair labor practice claim in which four employees, including Jose Castro, alleged that the employer, Hoffman Plastic Compounds, had unlawfully fired the employees in retaliation for their union organizing activities. After an NLRB decision that included an award of reinstatement and backpay, Jose Castro testified, at a subsequent compliance hearing, that he had never been legally authorized to work in the U.S., and, critically, that he had gained employment at Hoffman by using a birth certificate of a friend who had been born in the U.S. The Administrative Law Judge (ALJ) concluded that because Castro was undocumented, the NLRB did not have the authority to award backpay to him, as such an award would conflict with both IRCA and Sure-Tan. After a subsequent reversal by the NLRB of the ALJ’s decision, the DC Circuit denied review and the Supreme Court reversed in a 5-4 decision, vacating the backpay award.

Instead of relying upon the holding in Sure Tan as the lower courts had, the Court placed great emphasis on the wrongdoing, or lack thereof, of the involved parties. The focus on wrongdoing is evidenced by the Court’s emphasis on the alien’s illegal actions, both generally and IRCA related, its reliance upon precedent invoking “serious misconduct” and the framework of inevitable current and future wrongdoing of one of the parties to the employment relationship.

The opinion emphasized that Castro was never legally admitted to nor authorized to work in the United States and that he utilized a false birth certificate to obtain the job with Hoffman. Additionally, the Court noted

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51 The Board also ordered Hoffman to cease and desist from further violations of the NLRA, and to post a detailed notice to Hoffman employees indicating the nature of the Board’s remedial order. Id. at 140.
52 Id. at 141.
53 In Sure-Tan, the Court held that undocumented workers are not entitled to backpay for periods during which they are “unavailable” for work. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984). Most Circuits had narrowly interpreted the Sure-Tan decision to bar backpay only for undocumented plaintiffs who (at the time of judgment) are outside the United States and who could not lawfully re-enter the country (i.e., are “unavailable”). See Ho & Chang, supra note 23, at 480 & n.29 (discussing Circuit decision interpreting Sure-Tan). Nonetheless, the Hoffman court did not rely extensively on Sure-Tan, expressing as it did that the question in Hoffman was better analyzed “through [the] wider lens” of IRCA. Hoffman, 535 U.S. at 147.
54 Hoffman, 535 U.S. at 141 (finding instead that the best way to effectuate IRCA’s policies was to apply the full spectrum of protections and remedies of the NLRA, including backpay, to “undocumented workers in the same manner as other employees.”).
55 A three-judge panel of the D.C. Circuit originally denied Hoffman’s petition for review and an en banc panel later did the same. Id. at 142.
56 Id.
57 Id. at 146 (“The parties and the lower courts focus much of their attention on Sure-Tan, particularly its express limitation of backpay to aliens ‘lawfully entitled to be present and employed in the United States.’”).
58 Id. at 141.
59 Id. (noting also that Castro utilized the false birth certificate to also obtain a driver’s license, a social security card and other subsequent work). See also Affordable Hous., Found., Inc. v. Silva, 469 F.3d 219, 235 (2006) (stating that the Hoffman court “cited that alien’s criminal procurement of employment with false
that neither Castro nor the board offered any evidence that Castro applied or intended to apply for legal authorization to work.\footnote{Hoffman, 535 U.S. at 141.}

In addition to the Court’s emphasis upon the alien’s illegal or criminal acts, the opinion also repeatedly refers to the potential illegality involved in IRCA’s new “regime.”\footnote{Wishnie, supra note 21, at 506 (stating, “the heart of Chief Justice Rehnquist’s analysis of IRCA scrutinized the provisions prohibiting the use of fraudulent documents by workers.”); see also Hoffman, 535 U.S. at 147-48 (“This verification system is critical to the IRCA regime.”).} Linking these actions to IRCA’s new enforcement “regime,” the Court not only details that IRCA makes it a crime for unauthorized aliens to tender fraudulent documents,\footnote{8 U.S.C. § 1324c(a) (2010); Hoffman, 535 U.S. at 148.} to use or attempt to use such documents to obtain employment in the United States,\footnote{8 U.S.C. § 1324c(a)(1)-(3) (2010); Hoffman, 535 U.S. at 148.} but then ties these provisions to Castro’s actions as a way to deny him certain relief.\footnote{Hoffman, 535 U.S. at 148 (stating, “there is no dispute that Castro’s use of false documents to obtain employment with Hoffman violated these provisions.”). See also id. at 149 (stating “[t]he Board asks that we overlook this fact and allow it 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.”).} The Court stated, “[t]he Board asks that we . . . allow it 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.”\footnote{Hoffman, 535 U.S. at 148-49.}

In terms of precedent for its decision, the Court declined to rely upon Sure-Tan and instead focused its analysis upon a line of cases involving serious illegal conduct\footnote{Id. at 143-46. See also Wishnie, supra note 19, at 506 (stating, “[t]he majority’s focus on ‘criminal fraud’ by employees is apparent . . . in its attempt to align its holding with prior decisions denying reinstatement or backpay ‘to employees found guilty of serious illegal conduct in connection with their employment’ and who ‘had committed serious criminal acts.’”).} in connection with interstate commerce,\footnote{Local 1976 United Bhd. of Carpenters & Joiners of Am. v. N.L.R.B., 357 U.S. 93, 108-10 (1958) (precluding the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act).} bankruptcy,\footnote{NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529 n.9 (1984) (refusing to defer to the Board’s interpretation of the Bankruptcy Code); Hoffman, 535 U.S. at 143.} and anti-trust.\footnote{Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 626 (1975) (refusing the Board’s claim that federal antitrust policy should defer to the NLRA); Hoffman, 535 U.S. at 144.} The Court emphasized two cases in particular,\footnote{NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257-58 (1939); Hoffman, 535 U.S. at 143.} Southern S.S. Co. v. NLRB,\footnote{S. S.S. Co. v. NLRB, 316 U.S. 31, 46-48 (1942); Hoffman, 535 U.S. at 143.} to support the denial of an award of backpay or reinstatement when employees are found guilty of serious illegal conduct in connection with their employment.\footnote{Hoffman, 535 U.S. at 143-44 (rejecting the Board’s argument that AFB Freight System, Inc. v. N.L.R.B. supports the award of backpay. In AFB Freight System, Inc., the Supreme Court permitted an award of backpay and reinstatement where an employee presented false testimony at a compliance proceeding. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 322 (1994). In an attempt to distinguish this case, the Court presented three
Supreme Court often disregards an NLRB interpretation or award when allowing such an interpretation or award would thwart other congressional objectives including, in this instance, the Congressional objective of preventing the serious criminal acts committed by employees.73

The Court’s emphasis on current wrongdoing as well as the inevitable future wrongdoing of either the employer or employee, creates the fault constructs employed by courts after the Hoffman decision. The fault focused on by the majority does not directly relate to the underlying NLRB claims, but instead relates to the immigration status of the employee and work authorization process used by the employer and completed by the employee. In terms of past fault, the Court reasoned that under IRCA, the employment of an undocumented worker automatically signals that one of the parties in the employment relationship has violated IRCA – either the undocumented worker tenders fraudulent identification or the employer knowingly hires the undocumented alien in violation of its IRCA obligations.74 In terms of future fault, the Court explained that the award of backpay would not only condone past violations but also encourage future violations.75 The Court’s concern for condoning past violations stems from the fact that employment was obtained by submitting false documents; allowing backpay would thus condone and reward this past bad act.76 The Court’s concern for future violations stem from two different lines of reasoning. First, the Court finds that backpay awards would encourage undocumented immigrants to seek employment in the U.S. or to stay in the U.S. to assure that they qualify for the award (because by leaving they would forfeit their right under Sure-Tan). Second, the Court finds that the mitigation required under the NLRA would necessarily entail a further arguments. First, the Court argued that the “serious misconduct” at issue in AFB Freight was related to internal Board proceedings and thus did not address the Hoffman context where the misconduct was unrelated to the Board proceeding. Second, the AFB Freight System, Inc. case did not implicate other federal agencies. And finally, while the misconduct was serious, it was not as serious as the misconduct in Hoffman which rendered “an underlying employment relationship illegal under explicit provisions of federal law.”).

73 Hoffman, 535 U.S. at 143-47 (finding in Fansteel that “the Board had no discretion to remedy [violations of the NLRA] by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts.”).

74 Id. at 148. “Under the IRCA regime, it 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.” As discussed below, this language may have been the logical starting point for lower court reasoning that examines the relative fault of the employer and the employee when evaluating claims which do not normally require such analysis.

75 Id. at 150.

76 Id. Presumably, this practical consequence of being eligible for backpay only by remaining illegally in the country not only “trivializes” immigration law by making backpay in such a context seem absurd, it also “condones and encourages future violations” because it encourages the undocumented worker to stay in the U.S. in violation of immigration law. Because illegally staying in the U.S. to maintain eligibility for backpay would always accompany an undocumented worker’s request for backpay, this strike against awarding backpay would seemingly apply in all backpay cases, at least under the NLRA.
IRCA violation by either the employee or employer.\textsuperscript{77}

The majority opinion ultimately created two fault-related constructs that are commonly used by Hoffman’s progeny: past fault, which focuses on the employee’s unlawful immigration-related behavior and/or IRCA’s employment prohibitions; and potential future fault, which focuses on how judicial decisions on this subject might encourage future wrongdoing.

III. IDENTIFICATION OF FAULT-BASED DECISION MAKING STRANDS: HOW COURTS ARE ACTUALLY DECIDING CASES

Courts have employed (or been asked by one of the parties to employ) fault-based reasoning after Hoffman in every major non-NLRB employment context, including wage claims,\textsuperscript{78} discrimination claims,\textsuperscript{79} workers’ compensation claims,\textsuperscript{80} tort claims,\textsuperscript{81} and even contract claims.\textsuperscript{82}

\textsuperscript{77} Id. at 150-51. Castro in fact did mitigate his damages by finding interim work during the NLRB and ALJ proceedings. But, as the Court emphasized, Castro did so through tendering false documents to his post-Hoffman employer. Id. at 141, 151.

\textsuperscript{78} See, e.g., Jara v. Strong Steel Doors, Inc., 872 N.Y.S.2d 691 (N.Y. Sup. Ct. 2008) (state wage claim); Reyes v. Van Elk, Ltd., 56 Cal. Rptr. 3d 68 (Cal. Ct. App. 2007) (state wage claim); Coma Corp. v. Kan. Dep’t of Labor, 154 P.3d 1080 (Kan. 2007) (state wage claim); Chellen v. John Pickle Co., Inc., 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (FLSA wage claim case); Ullora v. Al’s Tree Service, Inc., 768 N.Y.S.2d 556, 558 (N.Y. Dist. Ct. 2003) (holding in FLSA wage claim case that because of the undocumented worker’s status the contract was “tainted with illegality,” and thus the plaintiff was only entitled to recover at the minimum wage rate instead of the contract rate). It comes as no surprise that the great majority of attempts to bring fault-based argumentation into the wage claim context have failed because, as noted above, courts have almost uniformly honored the distinction between wages for work already performed (FLSA and state analog unpaid wages cases) and wages for work which has not yet been performed (backpay and lost wages).


\textsuperscript{81} See, e.g., Affordable Hous. Found., Inc., v. Silva, 469 F.3d 219, 237 (2d Cir. 2006) (finding that employer’s IRCA misconduct (no evidence of employee misconduct) was one factor weighing in factor of allowing lost wages, subject to jury limitation); Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317 (M.D. Fla. 2003) (refusing to award any lost wages in products liability case where employee tendered fraudulent documentation to obtain employment); Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (N.Y. 2006) (finding that absent proof of employee fraud in violation of IRCA (no employee fraud), lost wages appropriate for undocumented workers); Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005) (holding that undocumented workers are eligible only for lost wages at the rate they would have received in their country of origin, unless the employee can prove that the employer knew or should have known about the employee’s undocumented status, in which case the employee would be entitled to lost wages at U.S. pay rates; further, employee fraud only applicable if it actually induces employer to hire employee); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314 (N.Y. App. Div. 2004), overruled in part by Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (N.Y. 2006) (holding that, regardless of relative fault, undocumented workers only entitled to wage rates from country of origin).

courts have latched on to immigration or work status “fault” as part of its decision making despite the fact that such fault is not typically relevant to the underlying case. In reaching their decisions and attempting to support their ultimate conclusions, courts analyze fault along the two constructs identified in the *Hoffman* decision. Courts either examine past fault or fault as it relates to the likelihood of future illegal acts. When courts analyze past fault they explore which party may have committed a violation of IRCA and ask whether the employee submitted fraudulent documents in contravention of IRCA, whether the employer failed to verify the worker’s eligibility documents in contravention of IRCA, or whether the employer knew or should have known that the employee was an undocumented worker and nonetheless hired the worker or refused to fire the worker in contravention of IRCA. A smaller number of courts examine the unlawful manner of entry by the immigrant as part of the past fault analysis. When courts analyze the potential for future fault, courts examine whether the way in which they rule in a particular case will likely lead to future violation of the law or misconduct and ask whether the decision will discourage or encourage future immigration violations or future violations of safety and labor laws. Where the remedy would not result in a future illegal act, or would encourage compliance with workplace safety and labor laws, courts are inclined to award the remedy. However, where awarding the remedy is likely to result in a future illegal act, or would likely discourage compliance with workplace safety and labor laws, courts are inclined to deny such remedies.

A. *Past Fault-Based Reasoning*

of denying a number of different remedies) comes up in several cases where the employee sues under another cause of action other than breach of contract. In the two cases listed above, the actual cause of action the plaintiff sought to litigate was breach of contract. In *Coma* and *Design Kitchen*, for example, those courts rejected the notion that the workers’ undocumented status rendered their underlying employment contracts illegal such that they were foreclosed from pursuing remedies for a wage claim and a worker’s compensation claim, respectively. Further, in *Cont’l Pet Techs.*, *Earth First*, and *Dynasty Sample*, infra, the Georgia courts inquired whether the act of tendering false documents had a causal connection with the injury suffered; because all three courts found in the negative, they allowed worker’s compensation benefits, as the tendering of false documents did not render the employment contracts voidable under the “fraud in the inducement” rationale. See also, *Dynasty Sample Co. v. Beltran*, 479 S.E.2d 773, 774-75 (Ga. Ct. App. 1996).

83 See, e.g., *Morejon v. Terry Hinge and Hardware*, No. B162878, 2003 WL 22482036 (Cal. App. 2 Dist. Nov. 4, 2003) (involving claims by the employer that the employee submitted false documents to gain employment so she was barred from recovery for wrongful termination and state anti-discrimination violations under the doctrine of after-acquired evidence and unclean hands).

84 *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148, 150. In terms of fault as it relates to the employment relationship, the Hoffman Court stated, “[u]nder the IRCA regime, it 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.” In terms of future fault, the Hoffman court stated, “Awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations.”
The different ways that courts approach past fault appear to be rooted in part in the language used in *Hoffman*. The Court stated that, “[u]nder the IRCA regime, it 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.”

Utilizing the dichotomy set out by the *Hoffman* Court, some lower courts analyzing past fault examine only employee misconduct while others focus exclusively on employer misconduct. There are also a series of decisions in which courts actually examine the relative fault of both parties in reaching their decision. Finally, there are some courts that express concern about making an evaluative judgment of fault and attempt to use other bases for their decisions.

While this article identifies these different lines of reasoning as very distinct categories, it is not unusual for courts to employ more than one rationale in reaching their decision. Despite the overlapping lines of reasoning employed by some courts, this section will categorize decisions into four discrete areas in order to tease out the rationales used by courts.

1. **Examining Only Employee Misconduct**

While there are a number of courts that analyze only employee misconduct, within this line of reasoning courts reach disparate conclusions. Decisions within this category generally fall into one of two extremes, either courts allow a remedy despite employee fraud or courts bar claims and remedies based upon an employee’s fraud.

Courts that find employee’s claims are not barred and damages are not reduced even when the employee is the sole IRCA violator rely upon the absence of a nexus between the alleged fraud and the injury for which the worker is seeking relief. Specifically, these courts find that even

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85 Id. at 148.
86 See e.g., Balbuena, 845 N.E.2d at 1259-60.
87 See, e.g., Pineda v. Kel-Tech Const., Inc., 832 N.Y.S.2d 386, 395-98 (N.Y. Sup. Ct. 2007) (asserting that workers’ claims for unpaid wages are not necessarily barred even though the workers presented false documents at the inception of their employment); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 997 (N. H. 2005) (finding that undocumented workers are entitled to make a claim of lost wage/earning capacity in part because the “effect on the worker of his injury has nothing to do with his citizenship or immigration status.”) (quoting Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 224 (N.J. Super. Ct. App. Div. 1996)); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 331 (Minn. 2003) (tacitly holding that all WC claimants, including those who tender false documents, are eligible for temporary total disability benefits).
undocumented workers who engaged in fraud to obtain employment are generally allowed to recover full benefits unless there is a causal connection between the employee’s fraud and the injury suffered. 89

The casual connection inquiry arises most frequently in the workers’ compensation area. Whether courts are interpreting statutory provisions that condition the receipt of workers’ compensation benefits on the absence of fraud or common law doctrines that bar recovery based on fraud, the unifying theme in these cases is the lack of a causal nexus. 91 Employers used a variety of arguments to support their contention that undocumented workers should not be entitled to workers’ compensation including: the affirmative defense of fraud and misrepresentation; 92 that the contract was void for fraud in the inducement; 93 and that the contract was voidable based upon employee misrepresentation. 94 In each case, the court relied upon the lack of causal connection between the false representation and the physical

89 See, e.g., Farmers Bros. Coffee v. Workers’ Comp. Appeals Bd., 133 Cal. App. 4th 533, 544 (Cal. Ct. App. 2005) (noting that an employee is barred from receiving compensation under the statute only when the compensation obtained would be a direct result of the fraudulent misrepresentation, but in the instant case it was the employment (and acceptance of employment is not illegal) “not the compensable injury, that [plaintiff] obtained as a direct result of the use of fraudulent documents.”); Earth First Grading & Builders Ins. Group/Ass’n Service, Inc. v. Gutierrez, 606 S.E.2d 332, 335 (Ga. Ct. App. 2004) (finding that the employer’s reliance on language in Georgia’s WC statute indicating that “no compensation shall be allowed for an injury . . . due to the employee’s willful misconduct” was misplaced because “the employer fail[ed] to show that a causal connection between the employee’s misrepresentation and the work-related injury.”) (citing Cont’l PET Tech., Inc. v. Palacias, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004); Dynasty Sample Co. v. Beltran, 479 S.E.2d 773, 775 (Ga. Ct. App. 1996); Andrade v. Sun Valley Landscapes, No. 2305, 2008 WL 2882228, at *4 (Neb. Work. Comp. Ct. July 23, 2008) (rejecting employer’s argument that the employee’s inability to work is due to his illegal status and instead finding that the effect on plaintiff from the injury is not connected to his immigration status). 90 These statutory provisions are general misconduct provisions that prohibit more than IRCA specific fraud but can be applied to the undocumented worker context.

91 See, e.g., Farmers Bros. Coffee, 133 Cal. App. 4th at 544 (noting that an employee is barred from receiving compensation under the statute only when the compensation obtained would be a direct result of the fraudulent misrepresentation, but in the instant case it was the employment (and acceptance of employment is not illegal) “not the compensable injury, that [plaintiff] obtained as a direct result of the use of fraudulent documents.”); Earth First Grading, 606 S.E.2d at 335 (finding that the employer’s reliance on language in Georgia’s WC statute indicating that “no compensation shall be allowed for an injury . . . due to the employee’s willful misconduct” was misplaced because “the employer fail[ed] to show that a causal connection between the employee’s misrepresentation and the work-related injury.”) (citing Cont’l PET Tech., 604 S.E.2d at 631); Dynasty Sample Co., 479 S.E.2d at 775.

92 Silva v. Martin Lumber Co., No. M2003-00490-WC-R3-CV 2003 WL 22496233, at *2 (Tenn. Workers Comp. Panel Nov. 5, 2003) (emphasis in original) (finding that the employer failed to prove two elements of the affirmative defense of fraud and misrepresentation including: that the false representation related to the claimant’s physical condition; and that there was a causal connection between the false representation and the physical injury). 93 Dynasty Sample Co., 479 S.E.2d at 774-75 (explaining that in order for a contract to be void for fraud in the inducement the employer must demonstrate that “(1) that the employee knowingly and willfully made a false representation at the time the employee applied for work; (2) that said false representation was relied upon by the employer and was a substantial factor in its hiring decisions and (3) that there is a causal connection between the false representation and the injury for which the employee seeks benefits”). 94 Id.
injury to support the finding that the undocumented worker was entitled to relief.\textsuperscript{95}

This nexus-based reasoning was also applied in the tort context by one court that granted an award of full lost wages. In granting the remedy, the court separated IRCA-related duties from those imposed on the employer by the law of tort.\textsuperscript{96} The court reasoned that because the employer’s contractual, statutory, and common law duties to the employee are not predicated on the employee’s compliance with IRCA, the employer should be liable for his negligence independently of the worker’s status or submission of fraudulent documents.\textsuperscript{97} In fashioning its remedy, the court, unlike most courts confronting similar cases, disentangled the employee’s and employer’s duties created by the underlying claim from the duties imposed on both parties by immigration law.

Directly opposite the nexus cases described above are a group of cases that rely upon employees’ actions or fraud to bar employees’ claims for relief. At the extreme, a series of decisions find the illegal nature, or mere acceptance, of unlawful employment itself is sufficient to deny workers’ claims for relief. Other courts, taking a less extreme view, reason that any IRCA-related fraud committed by the employee bars that employee from particular remedies.

While the emphasis on illegal status or IRCA-related misconduct of the employee ties these decisions together, courts use these facts in different ways to support their denial of relief to the employee. In a series of decisions in which the employee did not present fraudulent documents to obtain employment, courts emphasize the illegal nature of mere employment as a basis to deny or limit remedies to undocumented workers. In a wage case, the mere illegal nature of employment proved the basis for the court’s limitation on recovery to minimum wage despite a contract

\textsuperscript{95} Dynasty Sample Co., S.E.2d at 774-75 (finding that the employee’s claim was not barred even though the employee was the sole IRCA violator because the employer failed to demonstrate that there was a causal connection between the alleged fraud and the injury); Martin Lumber Co., 2003 WL 22496233 at *2 (finding no causal connection between the false representation and the physical injury).


\textsuperscript{97} Majlinger, 802 N.Y.S.2d at 64 ("As between an undocumented worker and the federal government, the act of submitting fraudulent documents in order to secure employment is unlawful . . . . As between the employer and the federal government, the act of hiring an undocumented worker knowingly or without verifying his or her employment eligibility is unlawful . . . . As between the undocumented worker and the employer, however, there is a contract of employment, under which the worker is entitled to be paid for his or her work. Moreover, as between the worker and an alleged tortfeasor, there are duties under the common law and the New York statutes governing workplace safety . . . . The contractual, statutory, and common-law duties owed to the worker are unrelated to, and do not depend on, the worker's compliance with federal immigration laws.").
promising greater than minimum wage. In the torts context, one court found that the illegal nature of the employee’s acts barred the remedy of lost wages while another determined that such illegality limited undocumented workers to country of origin wages.

Other courts, while not going so far as to find workers ineligible for remedies based on misconduct stemming from their unauthorized status alone, have declared that any IRCA-related fraud committed by the employee bars that employee from particular remedies, regardless of employer IRCA-related fault. In the workers’ compensation context, two courts linked fraud related to immigration status to a statutory prohibition that limits recovery of workers’ compensation benefits. In one case, the court suspended workers’ compensation benefits under a specific provision of state law that permits the suspension of benefits if the employee has committed a crime that causes the employee to be unable to work and the other court denied the remedy because it found that the employee’s loss of earning power was caused by his immigration status, not his work related injury.

This emphasis on employee fraud was also used in a series of tort cases involving claims for lost earnings. In one case involving an auto accident,

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98 Ulloa v. Al’s Tree Serv., Inc., 768 N.Y.S.2d 556, 558 (N.Y. Dist. Ct. 2003) (finding the contract was “tainted with illegality,” the court took the extreme view that if the employee had submitted fraudulent documentation to secure employment, the claim would have been “disallowed in its entirety”). The Pineda court (along with others) flatly disagreed with the Ulloa court ruling. Pineda v. Kel-Tech Constr., Inc., 832 N.Y.S.2d 386, 395 (N.Y. Sup. Ct. 2007).

99 Balbuena, 845 N.E.2d at 1261-63 (Smith, J., dissenting) (relying upon a common law tort doctrine that plaintiffs should not be awarded the benefit of an illegal bargain, the dissent argues that while the plaintiffs are not quite seeking the enforcement of illegal contracts, their employment violates federal law and as such any tort claim for lost earnings should be prohibited). This case is another example of the overlapping nature of fault-based reasoning categories. While this dissenting opinion is categorized as one that relies upon employee fault to deny the benefit, the dissent does refer to the lack of wrongdoing on the other side. In arguing that no exceptions apply to the rule that illegal activity bars recovery, the court distinguishes this case from others in which the employer (defendant) is at least as guilty of wrongdoing as the plaintiff. Id. at 1262. Thus, the case could be discussed in the section on relative fault (See discussion infra Part III.A.3), but since the reference is not the focus of the dissent, I chose to categorize it as employee fault that bars a remedy.

100 Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 319-20 (N.Y. 2004) (“Hoffman compels the conclusion that plaintiff cannot recover lost United States wages he might have unlawfully earned, had he not been injured, whether it was Tower (by hiring plaintiff without requesting documentation of his right to work) or plaintiff himself (by tendering false documents to Tower) who committed the IRCA violation that resulted in the unlawful employment. In this regard, we believe that plaintiff’s acceptance of unlawful employment should be deemed to constitute misconduct contravening IRCA’s policies whether or not he submitted false documents so as to expose himself to potential criminal liability.”) (emphasis added).

101 Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) vacated, 471 Mich. 851 (Mich. 2004) (explaining that the statute requires both that (1) the employee commits a crime; and (2) the crime the employee commits causes the employee to be unable to work. When determining whether the employee’s conduct violated the statute, the court reasoned that the plaintiff’s admitted use of false documents to obtain employment constituted the “commission of a crime” and once the employer learned of the plaintiff’s status, the plaintiff became unable to obtain work “because of” the commission of the crime), vacated by 471 Mich. 851 (Mich. 2004).

the court determined that an employee’s fraudulent act in attaining employment is a factor that must be considered when calculating future lost earnings to avoid a “windfall” for wages undocumented workers “could” have earned rather than “would” have earned.\textsuperscript{103}

The other tort cases denying remedies based exclusively on employee IRCA-related fraud each involved workplace injuries and while each case raises questions about the employer’s compliance with IRCA, the courts ultimately focused their analysis on employee fraud. In a products liability case, despite obvious questions about the employer’s compliance with IRCA, the court refused to award any lost wages partly because the employee tendered fraudulent documentation to obtain employment and “permitting an award predicated on wages that could not lawfully have been earned, and on a job obtained by utilizing fraudulent documents runs contrary to both the letter and spirit of IRCA […]”.\textsuperscript{104} In another case with questionable IRCA compliance by the employer, the court denied the plaintiff’s claim for lost wages relying upon the finding that the employer had discharged its duty to “examine” the fraudulent documents while at the same time invoking the distinction between an undocumented worker who commits fraud and one who doesn’t.\textsuperscript{105} Finally, a federal court utilized the fraud distinction to arrive at the conclusion that “undocumented workers who violate IRCA may not recover lost wages in a personal injury action based on a violation of New York Labor Law.”\textsuperscript{106} Relying upon post-\textit{Hoffman} precedent determining that undocumented workers who did not engage in fraud were permitted to recover lost wages, the court concluded

\textsuperscript{103} Cruz v. Bridgestone/Firestone N. America Tire, LLC, No. CIV 06-538 BB/DJS, 2008 WL 5598439, at *6 (D.N.M. 2008) (assuming the initial submission of false documents could have eventually foreclosed an undocumented worker from continued employment, which would diminish that worker’s wages).

\textsuperscript{104} Veliz v. Rental Serv. Corp. U.S.A., Inc., 313 F. Supp. 2d 1317, 1335-36 (M.D. Fl. 2003) (In this case, the name on the Resident Alien Card (RAC) and the Social Security Card provided to the employer didn’t match the name of the employee; the photo on the RAC clearly didn’t match the likeness of the employee; and the RAC and the Birth Certificate provided to the employer had conflicting dates of birth. Although the court did not explicitly state that employee fraud would act as a bar regardless of employer IRCA-related fault, the fact that the court ignored the employer’s obvious failure to adequately verify the immigration-related documentation seems to indicate that the court adopted that position implicitly).

\textsuperscript{105} Macedo v. J.D. Posillico, Inc., No. 108316/06, 2008 WL 4038048, at *7-8 (N.Y. Sup. Ct. 2008). Despite language in the opinion explaining the IRCA obligations of both employers and employees, the court focuses on the employee violation only and fails to address what impact an employer violation of IRCA might have on the plaintiff’s ability to recover. In this way, a decision that could be categorized as a relative fault decision ends up employing a more one-sided fault based analysis.

\textsuperscript{106} Ambrosi v. 1085 Park Ave. LLC, No. 06-CV-8163(BSJ), 2008 WL 4386751, at *13 (S.D.N.Y. Sept. 25, 2008) (emphasis in original) (stating “both Balbuena and Madeira make clear that undocumented workers who suffer physical injury due to an employer’s violation of New York Labor Law and who do not use false documentation to obtain that employment may recover lost wages. However, by explicitly noting that their allowance of lost wages is limited to workers who do not violate IRCA, Balbuena and Madeira suggest that workers who do use false documentation to obtain employment may not recover lost wages under New York Labor Law.”). The court does not discuss what impact, if any, the employer’s potential IRCA violations would have on subsequent holdings—this case therefore seems to stand for the principle that any employee fraud, even if paired with an employer’s violation of IRCA, is sufficient to destroy the employee’s claim for lost wages. As such, this decision represents a one-sided perspective of fault-based analysis.
that the inverse must logically follow; employees who violate IRCA may not recover lost wages. ¹⁰⁷

When examining the impact of employee fraud a number of courts rely upon the absence of a nexus between the fraud and the injury to find employees’ claims are not barred and damages are not reduced even when the employee is the sole IRCA violator. At the other extreme are those courts that find the mere act of unlawful employment itself is sufficient basis upon which to deny undocumented workers all legal relief. In the middle are those courts that find fraud on the part of the employee justifies the denial of certain remedies to undocumented workers.

2. Examining Only Employer Misconduct

Rather than focusing exclusively on the employee’s misconduct when using a one-sided fault-based approach, some courts focus exclusively on the conduct of the employer. These courts factor in the employer’s wrongdoing when making decisions about whether (and to what extent) a particular remedy should be allowed, whether immigration status is discoverable and the general viability of the employee’s claim. ¹⁰⁸

In assessing whether and to what extent a particular remedy is allowed, courts examining only employer misconduct have taken different approaches. For example, one court found that the existence of a knowing employer entitles the employee to greater damages. ¹⁰⁹ After stating that undocumented workers would usually only be able to recover lost wages at country-of-origin rates, the court recognized that tort deterrence principles would be furthered if lost wage claims at U.S. rates were allowed in cases where the employer knew or should have known that the alien was illegal. ¹¹⁰ Consistent with its balancing of IRCA against tort principles, the court determined that whether the employee can recover lost wages at U.S.

¹⁰⁷ Id. at *12-13.
¹⁰⁸ Although each of these cases emphasize employer wrongdoing, they do so in combination with an analysis of future fault. For a more detailed discussion of how courts examine future fault see infra section III.B.
¹¹⁰ To refuse to allow recovery against a person responsible for an illegal alien's employment who knew or should have known of the illegal alien's status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles. Id. at 1000. Although the court couches its language as a discussion of “tort deterrence principles,” the reasoning provided above could just as easily be applied to indicate that denying lost wages in cases of a knowing employer would be contrary to “immigration deterrence” principles, since any of the above situations would also make employment of illegal aliens more attractive to employers. Further, tort deterrence principles could presumably be furthered even in cases of unknowing employers, as the 'spur and catalyst' of lost wage awards in those cases would still act as an incentive for employers to reduce the risk of workplace injuries.
rates or country of origin rates turns solely on what the employee can prove about the IRCA-related (mis)conduct of the employer. In an NLRA case before the Board, the ALJ found that where an employer violates IRCA and the employee has committed no IRCA violations, the employee is entitled to backpay under the NLRA. In finding absent the factual circumstances giving rise to the concern articulated in Hoffman that an award of backpay would condone criminal conduct by an employee, the court focused on the mirror problem of not rewarding the employer for his knowing and intentional violation of IRCA.

An emphasis on employer wrongdoing was used by another court to analyze whether employees had to disclose their immigration status. In this case, two undocumented plaintiffs were working on construction demolition and sustained workplace injuries. The court denied the employer’s motion to compel disclosure of immigration status because the employer intentionally violated IRCA by failing to have employees complete work applications, failing to obtain identification or SSN’s, and failing to use W2 forms. The court questioned the genuineness of the employer’s motives finding that “given the status of the industry, it seems somewhat disingenuous for contractors and owners to seek disclosure of the status of an employee after the employee has been injured under the guise of attempting to mitigate a lost wage claim, a concern which apparently never entered their minds when the work was bid out.”

Employer wrongdoing impacted the viability of an employee’s claim in a FLSA retaliation case. The court observed the distinction between a knowing employer and an unknowing employer when it denied a motion to dismiss finding that Hoffman is implicated only when the employer is unaware of the worker’s status. In this case, the defendant

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111 Id. at 1002 (“A person responsible for an illegal alien’s employment may be held liable for lost United States wages if that illegal alien can show that the person knew or should have known of his status, yet hired or continued to employ him nonetheless.”). The court then added that an employee’s violation of IRCA by committing fraud will totally bar the employee only when the employer “reasonably relied upon those documents” when hiring the employee. Id.


113 Id. at *42 (Nov. 1, 2006) (“[I]n failing to verify its employees’ documentation and continuing to employ the seven discriminates with knowledge of their undocumented status, the [employer] is the wrongdoer while the employees are innocent of violating IRCA.”).

114 Gomez v. F&T Int’l (Flushing, NY) LLC, 842 N.Y.S.2d 298, 302 (N.Y. Sup. Ct. 2007) (allowing plaintiff’s claim for lost wages to proceed because employees had not violated IRCA by committing fraud).

115 Id. at 299.

116 Id. at 300. (recognizing that only “[n]ow that plaintiffs are injured and seeking lost wages, the owner and general contractor are suddenly concerned with plaintiffs’ alien status and income tax returns”).

117 Id. at 301.

118 Singh v. Jutla & C.D. & R’s Oil, Inc., 214 F. Supp. 2d 1056, 1057 (N.D. Cal. 2002) (discussing an undocumented alien employee who was recruited by the employer to come to work for him in the U.S. The employer promised the employee a place to live, tuition for education, and the eventual partnership in his
actively recruited the plaintiff to come work in the U.S., and knowingly employed him for three years without proper work authorization. The court found that denying a remedy to undocumented workers where the employer knowingly hired them would create the perverse incentive to violate immigration laws. These cases illustrate that some courts exclusively examine employer wrongdoing to determine whether and to what extent remedies are allowed, whether immigration status is discoverable and even whether undocumented workers can proceed with their claims.

3. Weighing Relative Fault

Contrary to the one-sided fault-based reasoning discussed above, other courts engage in reasoning that involves some weighing of relative fault of the employer and employee, either as part of the courts’ holdings or analytical frameworks. An underlying thread in these cases appears to be the courts concern about fairness given the mutuality of fault.

Two courts utilize a balancing of relative fault between the employee and employer as part of their holding and focus on what the employer knew or should have known about the immigration status of the employee. In the first case, the court concludes that the employee is permitted to seek lost wages, despite tendering false documents to obtain employment, where the employer also violated IRCA by failing to verify documents. In contrast to Hoffman, the court held that an employee’s submission of false documentation alone does not bar recovery of damages for lost wages unless the conduct actually induces the employer to hire the worker. In the second case, the court proceeds from the position that

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119 Id. at 1057.
120 Id. at 1061 (citing to the dissenting opinion in Hoffman to support the conclusion that denial of a remedy would create economic incentive to hire undocumented workers).
121 Most of these courts also examine fault from another perspective. Most of these courts also examine fault from another perspective. See e.g., Madeira v. Affordable Housing Found., Inc., 469 F.3d 219, 225-26, 248-49 (2d Cir. 2006) (employee focus); Chellen v. John Pickle Co., 434 F. Supp. 2d 1069 (N.D. Okla. 2006) (employer focus); Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005) (employer focus); Gomez v. F & T Int’l LLC, 842 N.Y.S.2d 298 (N.Y. Sup. Ct. 2007) (employer focus).
122 Coque v. Wildflower Estates Developers, Inc. (Coque II), 867 N.Y.S.2d 158, 164 (N.Y. App. Div. 2008) (interpreting the fault-based language in Balbuena narrowly and reasoning that even assuming that the submission of a fraudulent document would be sufficient grounds by itself for denying lost wages under Balbuena, “this rule is limited to situations in which an innocent employer is duped by fraudulent documentation into believing that the employee is a United States citizen . . . as was the employer in Hoffman, for example.”).
123 Id. at 160. Therefore, the Coque II court reads Balbuena II narrowly, determining that an undocumented worker will lose his or her right to lost wages only if the fraudulent document that he or she presents “actually
generally an illegal alien is barred from recovering lost U.S. earnings because such earnings are based upon unlawful employment but concludes that if the employer was responsible for the illegal alien’s employment because it knew or should have known of the worker’s status, there exists a compelling reason to allow recovery.\textsuperscript{124}

A series of other decisions balance the immigration-related wrongs as part of their general reasoning in the case, but not as an integral part of the ultimate holding. Several courts weave the balancing of fault into a conflict preemption analysis.\textsuperscript{125} Courts employ two distinguishable lines of reasoning to illustrate the absence of conflict between IRCA, designed to deter the hiring of undocumented workers, and state labor and employment laws, designed to provide protection to employees injured in the workplace. First, courts find that where the employee did not engage in fraud, or commit any IRCA violation, but the employer did, IRCA’s purpose is not subverted.\textsuperscript{126} If the employee violates IRCA and is awarded a remedy under state law, the conflict between the state and federal law is more apparent because the remedy would function as an award for the IRCA violation; whereas no such tension exists where the employer, not the employee, violates both state and federal law.\textsuperscript{127}

Second, some courts reason that where both the federal IRCA violation and the state law violation stem from the fault of the employer,\textsuperscript{128} as opposed to the employee, denying the employee a remedy would subvert the policies underpinning both IRCA and state labor and employment

\textsuperscript{124} Rosa v. Partners in Progress, Inc., 152 N.H. 6, 15 (2005) (finding that “[a] person responsible for an illegal alien’s employment may be held liable for lost U.S. wages if that illegal alien can show that the person knew or should have known of his status, yet hired or continued to employ him nonetheless.”).

\textsuperscript{125} In addition to conflict preemption, Congress can convey its clear and manifest intent to preempt state law in two additional ways: explicitly stating it intends to preempt state law (express preemption); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) or by occupying the field, i.e., “where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.” Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

\textsuperscript{126} See Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, n. 8 (N.Y. 2006); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 69 (N.Y. App. Div. 2005) (asserting that because there was no evidence of the presentation of false documents by the employee at the time he was hired, this case did not fall within the scope of the Court’s decision in \textit{Hoffman}.


\textsuperscript{128} See Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 248 (2d Cir. 2006). (for notes 108-110 use pin cites and cite to the Hoffman dissent and the legislative history, all of which support this line of reasoning).
laws.\textsuperscript{129} In the absence of a remedy, employers would have further incentive to hire undocumented workers and thereby undermine the federal law goal of reducing illegal immigration;\textsuperscript{130} whereas, allowing recovery in such situations would not undermine federal immigration policy because the employer could avoid the remedy by declining to hire undocumented workers all together.\textsuperscript{131}

Other courts that balance immigration related wrongs use the absence of employee fault to justify a particular remedy. Starting from the premise that the worker’s unlawful presence in the U.S. alone is not sufficient to deny the remedy,\textsuperscript{132} courts reason that since the employer, and not the employee, violated IRCA, the employee is still entitled to recover.\textsuperscript{133} Where the employee was not at fault, the Hoffman Court’s concern that awarding backpay would condone the employee’s criminal conduct does not apply.\textsuperscript{134} In fact, where the employer knowingly hired the undocumented worker and continued their employment in violation of IRCA, courts were more concerned that the employer not be allowed to evade its liability.\textsuperscript{135}

Relative fault analysis is also evident in cases where employers specifically sought out foreign workers, misrepresented the terms of the employment agreement, and led those workers to mistakenly believe that they were working lawfully in the United States.\textsuperscript{136} In one case, the

\textsuperscript{129} Id. at 254. (holding that where the undocumented worker did not violate IRCA, where the employer knowingly violated IRCA at the outset of the employment relationship and where the wrong being compensated was not authorized by IRCA, there was no conflict between federal and state law and a remedy was allowed).

\textsuperscript{130} See Id. at 248.

\textsuperscript{131} Id.

\textsuperscript{132} Id. at 361.

\textsuperscript{133} Id. The policy behind the decision that the court articulated is an example of the ways in which court reasoning can overlap. In this case, the policy reasons for its decision focus more upon the potential for future fault. For a more detailed discussion of the future fault analysis see infra, section III.B.

\textsuperscript{134} Id.

\textsuperscript{135} Balbuena II, 6 N.Y.3d at 360 (finding no allegation that plaintiffs were even asked by their employers to present work documents). Mezonos Maven Bakery, Inc. and P. R. Legal Def. and Educ. Fund, No. 29-CA-25476, 2006 NLRB LEXIS 491, at *41-42 (Nov. 1, 2006) (relevant parenthetical would be helpful). See also, Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1263 (N.Y. 2006) (Smith, J., dissenting). In reaching his conclusion Justice Smith distinguishes the facts before him from those involving employees who were not paid for completed work. In those other cases, Justice Smith would be more inclined to balance the wrongs between the employer and employee. He states, "[T]hese are not cases, as some involving illegal arrangements are, in which to dismiss the claim is to give a windfall to a defendant at least as guilty of wrongdoing as the plaintiff, or in which to deny recovery is to leave a plaintiff uncompensated for work actually done.” Id. at 1262. In his analysis of the “illegal contract” he does acknowledge that there are some situations in which relative fault (or culpability) might be relevant. Id. at 1264 (“I agree with the majority here that the conduct of the undocumented alien in Hoffman was worse than the conduct of Balbuena and Majlinger. He committed a crime, and they did not. If Balbuena and Majlinger were suing their employers – who, on the facts of these cases, may well have acted criminally in hiring them without demanding documentation from them – the difference in culpability might be relevant; . . . a case in which a lesser offender is suing a greater one may sometimes (though not always) qualify for an exception to the general rule that lawsuits based on illegal transactions will not be countenanced.”).

employer recruited and employed workers from India as welders, fitters and electrical maintenance workers; housed them in very poor conditions; and restricted their "movement, communications, privacy, worship and access to health care."\textsuperscript{137} The court employed some balancing of fault when comparing the employees' and employers' actions, finding that the plaintiffs did not seek to enter and work in the United States illegally, but instead were misled by the employer into believing their employment was lawful.\textsuperscript{138} Relying on cases finding undocumented workers entitled to legal relief against a "knowing employer," the court found the employees entitled to damages under FLSA, Title VII and Section 1981.\textsuperscript{139}

In a similar case involving claims of breach of contract and intentional misrepresentation, employers went to India and putatively hired an employee as a computer analyst on an H-1B visa.\textsuperscript{140} Despite these promises, the employers had the employee working as a cashier at a gas station for less than minimum wage.\textsuperscript{141} After a jury verdict in favor of the employee, the employers relied upon \textit{Hoffman} on appeal to argue that the employee did not have standing to sue. In distinguishing \textit{Hoffman} and concluding that the employee did have standing to sue, the court balanced the actions of the employer and employee, finding that the plaintiff did not violate IRCA, but rather entered the United States legally and was legally entitled to work under an H-1B visa.\textsuperscript{142} Instead, but for the defendants’ actions, the plaintiff would have remained legally entitled to work during the period for which he sought damages.\textsuperscript{143} The Court reasoned that to deny plaintiff standing would violate immigration policy by "permitting, if not encouraging, unscrupulous employers to fraudulently obtain H-1B visas to employ foreign nationals at less than minimum wage."\textsuperscript{144}

Finally, one court laid the groundwork for examination of employee immigration fault against employer workplace fault. Though not the basis for the courts ruling,\textsuperscript{145} the court did recognize that in some instances,

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  \item \textsuperscript{137} \textit{Chellen II}, 434 F. Supp. 2d at 1080.
  \item \textsuperscript{138} \textit{Id.} at 1099 (finding the employer knew the plaintiffs could not be legally employed in the United States).
  \item \textsuperscript{139} \textit{Id.} at 1099, 1115.
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} \textit{Id.} at *4 ("[u]nlike \textit{Hoffman}, the case now before this Court is not one in which the plaintiff/employee seeks to subvert the IRCA.").
  \item \textsuperscript{143} \textit{Id.} at *2 (Tenn. Ct. App. 2005) ("[a]s an initial matter, we note that Mr. Chopra entered the United States legally under an H-1B visa obtained by Appellants. Mr. Chopra’s later illegal alien status resulted from Appellants’ failure to fulfill their obligations under 8 U.S.C. §1184(c)(5)(A), to pay for the reasonable costs of his return to India upon dismissal before the end of the period of authorized admission. We therefore find Appellants’ reliance on Mr. Chopra’s status as an illegal alien somewhat disingenuous.").
  \item \textsuperscript{144} \textit{Id.} at *4 (Tenn. Ct. App. 2005).
\end{itemize}
where the workplace discrimination is so unconscionable as to outweigh the employee’s illegal acceptance of employment, the employee would not be barred from seeking economic and non-economic damages.\textsuperscript{146}

Thus, there are a number of courts that weigh the relative fault of the employee and the employer and utilize that finding either as part of the holding or reasoning in the case. Courts that balance fault as part of the holding incorporated this reasoning into the assessment of damages while courts that balance fault as part of the reasoning utilized it as part of a preemption analysis or as part of a general analysis of fairness.

4. Raising Concern with or Refusing to Engage in Evaluation of Fault

Despite the various ways courts utilize concepts of fault, several courts have expressed concern with evaluating fault or have refused to engage in a balancing of the respective fault of the parties.\textsuperscript{147} While each of these courts necessarily discusses fault,\textsuperscript{148} they have expressly declined to make an evaluative judgment about immigration-related fault and thus do not address how such an evaluation might impact their decision making.

One court refused to engage in fault-based reasoning because the court feared that doing so would require the court to delve into endless evidentiary proceedings that would make the workers’ compensation system an enforcer of IRCA.\textsuperscript{149} In another case involving lost wages, the

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\textsuperscript{146} Crespo v. Evergo Corp., 366 N.J. Super. 391, 401 (N.J. Super. Ct. App. Div. 2004). In Crespo, the court seemed to balance the employee’s illegal acceptance of employment against non-IRCA related factors which sometimes accompany discrimination claims. This type of reasoning isn’t really an IRCA-related balancing, and, anyway, the analysis is clearly employee-centered: just the act of accepting employment forecloses the remedy. \textit{Id.} at 400 (“We can conceive of other circumstances, such as the aggravated sexual harassment alleged in \textit{Lehmann v. Toys ‘R’ Us, Inc.}, . . . , where the need to vindicate the policies of the LAD or CEPA and to compensate an aggrieved party for tangible physical or emotional harm could lead to the conclusion that even a person who was absolutely disqualified from holding public employment should be allowed to seek compensation for harm suffered during that employment.”).
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\textsuperscript{148} Each of these cases also fall into other categories – those where the employee fraud bars or does not bar the claim. While courts in each of these cases discuss fraud in these other contexts, the courts expressly refuse to make an evaluative judgment about that fault.
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If compensation benefits were to depend upon an alien employee’s federal work
court refused to evaluate fault because it found Hoffman and its emphasis on the employee’s IRCA violation inapplicable in the tort context. In reaching its conclusion, the court decoupled concepts of immigration-related fault from the underlying issues raised in the case and framed the discussion in terms of the parties’ respective duties. The court stated, “[a]s between an undocumented worker and the federal government, the act of submitting fraudulent documents in order to secure employment is unlawful... As between the employer and the federal government, the act of hiring an undocumented worker knowingly or without verifying his or her employment eligibility is unlawful... As between the undocumented worker and the employer, however, there is a contract of employment, under which the worker is entitled to be paid for his or her work. Moreover, as between the worker and an alleged tortfeasor, there are duties under the common law and the New York statutes governing workplace safety... The contractual, statutory, and common-law duties owed to the worker are unrelated to, and do not depend on, the worker’s compliance with federal immigration laws...” Thus, the court emphasized the duties implicated by the plaintiff’s substantive claims for relief and in so doing, removed immigration-related fault from its analysis.

Finally, in another lost earnings case, the court found that it made no difference whether it was the employer who violated IRCA (by hiring plaintiff without verifying his documents), or whether it was the employee who violated IRCA (by tendering false documents). Instead, the court...
limited the plaintiff’s recovery to wages he could have earned in his home country and found that the plaintiff’s acceptance of the unlawful employment was enough to “constitute misconduct contravening IRCA’s policies whether or not he submitted false documents so as to expose himself to potential criminal liability.” 153 Contrary to the decisions discussed up to this point, these decisions reflect some courts’ reluctance to examine and weigh the immigration-related fault of the parties.

B. Future Fault-Based Reasoning

Courts employing future fault-based reasoning typically analyze whether a particular ruling has the potential to lead to future violation of the law or other misconduct. The roots of this analytical framework can be found in pre-\textit{Hoffman} cases and the \textit{Hoffman} case itself. Pre-\textit{Hoffman} cases weighed in favor of the employee, finding that protection of undocumented workers in the labor and employment arena would discourage the hiring of undocumented workers and thus uphold immigration laws. 154 \textit{Hoffman}, on the other hand, asserted that allowing backpay to undocumented workers under the NLRA would subvert IRCA’s important policy goals because it would both condone past violations and encourage future violations of IRCA. 155 In terms of encouraging future violations, the court emphasized that the employee could not technically mitigate damages, as required under the NLRB remedial scheme, “without triggering new IRCA violations either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers.” 156

153 \textit{Sanango v. 200 E. 16th St. Hous. Corp.}, 788 N.Y.S.2d 314, 320-21 (N.Y. App. Div. 2004), \textit{overruled in part} by \textit{Balbuena v. IDR Realty LLC}, 845 N.E.2d 1246 (N.Y. 2006) (limiting the plaintiff’s recovery to what he could have earned \textit{lawfully} and rejecting the \textit{Balbuena I} dissent’s suggestion that limiting the plaintiff’s recovery to foreign wages was the equivalent of “punishment of the undocumented worker.”).

154 \textit{Sure-Tan, Inc. v. N.L.R.B.}, 467 U.S. 883, 893 (1984) (stating that the application of the NLRA to illegal aliens “helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If the employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened.”); \textit{Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir. 1988)} (holding that “the FLSA’s coverage of undocumented aliens goes hand in hand with the policies behind the IRCA . . . If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them . . . By reducing the incentive to hire such workers the FLSA’s coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA.”).

155 \textit{Hoffman Plastic Compounds, Inc. v. N.L.R.B.}, 535 U.S. 137, 148-51 (2002). In terms of condoning past violations, presumably the Court’s concern stemmed from the fact that in this particular case, Castro obtained his employment by submitting false documents; allowing backpay would thus condone his past act and others similar to it. “The Board asks that we . . . allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.” \textit{Id.} at 148-49 (emphasis added). Presumably, the Court’s concern for future violations stemmed from its perception of both the incentive that backpay awards would provide in encouraging undocumented immigrants to seek employment in the U.S. or to stay in the U.S. to assure that they qualify for the award (because by leaving they would forfeit their right under \textit{Sure-Tan}), and its later argument that mitigation required under the NLRA would necessarily entail a further IRCA violation by either the employee or a subsequent employer.

156 \textit{Hoffman Plastic Compounds, Inc.}, 535 U.S. at 150-51. Castro in fact did mitigate his damages by finding
Post-*Hoffman* courts analyze both whether their decision will encourage or discourage future immigration violations and encourage or discourage violations of safety and labor laws.157 Among these two future-based fault approaches, courts most often discuss whether their decision will encourage or discourage future immigration violations. In this context, courts analyze future fault from the perspective of the employer and the employee.

When analyzing future fault from the perspective of the employer, courts question whether the denial of a certain remedy will create incentive for employers to violate immigration laws or whether granting a remedy will encourage employers’ compliance with immigration laws. Denying employees standing and/or recovery lowers employers’ potential liability and creates a financial incentive to violate immigration laws by hiring undocumented workers.158 Courts reason that if specific remedies are
denied to undocumented workers, employers could simply disregard the employment verification system and avoid future liability by hiring undocumented workers. Conversely, if employers are required to compensate undocumented workers at the same rates as legal workers, the employer will have less incentive to hire the undocumented worker. Further, courts reason that because undocumented workers are more willing to work in dangerous and less desirable jobs than United States citizens and legal immigrants, and because they are willing to work for less money, disallowing recovery for lost wages would “actually increase employment levels of undocumented aliens,” not decrease it as Congress intended when it passed IRCA. Some courts have also considered an additional dynamic at play here; because employers want to avoid being held liable for violations of immigration laws, they may ignore immigration laws when they hire, but are more likely to attempt to have the law selectively enforced when employees complain. While the reasoning above represents the


See Mezonos Maven Bakery, Inc. and P.R. Legal Def. and Educ. Fund, No. 29-CA-25476, 2006 NLRB LEXIS 491, at *43 (Nov. 1, 2006). Perhaps this best sums the court’s policy argument up: “If a backpay remedy is denied, the seven employees would be held responsible for the Respondent’s violation of IRCA. Denying an award of backpay would punish the employees, benefit the wrongdoer, condone the employment of undocumented workers and place the risk associated with such employment on the employees instead of the employer. However, by requiring the employer to pay backpay to undocumented workers, the employer will have no incentive to hire undocumented workers because there will be no benefit in violating the Act.” Id. at *51; See also Singh v. Juta & C.D. & R’s Oil, Inc., 214 F.Supp.2d 1056, 1062 (N.D. Cal. 2002) (stating that FLSA “discourages employers from hiring such workers because it eliminates the employers’ ability to pay them less than minimum wage or otherwise take advantage of their status”); Amoah v. Mallah Mgmt., LLC, 57 A.D.3d 29, 33 (N.Y. App. Div. 2008).

See Flores v. Amigon, 233 F.Supp.2d 462, 464 (E.D.N.Y. 2002) (finding that employer know that “when they hire illegal aliens, . . . they will . . . be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance”); Pineda v. Kel-Tech Const., Inc., 15 Misc.3d 176, 185 (N.Y. Sup. Ct. 2007) (citing Garcia v. Pasquareto, 812 N.Y.S.2d 216, 217 (N.Y. App. Term 2004)).

Balbuena v. IDR Realty LLC (Balbuena II), 6 N.Y.3d 338, 360 (N.Y. 2006); See Madeira v. Affordable Hous. Found. Inc., 469 F.3d 219, 248 (2d Cir. 2006) (stating that to refuse to allow recovery against an employer who knew or should have known of the undocumented worker’s illegal status would incentivize such employers to “target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions”); Reyes v. Van Elk, Ltd., 148 Cal. App. 4th 604, 614 (Cal. Ct. App. 2007); Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1000 (N.H. 2005).

See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004) (“Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.”); Reyes v. Van Elk Ltd., 148 Cal.App.4th 604, 617-18 (Cal. Ct. App. 2007) (citing Rivera v. NIBCO, Inc., 364 F.3d 1057, 1072 (9th Cir. 2004) (finding that employers also want to avoid being held liable for violations of immigration laws, and therefore, while they may ignore the law when they hire, they are
vast majority of decisions, one court found the opposite and reasoned that potentially limiting one type of damages is such a “remote and uncertain benefit” that it would not incentivize employers’ hiring of undocumented workers.\textsuperscript{163}

The flip side of this analysis reveals that granting employees standing or allowing employees to recover actually prevents future illegal acts by denying employers the economic incentive to hire undocumented workers.\textsuperscript{164} Thus if courts actually uphold labor and employment protections, IRCA’s policy of reducing illegal immigration is supported because it “offset[s] the most ‘attractive feature’ of such workers – their willingness to work for less than legally required.”\textsuperscript{165} Employers will be left with little, if any, incentives to hire undocumented workers at all\textsuperscript{166} and will have less incentive to unlawfully fire undocumented workers as well.\textsuperscript{167}

When analyzing the potential for future fault from the perspective of the employee, some courts find that granting a remedy will encourage future misconduct by undocumented workers or reward an undocumented worker for previous misconduct. In its simplest form, courts find that awarding a remedy to an undocumented immigrant provides incentive for illegal aliens to seek work in the United States.\textsuperscript{168} Courts reason that an award of U.S. wages would encourage future IRCA violations because the remedy assumes or requires that the undocumented worker continue future employment in violation of immigration laws.\textsuperscript{169} Courts also reason that requiring the employer to pay would “punish” the employer and “reward” the undocumented worker for remaining in the U.S., working without likely to attempt to enforce the law when their employees complain).\textsuperscript{166} See Coque v. Wildflower Estates Developers, Inc. (\textit{Coque II}), 867 N.Y.S.2d 158, 166 (N.Y. App. Div. 2008); Coma Corp. v. Kan. Dept. of Labor, 154 P.3d 1080, 1087 (Kan. 2007); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 69 (N.Y. App. Div. 2005).


\textsuperscript{167} Mezonos Maven Bakery, Inc. and P.R. Legal Def. and Educ. Fund, No. 29-CA-25476, 2006 NLRB LEXIS 491, at *50 (Nov. 1, 2006).


authorization, and intentionally violating IRCA.\(^{170}\)

While a limited number of courts fear that granting remedies to undocumented workers will encourage future violations of immigration laws, other courts find that the potential for a future award is too speculative to encourage illegal immigration. These courts reason that it is unlikely that an undocumented worker would submit fraudulent documents and immigrate to the United States illegally in the hopes that someday he or she could recover a large labor or employment violation award.\(^{171}\) Further, some courts find that the award to the employee does not encourage immigrants to enter the United States;\(^{172}\) immigrants come seeking work as opposed to protection of our labor laws.\(^{173}\)

In addition to analyzing whether or not certain remedies will encourage or discourage future immigration law violations, courts also, though to a lesser extent, question whether awarding a certain remedy will undermine workplace safety and other labor laws. Courts reason that to limit or deny awards to undocumented workers creates a disincentive for the employer to supply all workers with a safe workplace\(^{174}\) whereas awarding benefits to an

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\(^{170}\) Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 318 (N.Y. App. Div. 2004) (stating that, like an award of back pay in Hoffman, a lost earnings award would compensate an undocumented worker for wages he could have earned “only by ‘remain[ing] in the United States illegally, and continu[ing] to work illegally, all the while successfully evading apprehension by immigration authorities.’”); see also Coma Corp., 154 P.3d at 1093-94 (discussing the District Court’s holding, not the Kansas Supreme Court’s holding, which found that a lost earnings award would wrongly compensate the plaintiff for work that he did illegally in the United States); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 332 (Minn. 2003) (Gilbert, J., dissenting) (arguing that by allowing the employee to recover disability benefits predicated on a diligent job search, the employee was actually being rewarded for remaining in the United States illegally).

\(^{171}\) Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 246 (2d Cir. 2006) (finding that potential eligibility for workers’ compensation benefits is not an incentive for undocumented aliens to obtain work in the United States illegally); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (noting that it is the procurement of employment at any wage, not prospect of job-related protections under the labor laws, that attracts illegal immigrants, and that if FLSA did not cover undocumented aliens, employers would have a greater incentive to hire them); Mezonos Maven Bakery, Inc. and P.R. Legal Def. and Educ. Fund, No. 29-CA-25476, 2006 NLRB LEXIS 491, at *51 (Nov. 1, 2006) (“It is too speculative to contend that people will enter the United States illegally only to obtain backpay in the event that they are illegally discharged.”); Coque v. Wildflower Estates Developers, Inc. (Coque II), 867 N.Y.S.2d 158, 166 (N.Y. App. Div. 2008); Reyes v. Van Elk Ltd., 148 Cal. App. 4th 604, 618 (Cal. Ct. App. 2007) (“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.”); Balbuena v. IDR Realty LLC (Balbuena I), 13 A.D.3d 285, 288 (N.Y. App. Div. 2004) (Ellerin, J., dissenting).

\(^{172}\) See, e.g., Mezonos Maven Bakery, Inc. and P.R. Legal Def. and Educ. Fund, No. 29-CA-25476, 2006 NLRB LEXIS 491, at *50 (Nov. 1, 2006).

\(^{173}\) Balbuena, 13 A.D.3d at 288 (Ellerin, J., dissenting).

\(^{174}\) Amoah, 57 A.D.3d at 33 (“[L]imiting a [reduced earnings] claim by an injured undocumented alien would lessen an employer’s incentive to . . . supply all of its workers the safe workplace that the Legislature demands.”) (citation omitted) (citing Balbuena v. IDR Realty LLC (Balbuena II), 6 N.Y.3d 338, 359 (N.Y. 2006)); Design Kitchen and Baths v. Lagos, 892 A.2d 817, 826 (Md. 2005) (“[W]ithout the protections of the statute, unscrupulous employers could, and perhaps would, take advantage of this class of persons and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers.”); Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 225 (N.J. Super. Ct. App. Div. 1996) (denying compensation to illegal aliens may have the effect of encouraging employers to hire more illegal aliens and take less care to provide safe workplaces).
injured undocumented worker encourages employers’ compliance with immigration and safety laws.\textsuperscript{175} Thus, the denial of recovery for undocumented workers could actually promote unsafe work site practices, undermining the objectives of the state labor law.\textsuperscript{176} Similar to the reasoning employed by courts that suggest undocumented workers should not benefit from their illegal actions, courts in this context find that an employer should not be rewarded for failing to provide a safe workplace for his or her employees.\textsuperscript{177}

Across many labor and employment cases involving undocumented workers, courts are applying concepts of fault, both past fault and fault as it relates to the potential for future wrongdoing. When utilizing past fault as part of their decision making, courts take a range of different approaches. Some court focus exclusively on the wrongdoing of the employee as the basis of their decision making, while other courts focus exclusively on the wrongdoing of the employer. Other courts examine the relative fault of both parties to the litigation, while yet others specifically reject the use of fault concepts altogether. There are also a number of different approaches taken by courts that examine fault as it relates to the potential for future misconduct. Some courts emphasize the impact a decision will have upon future immigration wrongdoing, whether from the prospective of the employer or employee. Other courts examine the impact a decision will have upon future labor and employment wrongdoing. In light of the fact that courts routinely invoke concepts of fault in employment cases involving undocumented workers, the next section examines the validity of such reasoning.

IV. PROBLEMS WITH FAULT BASED CONSTRUCTS

This section follows the past and future fault taxonomy applied in \textit{Hoffman} and its progeny to examine the legitimacy of fault-based decision making. Specifically, this section categorizes decision making into three types: future fault-based decision making; past fault-based decision making rooted in existing doctrine; and past fault-based decision making not rooted in existing doctrine. At one end of the continuum is future fault-based decision making in which courts evaluate the ways in which a decision will impact future behavior and either effectuate or thwart legislative intent.

\textsuperscript{175} Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 246 (2d Cir. 2006).
\textsuperscript{176} See Balbuena, 6 N.Y.3d at 362; Design Kitchen, 882 A.2d at 826 (“Without the protection of the [workers’ compensation] statute, unscrupulous employers could, and perhaps would, take advantage of this class of [undocumented workers] and engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers.”); Balbuena, 13 A.D.3d at 288 (Ellerin, J., dissenting).
Such reasoning, to the extent that it attempts to effectuate legislative intent, supports separation of powers principles and is the least problematic of the decision making modalities. At the other, most problematic end of the continuum is past fault-based decision making that is not rooted in any doctrine. These decisions are most concerning as they appear to be nothing less than courts’ attempts to shape immigration policy through employment law cases and as such undermine separation of powers principles. In the middle, are courts that apply past fault-based decision making that is rooted in existing common law doctrine or statutes. These existing doctrines or statutes are designed to limit remedies for general, as opposed to immigration specific, misconduct. This line of reasoning can be problematic in instances where courts improperly apply the general misconduct doctrines to immigration misconduct without sufficient nexus between the injury and the immigration wrongdoing.

A. Future fault-based Decision Making

Courts that employ future fault-based decision making are attempting to discern legislative intent and then examine ways in which a judicial decision would best effectuate that legislative intent. Courts adopting future fault-based reasoning generally examine the potential impact of their decision upon the future behavior of the litigants and potential litigants as a way to give effect to, or support, the policy decisions enacted by Congress and state legislatures. Specifically, courts analyze whether their decision will encourage or discourage future immigration violations as well as encourage or discourage future violations of safety and labor laws. Such attempts to effectuate legislative intent as part of the decision making process represent judicially sound ways to attempt resolution of competing policy objectives.

The future fault-based decisions assess incentives in different ways. A number of courts reason that denying undocumented workers recovery would create financial incentive to violate immigration laws by hiring undocumented workers; whereas, requiring undocumented workers’ be

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compensated at the same rate as legal workers decreases the incentive to hire undocumented workers.\textsuperscript{179} While the reasoning above has been adopted by the large majority of cases, one court found that potentially limiting damages to undocumented workers is so “remote and uncertain” a benefit that employers would have not incentive to hire undocumented workers.\textsuperscript{180} There are a small number of courts that view the incentives from an entirely different angle. These courts find that granting a remedy will encourage future misconduct by undocumented workers or reward them for prior misconduct.\textsuperscript{181} Other courts find that the potential for a future award is too speculative to encourage illegal immigration.\textsuperscript{182}

Regardless of one’s perspective on the underlying policy question, these courts, despite divergent outcomes, all attempt to effectuate legislative intent by assessing the ways in which a particular ruling would incentivize future behavior. In so doing, these courts may have gotten the underlying policy right or wrong, depending upon one’s perspective, but courts did not attempt to legislate immigration policy from the bench. In this way, future fault-based reasoning that attempts to effectuate legislative intent and adhere to separation of powers principles is the least problematic of the decision making modalities.

### B. Past Fault Not Rooted in An Existing Doctrine

Some courts examine fault unrelated to the underlying case, without rooting that examination in existing doctrine. Such analysis, not tethered to any existing doctrine and lacking nexus to the defined elements of the underlying action, may be nothing more than judicial policy making. Basic

\textsuperscript{179} See e.g., Flores v. Amigon, 233 F.Supp.2d 462, 464 (E.D.N.Y. 2002) (finding that employer know that “when they hire illegal aliens, . . . they will . . . be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance”); Pineda v. Kel-Tech Const., Inc., 15 Misc.3d 176, 185 (N.Y. Sup. Ct. 2007) (citing Garcia v. Pasquareto, 812 N.Y.S.2d 216, 217 (N.Y. App. Term 2004)).


\textsuperscript{181} See, e.g., Coma Corp. v. Kan. Dept’ of Labor, 154 P.3d 1080, 1093-94, (Kan. 2007); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314, 318 (N.Y. App. Div. 2004) (stating that, like an award of back pay in \textit{Hoffman}, a lost earnings award would compensate an undocumented worker for wages he could have earned “only by [remaining] in the United States illegally, and continuing to work illegally, all the while successfully evading apprehension by immigration authorities.”); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 332 (Minn. 2003) (Gilbert, J., dissenting) (arguing that by allowing the employee to recover disability benefits predicated on a diligent job search, the employee was actually being rewarded for remaining in the United States illegally).

\textsuperscript{182} See e.g., Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 246 (2d Cir. 2006) (finding that potential eligibility for workers’ compensation benefits is not an incentive for undocumented aliens to obtain work in the United States illegally); Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988) (noting that it is the procurement of employment at any wage, not prospect of job-related protections under the labor laws, that attracts illegal immigrants, and that if FLSA did not cover undocumented aliens, employers would have a greater incentive to hire them); Mezonos Maven Bakery, Inc. and P.R. Legal Def. and Educ. Fund, No. 29-CA-25476. 2006 NLRB LEXIS 491, at *51 (Nov. 1, 2006) (“It is too speculative to contend that people will enter the United States illegally only to obtain backpay in the event that they are illegally discharged.”).
to our notions of separation of powers is the idea that the legislature, as a body accountable to the people, makes the laws while the judiciary interprets the law. When courts adhere to their role as a body that effectuates legislative intent, they uphold the concepts underlying separation of power doctrines – namely, a tripartite governance system with checks and balances. However, when courts move away from effectuating policy and toward making policy, they are more likely to violate the principles underlying the separation of powers doctrine.

In the wage and hour context, one court applied concepts of immigration fault unrelated to any existing doctrine. The court found that because the contract was “tainted with illegality,” the undocumented worker was not entitled to recover the amount of wages due him under the contract, and was instead only eligible for minimum wage.\textsuperscript{183} The court reached this conclusion based upon the mere fact that the employee was undocumented and further found that had there been evidence that the undocumented worker utilized fraudulent documents to obtain employment, all remedies would be denied.\textsuperscript{184}

In a state discrimination case, one court, though declining to rely upon the after-acquired evidence doctrine, used general fault based decision making, unattached to any doctrine, when barring a claim for economic and non-economic damages because of the underlying illegality of the plaintiff’s employment.\textsuperscript{185} The court found that because there were no egregious discriminatory acts committed by the employer, the illegality of plaintiff’s employment precluded all recovery.\textsuperscript{186} In these cases, in the absence of an existing fault-based doctrine, the decisions appear to be based upon the courts’ improper attempts to influence immigration policy through adjudication of the specific employment issue.

In the torts context, in the absence of a viable existing doctrine that allows for the consideration of immigration fault, courts examine fault unrelated to any doctrine. There are two discernable approaches courts take to limit undocumented workers rights to damages in the tort context: denial of all recovery because of fraud; and limiting recovery to home-country

\textsuperscript{184} Id.
\textsuperscript{185} Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004). Interestingly, in this case, the plaintiff relied upon the court’s prior case law in the after-acquired evidence arena to argue that she was still entitled to non-economic damages, even if economic damages were barred, because of the underlying discriminatory harm done to her. \textit{Crespo}, 841 A.2d at 477 (relying upon Taylor v. Int’l Maytex Terminal Corp., 810 A.2d 1109 (N.J. Super Ct. App. Div. 2002) to argue that the fact that the employer later learns of facts that would have caused her termination does not excuse the employer for non-economic damages caused by discriminatory conduct).
\textsuperscript{186} \textit{Crespo}, 841 A.2d at 477.
wages. Courts that deny all recovery find that employee fraud is a sufficient basis upon which to deny recovery.\(^{187}\) One court went so far as to deny all relief to a plaintiff who died as a result of an accident because it found that granting a lost wages award in such circumstances would be tantamount to the court itself committing a violation of IRCA.\(^{188}\) The court found the plaintiff’s submission of fraudulent documents to be a significant factor to support its decision to deny lost wages.\(^{189}\) The court further distinguished the remedies of workers’ compensation benefits and lost wages, finding lost wages more akin to backpay.\(^{190}\) In another case, one court took the extreme route of dismissing a lost wages claim with prejudice because the employee filed his lawsuit using a false name; the court did not ever reach the merits on the actual claim.\(^{191}\)

Another line of cases create a bifurcated recovery system in which undocumented workers either recover U.S. wages if the employer knew or should have known the workers were unauthorized, or recover the wages the workers could have earned in their home country if the employer did not know they were undocumented when it hired them.\(^{192}\) One court developed this bifurcated system by balancing the competing policy considerations -


\(^{188}\) Veliz, 313 F. Supp. 2d at 1336 (“Following Hoffman, this Court finds that it cannot condone an award of lost wages here. In addition to trenching upon the immigration policy of the United States and condoning prior violations of immigration laws, awarding lost wages would be tantamount to violating the IRCA. Indeed, if this Court were an employer, it would be compelled to discharge Mr. Ignacio. Otherwise, it would face civil fines and criminal prosecution for knowingly compensating an undocumented alien in exchange for work. Awarding lost wages is akin to compensating an employee for work to be performed. This Court cannot sanction such a result.”).

\(^{189}\) Id. The court noted that “it is apparent that the photo on the subject Resident Alien Card is not of the decedent.” Id. Thus, it appears that the employer failed to discharge its IRCA verification responsibilities if the fraudulently-tendered document was facially flawed. The court did not mention the employer’s gullibility or relative fault, and instead focused solely on the employee’s fraud. The court in Coque, above, presumably would have found lost wages recoverable under these same facts because the employer violated IRCA along with the employee.

\(^{190}\) Id. at 1336-37.


\(^{192}\) See, e.g., Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005); Sanango v. 200 E. 16th St. Hous. Corp., 788 N.Y.S.2d 314 (N.Y. App. Div. 2004); Hernandez-Cortez v. Hernandez, No. Civ.A. 01-1241-JTM, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003). The case arose when illegal immigrants were injured while being smuggled from the border when their smuggler-driver got into an accident with another driver. The court was thus considering whether those undocumented persons, who had not yet worked a day in the U.S., were eligible for lost wages as a result of the non-smuggling driver’s negligence. Hernandez, 2003 WL 22519678, at *1. This case can therefore be distinguished from other cases in which the undocumented workers had actually performed work before they filed suit for lost wages. Aside from distinguishing lost wages from wages for work already performed, the court noted that the defendants had conceded that plaintiffs were entitled to lost wages at country-of-origin rates as a result of their diminished earning capacity from the accident. Id. at *6. The court then rejected one plaintiff’s argument that the plaintiff should recover lost wages because the reality of the workplace economy dictated that he could have found employment despite his lack of status. Id. at *6 (noting that "while many illegal aliens do find employment in the United States, this argument does not overcome § 1324a and Hoffman."). The court concluded that the plaintiff’s "status as an illegal alien precludes his recovery for lost income based on projected earnings in the United States." Id. at *7.
on the one hand, allowing an illegal alien to recover lost wages at U.S. rates which would create a paradoxical situation in which “an illegal alien can lawfully become entitled to the value of United States wages only if he becomes physically unable to work,” and, on the other hand, tort deterrence principles which would be furthered if lost wage claims at U.S. rates were allowed in cases where the employer was responsible for an illegal alien’s employment because the employer knew or should have known that the alien was illegal.

Another court denied undocumented workers lost wages claims at U.S. rates. That court found that allowing lost wages at U.S. wages would unduly encroach upon federal immigration policy because it would have allowed the worker to recover wages which, but for his injury, the employee could not have earned legally. This court found that an undocumented worker would not be eligible for lost wages at U.S. rates regardless of fault, but could recover lost wages at country-of-origin rates.

In cases that deny remedies to undocumented workers based upon their illegal behavior and those that deny workers U.S. wages based on employee

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193 *Rosa*, 868 A.2d at 1000. The court’s reasoning here is technically incorrect. Although the situation described would create a potential paradox, the paradox has been resolved in another arena: courts have uniformly held that undocumented workers are entitled to U.S. wages for work already performed, and thus entitlement to U.S. wages is not dependent solely on an injury. The paradox cited by the court, then, is somewhat of a red herring.

194 *Id.* (discussing how denying lost wage claims at U.S. rates would undermine tort deterrence principles has been quoted extensively in subsequent cases: “To refuse to allow recovery against a person responsible for an illegal alien’s employment who knew or should have known of the illegal alien’s status would provide an incentive for such persons to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions. It would allow such persons to treat illegal aliens as disposable commodities who may be replaced the moment they are damaged. Such a result is incompatible with tort deterrence principles.”).

195 While *Sanango* was overruled by *Balbuena II*, the decision can nonetheless shed light on the reasoning for allowing only home-country wages.

196 *Sanango*, 788 N.Y.S.2d. at 319. This perspective that the worker could only have earned his wages illegally is, of course, misguided to the extent that it ignores the fact an employer may violate IRCA by hiring an undocumented worker who does not violate IRCA by merely accepting employment. From the perspective of the employee, he has done nothing illegal in this scenario, and he may still legally accept wages. Furthermore, as indicated above, courts in the wages-for-work-already-performed cases (FLSA and state wage claims) have uniformly allowed recovery of such wages.

197 *Id.* (“In this regard, we believe that plaintiff’s acceptance of unlawful employment should be deemed to constitute misconduct contravening IRCA’s policies whether or not he submitted false documents so as to expose himself to potential criminal liability.”).
wrongdoing, the justifications for the limitations appear not to be rooted in any existing doctrine but rather seem to be courts’ attempts to influence immigration policy through the application of fault-based concepts.

C. Past fault-based Decision Making Tied to Existing Fault Doctrine

In the middle of the continuum are those cases where courts use past fault-based decision making but tie it to existing doctrine. Fault-related doctrines or statutory provisions that are not specific to the undocumented worker fault-based constructs exist in each of the major employment law areas. These doctrines or statutory provisions are, at times, invoked by employers as a way to argue that immigration-related misconduct, even if not directly related to the litigation, should bar employees’ legal relief. For example, in the wage and hour context an employer might argue that the doctrine of unclean hands or estoppel bars relief to a worker who has acted fraudulently by obtaining work either without documentation or with improper documentation. In the Title VII/state anti-discrimination context, an employer may attempt to limit its liability by arguing that because the employee engaged in acts that would have led to termination had they been known, the employees’ recovery should be reduced or prohibited. In the workers’ compensation context, an employer might argue that the undocumented worker’s crime or fraud should bar recovery of benefits under state statutory “willful misconduct” or “criminal conduct” prohibitions. Finally, in the tort context, the outlaw or serious misconduct doctrine, designed to consider fault unrelated to the injury, could be invoked to argue that undocumented workers should be barred from legal relief for workplace injuries. This section explains the ways in which such doctrines have been used in the undocumented worker context and postulates that strict application of the doctrines and statutory provisions may be misguided because of an insufficient nexus between the injury and the wrongdoing.

1. Workers’ compensation

Under the workers’ compensation system, an employee who is injured on the job waives his or her right to sue in tort and instead recovers under an insurance system financed by employers. The majority of courts and agencies have allowed undocumented workers unfettered access to workers’ compensation remedies, either rejecting employer and insurer-proffered arguments that IRCA preempts awards of such benefits to undocumented workers,198 offering policy reasons to conclude that undocumented workers

198 Anne Marie O'Donovan, Immigrant Workers and Workers’ Compensation After Hoffman Plastic
may recover such benefits, or finding that there is no causal connection between the employee’s fraud and the compensable injury. Despite this near consensus, two courts relied on Hoffman when interpreting state law to exclude undocumented workers from workers’ compensation benefits based on their immigration status.

There are four types of statutory defenses that could preclude undocumented workers' recovery of workers’ compensation benefits, including: (1) a complete bar to coverage for undocumented workers; (2) willful misconduct; (3) a violation of law or statute; or (4) employee fraud provisions. Only two state workers’ compensation statutes have provisions that operate to completely bar undocumented workers from coverage – Wyoming and Idaho. And although roughly one-third of state workers’ compensation statutes have disqualifying "willful misconduct" provisions, most courts have found that the necessary causal connection


199 Medellin, 17 Mass. Workers’ Comp. Rep. 592, No. 03324300, 2003 WL 23100186, at *5 n.10, 17 (Dep’t Ind. Acc. Dec. 23, 2003) (finding that awards of workers’ compensation benefits to undocumented workers would further, or at least not frustrate, federal policy goals of IRCA while denying benefits would undermine the valuable state interest, incident to the contract for employment, of compensating all workplace injuries and would also undermine the deterrent function of state WC laws in creating a windfall for both the insurer (paying the benefits) and the employer (no increase in premium).

200 See Farmers Bros. Coffee v. Workers’ Comp. Appeals Bd., 133 Cal. App. 4th 533, 544 (Cal. Ct. App. 2005) (noting that an employee is barred from receiving compensation under the statute only when the compensation obtained would be a direct result of the fraudulent misrepresentation, but in the instant case it was the employment (and acceptance of employment is not illegal) “not the compensable injury, that [plaintiff] obtained as a direct result of the use of fraudulent documents.”), Earth First Grading v. Gutierrez, 606 S.E.2d 332, 335 (Ga. Ct. App. 2004) (finding that the employer’s reliance on language in Georgia’s WC statute indicating that “no compensation shall be allowed for an injury . . . due to the employee’s willful misconduct” was misplaced because ‘the employer fail[ed] to show that a causal connection between the employee’s misrepresentation and the work-related injury.”) (citing Cont'l PET Tech., Inc. v. Palacios, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004); Dynasty Sample Co. v. Beltran, 479 S.E.2d 773, 775 (Ga. Ct. App.1996); Andrade v. Sun Valley Landscapes, No. 2305, 2008 WL 2882228 at *4 (Neb. Work. Comp. Ct. July 23, 2008) (finding that the worker’s injury will render him unable to work whether legal or illegal, in the U.S. or in his home country and rejecting employer’s argument that illegal status is the cause of plaintiff’s inability to work).

201 Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 521 (Mich. Ct. App. 2003) (barring the employee from WC wage-loss benefits under a specific provision of state law that allows for the suspension of benefits if the employee has committed a crime that causes the employee to be unable to work); Reinforced Earth Co. v. Workers’ Comp. Appeal Bd., 810 A.2d 99, 106-08 (Pa. 2002) (suspending an award of temporary total disability benefits because the judge found that it was the employee’s status, not the injury, that was the cause of the worker’s inability to work).

202 I.DAHO CODE ANN. § 72-1366(19)(a) (2010) (“Benefits shall not be payable on the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time the services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of sections 207 and 208 or section 212(d)(5) of the immigration and nationality act.”); WYO. STAT. ANN. § 27-14-102(a)(vii) (“Employee means any person engaged in any extrahazardous employment under any appointment, contract of hire or apprenticeship, express or implied, oral or written, and includes legally employed minors, aliens authorized to work by the United States department of justice, office of citizenship and immigration services, and aliens whom the employer reasonably believes, at the date of hire and the date of injury based upon documentation in the employer’s possession, to be authorized to work by the United States department of justice, office of citizenship and immigration services.”).

203 AL, AZ, CA, GA, MA, MD, MT, NE, NH, NJ, NM, SD, TN, UT, VA, WV, WY.
between the employee’s misrepresentation and the work-related injury is not met simply because the worker used false documents to obtain employment.\(^{204}\)

However, there are some cases in which courts construe the workers’ illegal status or use of fraudulent papers to be sufficiently criminal or fraudulent so as to fit within state specific statutory bars. In two states, courts have found that undocumented workers’ submission of false documents constitute the “commission of a crime” which can bar the workers' recovery of benefits.\(^{205}\) Both states’ statutory provisions require that the “commission of a crime” must make the employee unable to obtain or perform work.\(^{206}\) The cases construing such provisions found that undocumented status, as opposed to the workplace injury, was the cause of the workers’ inability to work.

In other states, employers have argued that statutory fraud provisions operate to bar a worker's recovery of benefits in the event that the worker provided false documents or a false identity to either obtain employment or to obtain workers’ compensation benefits.\(^{207}\) In one case, the court denied the worker coverage, concluding that the employee's provision of false documents constituted a "knowing or intentional" fraudulent statement "made with the intent" to obtain workers’ compensation benefits.\(^{208}\) In another case, the court concluded that although the worker was legally entitled to her benefits, because she used a false SSN and name in the workers’ compensation proceedings, she was subject to penalties under the state workers’ compensation act fraud provision.\(^{209}\)

While these decisions rely upon specific state statutory provisions designed to limit access to workers’ compensation benefits in the event of a crime or fraud, the decisions lack meaningful consideration of the tenuous nature of the nexus between the injury claimed and the alleged wrongdoing. Specifically, the underlying injuries which gave rise to the workers’ compensation claim are inadequately related to the alleged fraud/illegality. In the absence of legitimate consideration being given to the impact of the underlying injury upon an employee’s ability to work and the lack of nexus between the alleged fraud and the injury, these decisions appear to misapply statutory prohibitions in an attempt to address immigration policy concerns.

\(^{204}\) See, e.g., Earth First Grading, 606 S.E.2d at 335; accord Cont’l PET, 604 S.E.2d at 629.


\(^{208}\) See, e.g., id.

2. **Torts**

Concepts of fault are central to torts jurisprudence. The tort system itself is designed to allocate the costs associated with injuries among the parties at fault. Examining fault as it relates to the injuries at issue in the case is the most typical way in which concepts of fault get employed in tort cases. However, courts that deny or limit undocumented workers’ remedies in the tort context are often not examining the undocumented workers’ fault related to the accident but, instead, consider fault related to their immigration and work status.

While there exists a tort doctrine that allows courts to consider fault unrelated to the injuries, this doctrine has not been expressly cited by courts in tort cases involving the undocumented workers. This doctrine, known as the “outlaw doctrine,” is rooted in the idea that “the law will not allow a wrongdoer whose injury arises out of his serious misconduct to ‘benefit’ from his wrongdoing by recovering damages from a tortfeasor who otherwise might be liable for causally contributing to the injury.”

The outlaw doctrine operates to bar recovery only where the injury arises out of the misconduct. Thus, it would likely not serve as a barrier to undocumented workers who seek recovery for workplace or other injuries because of the lack of a nexus between the misconduct and the injury. Since the lack of documents, or even the use of fraudulent documents to obtain work, is not the direct cause of the injury, the doctrine very likely does not apply.

3. **Wage and Hour Claims**

Workers are statutorily entitled to seek compensation for work already performed through the FLSA on the federal level and state wage claim statutes and courts have found it irrelevant whether the worker was...

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210 Joseph H. King, Jr., Outlaws and the Outlier Doctrines: The Serious Misconduct Bar in Tort Law, 43 WM. & MARY L. REV. 1011, 1017 (2002). The doctrine is also known as the “unlawful acts doctrine,” the “unlawful conduct doctrine or defense,” “unlawful acts rule,” “ex turpi rule,” “serious misconduct doctrine,” “wrongful conduct rule,” “illegality defense,” and sometimes “in pari delicto.” The “outlaw doctrine” is subsumed by contributory negligence principles, which serve as a complete bar to tort recovery, in those limited states that still adhere to a contributory negligence model. In the majority of states that utilize a comparative fault model and consider relative fault as a way to balance recovery, the outlaw doctrine can still be employed to limit the remedy.

211 Defendants could make proximate cause argument that the worker would not be injured, but for being unlawfully employed in the first place. The “but for” test is more specifically part of cause-in-fact analysis, with foreseeability being tied to the test for “proximate cause.” Although I guess both cause-in-fact and proximate cause are two elements related to the broader proximate cause injury.
documented. Despite the well-established principle that undocumented workers are protected under such laws, employers continue to challenge the right of undocumented workers to receive pay for completed work. At times, employers attempt to undermine applicable wage laws by using the existing fault doctrines of unclean hands and estoppel as affirmative defenses. Though the Supreme Court has held that "one cannot waive, release, or compromise his or her rights under the FLSA" and federal courts have repeatedly rejected unclean hands and equitable estoppel as affirmative defenses to FLSA actions, some courts have found these


213 Unclean hands is described as follows: "the equitables powers of the court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means, has gained an advantage." Torres v. Grissteed's Operating Mgmt., 642 F. Supp. 2d 447 (S.D.N.Y. 2008). "Equitable estoppel (stating that one party, through his actions or words, leads the other party to act to its detriment." Curran v. High Springs Family Practice Clinic & Diagnosis Ctr., Inc., No. 1:08-cv-00008-MP-AK, 2008 WL 5157683 (N.D. Fla. Dec. 9, 2008); see also Wlodynski v. Ryland Homes of Fla. Realty Corp., 2008 WL 2783148, at *3 (M.D. Fla. July 17, 2008) ("Generally, federal courts reject equitable estoppel as an affirmative defense to an FLSA action.").


215 "Generally, federal courts reject equitable estoppel as an affirmative defense to an FLSA action.") Under this defense, in actions "to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages," "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the FLSA," the court may deny liquidated damages. 29 U.S.C. § 260 (2009).

216 Lee v. Askin Trucking, Inc., No. 05-14335-CIV-MARRA/LYNCH, 2006 U.S. Dist. LEXIS 97552, at *5-6 (S.D. Fla. Feb. 7, 2006) (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945)); holding FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purpose" of the statute and thwart the legislative policies it was designed to effectuate, and stating that "[t]he doctrine of estoppel is not recognized under the FLSA.");

217 See, e.g., Neuman v. CTRL Systems, Inc., No. 09-22508-CIV, 2009 WL 4730722, at *4 (S.D. Fla. 2009) ("[A] 'good faith' defense is provided for in the FLSA."). Under this defense, in actions "to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages," "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the FLSA," the court may deny liquidated damages. 29 U.S.C. § 260 (2009).

218 See also Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); Lynn's Food Stores v. U.S. Dep’t of Labor, 679 F.2d 1350, 1352 (11th Cir. 1983).

219 Askin Trucking, 2006 U.S. Dist. LEXIS 97552, at *6 (citing Caserta v. Home Lines Agency, Inc., 273 F.2d 943, 946 (2d Cir. 1959) (allowing such a defense would be "inconsistent with both the language and the policy of the FLSA."); Morrison v. Executive Aircraft Refinishing, Inc., 434 F. Supp. 2d 1314, 1320 (S.D. Fla. 2005) (citing Caserta, 273 F.2d at 946) ("[T]he doctrine of estoppel is not recognized under the FLSA.");

220 See also Robertson v. LTS Mgmt. Servs., LLC, 642 F. Supp. 2d 922, 933 (W.D. Mo. 2008) (stating that "generally, estoppel is not allowed as a defense to a FLSA claim" but then the case goes on to detail a limited exception); Wlodynski, 2008 WL 2783148, at *3 ("Generally, federal courts reject equitable estoppel as an affirmative defense to an FLSA action, even in instances where an employee is required but fails to record any overtime hours worked."); Askin Trucking, 2006 U.S. Dist. LEXIS 97552, at *7 (stating, "it is well-established that the defenses of waiver and estoppel are precluded under the FLSA.").
applicable in limited circumstances where the employee’s wrongdoing is directly related to his claim and the employer is injured as a result.\textsuperscript{216}

The two courts to consider cases in which employers attempted to invoke unclean hands or estoppel to bar recovery of wages by an undocumented worker rejected the applicability of these defenses. In one case, the court rejected the defendant’s arguments on the grounds that they were based upon the incorrect assumption that plaintiff’s immigration status bars recovery in the wage and hour context\textsuperscript{217} and in the other, the court struck this affirmative defense on the grounds that plaintiffs’ claims were statutory claims seeking only monetary relief, and thus the equitable doctrine of unclean hands did not apply.\textsuperscript{218}

Thus, in the context of wage and hour claims, courts have rejected application of the existing fault-related doctrines of unclean hands and estoppel, finding instead that such defenses can only apply where there is a sufficient nexus between the employee’s wrongdoing and his claim which results to an injury to the employer.

4. Title VII and State Anti-Discrimination Statutes

Under both Title VII and state anti-discrimination laws, undocumented and documented workers alike are entitled to be free from discrimination under Title VII and state anti-discrimination acts.\textsuperscript{219} At the federal level, while it is settled that undocumented workers are considered “employees” under Title VII,\textsuperscript{220} it is unclear whether undocumented workers are eligible

\textsuperscript{216} See, e.g., McGlothan, 2006 WL 1679592, at *3, n. 3 (explaining that the unclean hands defense requires that the plaintiff’s wrongdoing “is directly related to the claims against which it is asserted “and the defendant is injured by the plaintiff’s conduct”) (citing Calloway Partners Nat’l Health Plans, 986 F.2d 446, 450-51 (11th Cir. 1993); see also Wlodzinski, 2008 WL 2783148, at *4 (finding that the “affirmative defense of unclean hands may be applicable to FLSA claims in limited circumstances.”)); Green v. City & County of San Francisco, 2007 WL 521240 at *1 (N.C. Cal. 2007) (finding that the equitable doctrine of unclean hands may bar recovery where the party engaged in “reprehensible conduct in the course of the transaction.”).

\textsuperscript{217} Bailon, 2009 WL 4884340, at *4.


\textsuperscript{219} Additionally, undocumented workers may avail themselves of the protections of other federal non-discrimination statutes, including: the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et.seq.; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq.. The Civil Rights Act of 1866, 42 U.S.C. § 1981 also protects the rights of “all persons” in the making, enforcement, performance, modification, and termination of contracts, on an equal basis. Section 1981 prohibits discrimination on the basis of alienage, race or color. See, e.g., Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 419-20 (1948); Sagana v. Tenorio, 384 F.3d 731, 738 (9th Cir. 2001).

\textsuperscript{220} NLRB v. Kolka, 170 F.3d 937, 940 (9th Cir. 1999) (finding that undocumented workers are considered “employee” under the NLRA); see also, NATIONAL EMPLOYMENT LAW PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER HOFFMAN PLASTIC COMPOUNDS V. NLRB at 8 (Feb. 23, 2007) available at http://nelp.3cdn.net/b378145245dde2e58d_0qm6i6i6g.pdf (citing EEOC guidance which states unequivocally that undocumented workers are covered employees under Title VII, the ADA, the ADEA, and all other federal non-discrimination statutes).
for backpay under Title VII. Under state anti-discrimination laws, the question of the availability of back pay for undocumented workers has not yet been answered fully, but one of the few state courts to address the issue precluded any form of damages, including backpay, under its state anti-discrimination statute.

One of the ways in which employers attempt to undermine claims of discrimination by undocumented workers is to invoke the existing “fault-based” doctrine known as the after-acquired evidence doctrine. The employer typically attempts to limit liability to a wrongfully terminated employee where the employer learns, subsequent to the termination, that the employee engaged in acts that would have led to the employee’s termination. The after-acquired evidence doctrine is equitable in nature and is usually applied to ensure that an employee does not benefit from the employee’s own misconduct or misrepresentation. Within the context of undocumented workers seeking Title VII remedies, employers argue that, had they known the employee was undocumented or used false papers to obtain work, they would have fulfilled their statutory obligation to refuse to hire, or terminate, the employee.

Balancing the competing interests of protecting employees from discrimination in the workplace and the employer’s lawful business prerogative to take action against employee wrongdoing, the Supreme Court found that in order to successfully rely upon the after-acquired evidence doctrine, the employer must establish that the wrongdoing was so severe

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221 See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1066-70 (9th Cir. 2004) (holding that the employer could not use the discovery process to find out the plaintiff worker’s immigration status because Hoffman did not make immigration status relevant for a Title VII claim); De La Rosa v. N. Harvest Furniture, 210 F.R.D. 237, 238-39 (C.D. Ill 2002) (asserting that Hoffman applied to an award of backpay by the NLRB but did not necessarily apply to remedies in federal court); see also, Maria Pabon Lopez, The Place of the Undocumented Worker in the United States Legal System after Hoffman Plastic Compounds, 15 IND. INT’L & COMP. L. REV. 301, 320 (2005) (finding that while “coverage and enforcement of the anti-discrimination laws under the EEOC’s purview has remained the same after Hoffman” questions about the availability of Title VII remedies after Hoffman still exist); Ho & Chang, supra note 23, at 498-99, n. 111 (explaining that the Supreme Court was clearly aware that the Hoffman decision might have repercussions for remedies under Title VII, but both the majority and the dissent were silent on the matter). But see, Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (holding that Hoffman necessitates that an undocumented worker is not entitled to backpay under Title VII due to his immigration status).


223 The after-acquired evidence doctrine emerged from common law contract and equity. Gregory S. Fisher, A Brief Analysis of After-Acquired Evidence in Employment Cases, 17 ALASKA L. REV. 271, 275 (2000). It derives from the contract principle that a breach of contract is not actionable if a legal basis is provided for excusing performance, even if a breaching party was unaware of the legal excuse. Id. The doctrine is also related to the equity doctrine of unclean hands, which bars a party from claims for relief if that party engaged in fraudulent, deceitful, or unfair conduct. Id.

224 Hyatt v. Northrop Corp., 80 F.3d 1425, 1431 (9th Cir. 1996).

that the employee would have been terminated on those grounds alone if the employer had known about the wrongdoing prior to the discharge. 226

A couple of courts have grappled with application of the after-acquired evidence rule in cases involving undocumented workers. In one case under Title VII and California’s state anti-discrimination statute, the defense sought discovery of the employee’s immigration status. The Ninth Circuit upheld the trial court’s protective order, finding that the doctrine neither authorized the use of depositions to uncover illegal action by the plaintiff nor required the submission to such discovery as a pre-requisite to pursuing a claim. 227 Most relevant to this inquiry, the court questioned whether an employer who independently found out that the plaintiff was undocumented would be able to meet the burden of proof required by the after-acquired evidence doctrine. Specifically, the court emphasized that not only must the employer show that it could have fired the employee, it must also show that it would in fact have done so. 228 Questioning whether employers could meet the burden in the context of undocumented workers, the court explained, “[r]egrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.” 229

In another case, the employer argued that an undocumented worker who had submitted a fraudulent Social Security card at the time of hiring was barred from seeking a remedy for unlawful termination based on disability discrimination because of the after-acquired evidence and unclean hands doctrines. 230 While that court found that summary judgment was inappropriate under the after-acquired evidence doctrine because questions of fact remained as to whether the employer had prior knowledge of the employee’s immigration status, the court held that the unclean hands doctrine barred plaintiff’s claims in their entirety. 231

Thus, in the Title VII/state antidiscrimination area, at least one court relied upon existing fault based doctrines that are unrelated to the fault-based constructions discussed in Hoffman, including the after-acquired

227 Rivera v. NIBCO, 364 F.3d 1057 (9th Cir. 2004).
228 Id. at 1072 (citing O’Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 758-59 (9th Cir. 1996).
229 Id.
231 Id. at *8-9.
evidence doctrine and the unclean hands doctrine to limit or bar recovery. Pursuant to established precedent, in order to succeed on the after-acquired evidence defense, the employer must prove that it would have fired the undocumented worker on the basis of status alone. An employer may have difficulty proving this given the practice, in certain industries, of intentionally hiring undocumented workers. Whether the equitable doctrine of unclean hands can be applied in the Title VII/state antidiscrimination statutory context to bar relief to undocumented workers is an open question.

As undocumented workers seek the courts protection against workplace abuses, courts appear to be struggling with the absence of definitive guidance from Congress as to how to balance competing legislative priorities – enforcing immigration laws designed to prohibit undocumented workers from employment and enforcing state and federal workplace laws designed to protect employee from workplace abuses. Relying upon the fault constructs that emanate from the *Hoffman* decision, courts examine the potential for future fault and past fault either rooted in an existing fault doctrine or unrooted to any existing doctrine. Courts’ use of the future fault construct upholds separation of powers principles in that it is designed to effectuate legislative intent. Judicial application of past fault however, is problematic in two ways: either courts improperly apply existing fault doctrines to the undocumented worker context by failing to require a nexus between the alleged wrongdoing and the claims; or alternatively, courts apply concepts of fault unrelated to any existing doctrine which appear to be judicial policy making about immigration in the context of a labor or employment case. On each end of the decision making spectrum courts are either supporting or undermining separation of powers principles and those decisions that undermine separation of power principles are the most troubling. In the middle, are courts that at least cabin their decision-making in the framework of existing doctrine, but problems arise where courts fail to require a nexus between the immigration wrong and the injury for which the employee is seeking redress.

**D. Conclusion**

In the absence of federal legislation designed to reform the immigration system, federal and state courts will continue to confront cases involving undocumented workers in the labor and employment context. Continued reliance by courts upon concepts of fault related to immigration status to resolve questions of how to balance the difficult competing policy objectives set forth in immigration and labor and employment statutes present the potential for courts to step into the void and legislate
immigration policy from the bench. Until Congress acts, courts have to find alternative ways to resolve these thorny questions that uphold concepts of separation of powers, transparency, predictability and standards. Failure to do so will exacerbate the development of an incoherent body of law surrounding the rights undocumented workers in the workforce.