

# Working Above the Law:

## Why a Legislative Solution to the Hoffman Plastic Compounds Decision is Long Overdue

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Justice  
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### I. Introduction

America is known as a nation of immigrants. In 2008, the Department of Homeland Security (DHS) reported that there were an estimated 12.8 million legal permanent residents and 11.6 million undocumented immigrants in the United States. Of the estimated 11.6 million undocumented immigrants, approximately six to eight million participate in the United States labor market. Many come because they hope for a better life and future for themselves and their children. Others come to join the family that is already living here or to escape persecution in their country of origin. In an attempt to avoid creating a subclass of workers, up until recently, the United States government maintained a baseline of individual and collective rights that protected all workers, regardless of immigration status.

Immigrants fill a variety of jobs and needs in the United States labor market. Studies show that immigrant labor is key to maintaining the health of the U.S. economy. The United States workforce is aging and becoming more and more skilled. With these changes, there are fewer individuals born in the United States filling jobs in areas such as agriculture, manufacturing, service occupations and construction. Researchers have predicted that as the trend of U.S. workers aging and growing more skilled continues, even more workers will be needed in many different industries. In addition, while many Americans may think that immigrants are only filling jobs because they depress wages to substandard levels, evidence shows that many immigrants fill jobs that pay significantly above minimum wage. Despite this demand for workers, U.S. immigration laws provide a very limited number of visas that leave some businesses short of needed employees. While undocumented workers occupy an estimated six million jobs in America, many in the agriculture and service sectors, the current visa system only provides approximately 200,000 visas for unskilled labor. A quick comparison demonstrates that immigration laws are out of tune with current labor needs.

Despite the proven benefits of immigration, hostility toward immigrants has significantly grown in recent years, resulting in the growth of enforcement initiatives intended to identify and deport undocumented immigrants. Americans

have generally accepted these programs because of their fear of terrorism and a growing belief that undocumented immigrants are more likely to commit crime, increase the poverty rate and overburden state and local institutions such as hospitals and schools. In addition to the rise of enforcement initiatives targeting all immigrants, the rights of the undocumented worker have come under attack in the United States judiciary, most notably in the 2002 United States Supreme Court decision *Hoffman Plastic Compounds v. NLRB* (*Hoffman Plastic*).

In *Hoffman Plastic*, the Supreme Court held that federal immigration policy foreclosed the National Labor Relations Board from awarding backpay to an undocumented worker who was fired because of his support of a union organizing

campaign in his workplace. Although the employer had clearly committed an unfair labor practice in violation of the National Labor Relations Act, the Supreme Court ignored the employer's blatant labor violations and focused instead on the worker's violation of United States immigration laws. In doing so, the Supreme Court provided employers with incentives to hire undocumented workers and intimidate them from collectively

bargaining, thereby violating both U.S. immigration and labor laws. Undocumented workers, with little to no bargaining power or legal protection, have become even more vulnerable to abuse and exploitation. Because undocumented workers are essentially unable to unionize, the ability of all workers to protect their rights by taking part in collective action is severely restricted. The result is that many workers now have no way to participate in collective action in order to ensure a safe work environment, reasonable benefits, and a livable wage.

Eight years have passed since the *Hoffman Plastic* decision, and Congress has yet to meaningfully address the issue. Despite government agencies expressing criticism and advocacy groups working tirelessly to mitigate its impact, Congress has not acted. In order to safeguard important workplace rights, Congress should create a legislative solution that reverses the negative consequences of *Hoffman Plastic*



and clarifies the tensions between the nation's immigration enforcement laws and protective employment laws.

This paper will first provide a brief historical overview of the development of labor and employment protections as well as the increased tensions between immigration law and labor and employment law. Second, it will discuss the *Hoffman Plastic* decision and its rationale. Third, it will explore the impact of the decision and what actions federal agencies and advocacy groups have taken to mitigate its impact. And finally, it will suggest recommendations for how the decision can essentially be reversed through federal legislation.

## II. Brief Historical Overview

### a. The Development of Important Labor and Employment Law Protections

Labor and employment law have seen major developments over the past century. Since World War I, numerous laws have been passed that provide workers with the right to unionize, the right to certain health and safety protections and the right to a minimum wage, among many other protections. The National Labor Relations Act (NLRA or Act), passed in 1935, is the primary law governing relations between employers and unions in the private sector. It is a remedial law that guarantees workers the right to unionize and bargain collectively with their employers or to refrain from these activities if they so choose. The Act was unique at the time of its passage as it was the only law that created a process by which workers, as a collective unit, could assert their rights. Instead of granting workers individual rights, “[w]orkers could gain substantive rights . . . [only] by joining together in labor organizations and using their collective economic power to persuade employers to grant employees’ rights in collective bargaining agreements.” The premise of the Act was that individual and group rights were best protected

through collective action.

An employer violates the Act by discriminating against employees in regard to hiring or tenure for the purpose of encouraging or discouraging membership in a labor organization, or by discriminating against an employee because of the employee’s union or other group activity that falls within the protection of the Act. Backpay, as the only monetary remedy available under the NLRA, is the most important and significant remedy provided and it usually compensates workers for lost future earnings, or “renumerable work lost because of discharge.” Other possible remedies under the NLRA include requiring the employer to post a notice about the violations of the Act or telling the employer to “cease and desist” from its violations.

Congress created the National Labor



Relations Board (NLRB) to administer the NLRA. The functions of the NLRB are twofold: (1) to use secret ballot elections to determine if employees wish to be represented by a union in dealing with their employers, and if so, which union, and (2) to prevent and remedy unfair labor practices by employers and/or unions. While the NLRB governs the administration of the NLRA, there are many employment laws that are enforced either through the U.S. Department of Labor (DOL), which administers laws such as the Federal Labor Standards Act (FLSA) or the Equal Employment Opportunity Commission (EEOC), which administers law such as Title VII. FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards while Title

VII makes it illegal to discriminate against someone because of race, color, religion, sex or national origin.

### b. The Relationship Between Immigration Law and Labor and Employment Law

It was only recently that immigration enforcement and employment law became significantly intertwined. When the Immigration and Nationality Act (INA) was passed in 1952, there was no mention of how immigration law would interact with employment protections. While the INA made it illegal to enter the country without permission, an individual who did so and then obtained employment did not violate U.S. law. Until the passage of the Immigration Reform and Control Act (IRCA) of 1986, for the most part, courts did not question the right of undocumented workers to sue their employers under U.S. labor and employment laws. Instead, courts consistently held that undocumented workers were able to sue their employers under laws such as NLRA, FLSA and Title VII.

The primary goal of IRCA is to deter and control illegal immigration into the United States. The law imposes civil and criminal penalties on employers who knowingly hire undocumented workers, requires employers to verify an employee’s work authorization status before starting employment and forbids the use of fraudulent papers to obtain legal employment. Despite the passage of IRCA and the newly created link between immigration status and the ability to obtain lawful employment, undocumented immigrants continued to benefit from the protections of U.S. labor laws for many years without significant judicial or legislative opposition. ■

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