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Aftermath of September Eleventh: Increased Exploitation of Undocumented Workers in the Workplace, The

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COMMENT

The Aftermath of September Eleventh: Increased Exploitation of Undocumented Workers in the Workplace.

I. INTRODUCTION

On September 11, 2001, commercial airplanes crashed into the World Trade Center, the Pentagon, and a field in Pennsylvania.[1] Of the nineteen hijackers, all were believed to have entered the United States legally, but at least three of the nineteen hijackers had overstayed their authorized period in the United States.[2] The Federal government immediately responded to the horrible mass destruction and loss of life.[3] As part of this response, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act).[4] This Act has had a large effect on American immigration and labor laws.[5]

Immigrant workers, including those that are undocumented, are an integral part of the workforce in the United States.[6] It is indisputable that these workers enrich this country and improve its quality of life.[7] Recognizing this, prior to September eleventh, American immigration and labor laws generally granted illegal immigrant workers protections similar to their American counterparts.[8] However, the USA Patriot Act runs counter to the

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1. Catherine Etheridge Otto, *Tracking Immigrants In the United States: Proposed and Perceived Needs to Protect the Boarders of the United States*, 28 N.C.J. INT'L L. & COM. REG. 477 (2002).

2. *Id.*

3. *Id.* The U.S. government initiated military action in Afghanistan. *See* Kevin R. Johnson, *Beyond Belonging: Challenging the Boundaries of Nationality: September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 850 (2003). The month after September 11, the U.S. government arrested and detained more than one thousand Arab and Muslim people. *Id.*

4. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, § 412, 201-25, 115 Stat. 272, 278-96, 350-52 (2001) [hereinafter USA Patriot Act].

5. *War on Terrorism and Immigration Enforcement; Congressional Testimony by Federal Document Clearing House Testimony Before Subcommittee on Immigration, Border Security, and Claims House Judiciary Committee*, [107th] Cong. Testimony (2003) (page numbers are unavailable) (statement of Laura W. Murphy, Director, ACLU Washington National Office). The result of this Act has been increased exploitation of undocumented workers with less protection. *Id. See also infra* Part III. Particularly, two sections, sections 402 and 411 of the USA Patriot Act have an impact on the immigration laws. *Id.* Further, the Act has adversely affected the court's interpretation of the labor laws. *Id.* In this comment, the term "labor law" is used to refer to the law governing unions and collective bargaining agreements, general employment laws, and other laws governing the workplace. *See infra* Parts II-III. In this comment, the term "immigration law" means all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens. *See infra* Parts II-III.

6. *See infra* Part II for an explanation of employment law's recognition that immigrants play a pivotal role in this nation's economy.

7. *See infra* note 52 for a discussion of this nation's dependence on immigrant workers in labor intensive industries.

8. *See infra* Part II for an explanation of the legislative history of immigration laws; *see infra* Part II (explaining that Federal Labor laws included undocumented workers under the definition of "employee" covered by the acts).

tradition of protecting undocumented workers and has created an adverse effect on those workers, which will be discussed in Part III.[9]

This comment analyzes the effects of September eleventh and the subsequent passage of the USA Patriot Act on American immigration and labor laws and in particular the negative impact on undocumented workers.[10] As part of the analysis, this comment will present alternatives to current policy regarding undocumented workers with the intent to resolve the dilemma of how to protect undocumented workers and still prevent terrorist acts. Additionally, because there are an increasing number of undocumented workers in Wyoming, this comment will discuss Wyoming's state labor law in light of protecting undocumented workers.[11]

Part II of this comment will examine American immigration and labor laws and will demonstrate how they were meant to protect undocumented workers.[12] Specifically, this part will review the legislative intent and courts' interpretation of pertinent statutes prior to September eleventh. It will also illustrate that the partial purpose of these laws was to protect undocumented workers from illegal exploitation by employers.[13] Further, this part will discuss Wyoming worker's compensation law.[14] This part will argue that Wyoming's approach to undocumented workers in interpreting its worker's compensation statute is an exception to both the majority of states' and the U.S. Supreme Court's approach to protecting these workers, which results in exploitation of these worker's labor rights.[15]

Part III will analyze both the USA Patriot Act and the subsequent Enhanced Border Security and Visa Reform Act passed after September eleventh and will detail how these Acts dramatically affect immigrant work-

9. *See infra* Part III.

10. *See infra* Part II and Part III.

11. *Illegal-Immigrant Arrests Rise in 3 States*, LOS ANGELES TIMES, Mar. 2, 2003, at 17. The number of illegal immigrants arrested in Colorado, Wyoming and Utah soared last year to 12,183, a thirty two percent jump over 2001. *Id.* Deborah Sharp, *Employers Praise 'Guest Worker' Plan*, USA TODAY, Jan. 8, 2004, at 3A. The number of undocumented workers as of 2000 in Wyoming's neighboring states was as follows: Colorado, 144,000; Utah, 65,000; Nebraska, 24,000; Washington, 136,000. *Id.* The number of undocumented workers in Wyoming is expected to rise because of the increasing numbers of these workers in neighboring states, as well as the oil and gas industries in Wyoming. *See* Part II; *see also*, Department of Employment, Labor Standards, State of Wyoming, *available at* http://wydoe.state.wy.us (last visited December 6, 2004). Undocumented workers in Wyoming are typically employed in high level working hazards such as gas fields. *See infra* Part II. Therefore, this comment will analyze Wyoming worker's compensation law. *Id.*; *see infra* Part II. The federal and the majority of states' approaches include undocumented workers as "employees," but Wyoming remains only one of two states who do not interpret its law that way. *See infra* note 94.

12. *See infra* Part II.

13. *See infra* Part II.

14. *See infra* note 94.

15. *See infra* Part II; *see also* Sure-tan v. NLRB, 467 U.S. 883 (1984).

ers and undocumented workers.[16] This part will illustrate the negative impact these statutes have on immigrant communities, including racial profiling, discrimination, and increased immigration enforcement. It will show how this general adverse effect impacts undocumented workers' rights and remedies in federal labor laws.[17]

Part III will also explain how the aftermath of September eleventh and the USA Patriot Act's impact on undocumented workers is inconsistent with the traditional impetus of immigration and labor laws.[18] Particularly, this part will demonstrate how the increased deportation powers of the U.S. Citizenship and Immigration Service (USCIS) (formerly the Immigration and Naturalization Service (INS)) conflict with certain labor laws, such as the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), and other laws governing the workplace. Further, this part will demonstrate how the recent U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB* undermines how employment and immigration laws have historically protected undocumented workers by controlling employers' illegal activities.[19] Finally, this part will show how the USA Patriot Act and subsequent general changes of judiciary attitude conflicts with the underlying policy of Title VII.[20]

Part IV will suggest possible alternatives to reconcile the dilemma between the protection of undocumented workers and the fear of terrorism in the United States. This part proffers two possible alternatives and implementation methodologies.[21] Such alternatives include providing incentives to undocumented workers who report illegal employer activities.[22]

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16. Pub. L. No. 107-73, 116 Stat. 543 (2002) (codified in scattered sections of U.S.C. for the Enhanced Border Security and Visa Reform).

17. *See infra* Part III.

18. *See infra* Part III. A. 3.

19. The U.S. Citizenship and Immigration Service (USCIS), *available at* http://uscis.gov/graphics/aboutus/index.htm (last visited November 15, 2004). The Immigration and Naturalization Service (INS) has been replaced by USCIS within the Department of Homeland Security (DHS); USCIS provides information about various administrative and management functions and responsibilities now within DHS that were once in the former Immigration and Naturalization Service (INS). *Id.* The terms "INS" and "USCIS" will be used interchangeably throughout this comment. *See* Parts II-IV; *see also* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

20. 42 U.S.C. § 2000e et seq. (2004); *see infra* note 73 for an explanation of specific section of the Title VII.

21. *See infra* Part IV.

22. *See infra* Part IV for a discussion of possible incentives to undocumented workers who report illegal employer's activities and how to implement these incentives.

II. IMMIGRATION AND LABOR AND EMPLOYMENT LAWS INTENDED TO PROTECT UNDOCUMENTED WORKERS IN THE WORK PLACE

After September 11, 2001, the U.S. Government created the U.S. Department of Homeland Security and enacted the U.S.A. Patriot Act.[23] As a result, American immigration policy became focused on visa and border monitoring, which resulted in increased immigration enforcement.[24] Prior to September eleventh, the majority of immigration laws did not have that purpose.[25] Rather, they were created at least in part to protect undocumented workers by controlling unlawful employer activities.[26]

An "undocumented worker" is one who is not a citizen or national of the United States and is not lawfully admitted for permanent residence or authorized by law to work in the United States.[27] Undocumented workers, because of fear of deportation, are vulnerable to unfair labor practices because they are not likely to report an employer's illegal behavior.[28] Such unwillingness to report creates an incentive for employers to hire undocumented workers because they do not fear labor law penalties.[29] Labor and immigration laws respond to this problem by providing undocumented workers who are mistreated full rights and remedies.[30] The availability of such rights and remedies reduces the incentive to hire undocumented workers because employers are less apt to hire undocumented workers if they know they will be punished for unfair labor practices.[31]

A. U.S. Immigration Laws And Undocumented Workers

1. Immigration and Nationality Act of 1952

Although amended many times, the Immigration and Nationality Act of 1952 (INA) "continues to be the basic immigration law of this country."[32] Congress, through the INA, created the INS to regulate the entry into

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23. *See supra* note 4.
24. Elizabeth R. Baldwin, *Staking Claim to Employment Law Remedies For Undocumented Immigrant Workers After Hoffman Plastic Compounds, Inc. v. NLRB*, 27 SEATTLE U.L. REV. 233, 238-41 (2003); *See also* Johnson, *supra* note 3, at 858.
25. *See infra* Part II. A-B (describing new immigration and labor laws were intended to protect undocumented workers by controlling unlawful employer behavior).
26. *See infra* Part II. A-B for an explanation of Congressional intent to enact the immigration and labor laws.
27. 8 U.S.C. § 1324 a(h)(3) (2004); *see* Irene Zopoth Hudson & Susan Schenck, *America: Land of Opportunity or Exploitation?*, 19 HOFSTRA LAB. & EMP. L.J. 351, 358 (2002).
28. *See infra* Part IV.
29. *Id.*
30. *See infra* Part II. B.
31. Hudson & Schenck, *supra* note 27, at 356.
32. Baldwin, *supra* note 24, at 237-38; Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2004).

and deportation of aliens in the United States.[33] Passing the INA, Congress hoped to preserve jobs for legal American workers by regulating immigration.[34] However, soon after enacting INA, Congress recognized the INA was not effective for keeping undocumented workers from entering the United States workforce because it was still legal to hire them.[35]

2. Immigration Reform and Control Act of 1986

Congress passed the Immigration Reform and Control Act of 1986 (IRCA) to meet shortcomings of the INA.[36] IRCA changed immigration policy because "it penalized employers for hiring undocumented workers" and it "provided procedures for undocumented people who entered the country prior to 1982 to become legal residents or citizens."[37] The employer sanction provision was unprecedented because, prior to the passage of IRCA, it was still legal to hire undocumented workers.[38] IRCA required employers to check work authorization for their employees after 1986.[39] IRCA focuses on employers, not illegal aliens, by imposing fines and imprisonment for those who knowingly hire or employ undocumented workers or who do not check work authorization.[40] It does not punish undocumented workers who seek or take employment.[41]

The legislative history shows IRCA, at least in part, was aimed at deterring the exploitation of undocumented workers' cheap labor.[42] Specifi-

33. 8 U.S.C. §§ 1225-1227 (2004).

34. Sure-tan v. NLRB, 467 U.S. 883, 892 (1984) (explaining Congress' intent for enacting the INA was to protect undocumented workers).

35. Baldwin, *supra* note 24, at 238.

36. The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324(a) (2004); Baldwin, *supra* note 24, at 238.

37. Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 612 (1994); 8 U.S.C. § 1255(a) (2004). To be eligible to become a legal residency or citizenship, a person must show that she has been in continuous residence in the United States. 8 U.S.C. § 1255(a) (2004).

38. Hudson & Schenck, *supra* note 27, at 362.

39. 8 U.S.C. § 1324a(i)(1) (2004). Employers do not have to check that employees hired before this date have a legal right to work in the United States. *Id.*; Ontiveros, *supra* note 37, at 612.

40. 8 U.S.C. § (a)(e)(4). The IRCA provides a gradual scale of penalties for violations of the statute such as fines. *Id.* §§ 1324 (a)(e)(i), (f)(1). Employers are sanctioned with criminal penalties for repeated violations of the IRCA. *Id.*

41. *Id.* § 1324(c) (Supp. IV 1992). The only employee or applicant activity that is criminalized is the fraudulent use of employment verification documents. *Id.*

42. Baldwin, *supra* note 24, at 239. Congress recognized that such enforcement to control illegal employers' conduct furthers the IRCA's purpose by diminishing employer incentives to hire undocumented workers in order to take advantage of an easily exploited workforce; for example, Congressman Rodino stated that "[i]n my judgment, employer sanctions [under IRCA] are essential if this country is to regain control of its borders." *Conference Report on S. 1200, Immigration Reform and Control Act of 1985*, 132 CONG. REC. H10583-01 (daily ed. Oct. 15, 1986).

cally, IRCA "authorizes funds for the U.S. Department of Labor's (DOL) Wage and Hour Division to enforce employment standard" for undocumented workers.[43]

3. Illegal Immigration Reform and the Immigrant Responsibility Act of 1996

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRRA) in an effort to change employers' hiring procedures because IRCA had not decreased illegal immigration to the United States.[44] Notably, IIRRA imposed criminal penalties for some activities involved in by both employers and undocumented workers.[45] It was designed to decrease hiring undocumented workers.[46] For example, employers who knowingly and purposely hire ten or more undocumented workers over a one-year period are subject to criminal penalties, while IRCA imposes criminal sanctions only for repeated violations.[47] Imposition of these types of penalties caused employers who were hiring undocumented workers to change their hiring practices.[48]

As demonstrated, past immigration laws in the United States were aimed at preserving jobs for American workers by deterring employers from hiring undocumented workers.[49] At the same time, Congress also intended to address the treatment of immigrants themselves, who have been known to bear modern slave-like working conditions, by controlling employers' illegal conduct.[50] In sum, the policy embodied in past immigration law was consistent with the labor law as described below.

B. U.S. Labor Laws and Undocumented Workers

Although part of the underlying policy of U.S. immigration law is to protect undocumented workers, U.S. employment law offers even more pro-

43. Baldwin, *supra* note 24, at 239-40; *see also* Pub. L. No. 99-603, 111(d), 100 Stat. 3359 (Nov. 6, 1986).

44. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-3546 (September 30, 1996) (codified in scattered sections of 8 U.S.C.); Hudson & Schenck, *supra* note 27, at 364.

45. Hudson & Schenck, *supra* note 27, at 364. Employers continue to hire undocumented workers "because [enforcement of sanctions for their acts] is sporadic and penalties are low compared to the financial benefits realized." *Id.* Because of this pattern, which was not adequately addressed in IRCA, Congress increased the penalties in this law. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Baldwin, *supra* note 24, at 240; *see infra* Part IV (illustration of abused deaf Mexicans).

tection.[51] Immigration labor plays a pivotal and critical role in this nation's economy.[52] Accordingly, immigrant workers need the protection of U.S. labor and employment laws as American legal workers do.[53] Recognizing this, current federal labor and employment law policy affords undocumented workers protection comparable to U.S. workers because federal labor and employment laws make no distinction based on alienage.[54]

The Second Circuit's decision in *NLRB v. A.P.R.A. Fuel Oil Buyers Group* illustrates this point.[55] In that case, the employer knowingly hired two undocumented workers and discharged them when they engaged in union organizing activities.[56] The Court noted that IRCA does not preclude the NLRB from fashioning appropriate remedies for undocumented workers' rights under NLRA.[57] Thus, the court of appeals upheld the NLRB's conditional reinstatement and backpay orders as appropriate.[58]

1. The National Labor Relations Act

The National Labor Relations Act (NLRA) provides the important law governing relations between unions and employers in the private sector.[59] The NLRA allows the employees to collectively bargain with their employers and organize.[60] The NLRB administers the NLRA.[61]

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51. *See* Karen A. Herrling, *Federal Employment Laws and Immigrant Workers*, 00-11 IMMIGR. BRIEFINGS 1 (2000) (page numbers are unavailable).

52. *Id.* Herrling argues that:

> Immigrant labor represents twelve percent of this nation's workers and many industries depend heavily on their labor. Immigrant workers represent thirty-four percent of those working in households; twenty one point four percent of those providing other personal services; eighteen point five percent of the workers in "eating and drinking places"; and twelve point eight percent of construction industry employees. Eighty one percent of farm workers were foreign-born in 1997-98. Immigrants also dominate the garment, meatpacking, and poultry processing industries. Further, there was an estimated seven point eight million undocumented workers residing in the United States in 2001.

Id. See Jason Shumann, *Working in the Shadows: Illegal Alien's Entitlement to State Worker's Compensation*, 89 IOWA L. REV. 709, 710 (2004).

53. *See* Herrling, *supra* note 51.

54. *Id.*; *see infra* Part II. B. 1-3 (explaining each labor law's definition of employees).

55. NLRB v. A.P.R.A. Fuel Oil Buyers Group, 134 F.3d 50, 52 (2d Cir. 1997).

56. *Id.*

57. *See id.* at 55-57; *see also* 29 U.S.C. §§ 151-169 (West 2004).

58. *A.P.R.A. Fuel*, 134 F.3d at 55-57.

59. 29 U.S.C. §§ 151-169.

60. *Id.*

61. *Id.* §§ 153-156. The NLRB has two main functions: to conduct representation elections and certify the results and to prevent employers and unions from engaging in unfair labor practices. *Id.*

The NLRA defines "employee" as any employee of an employer, including individuals whose work has ceased because of a current labor dispute or unfair labor practice.[62] The Supreme Court has recognized undocumented workers "[p]lainly come within the broad statutory definition of 'employee'."[63] Therefore, undocumented workers are considered "employees" under the NLRA.[64] Under the NLRA, the NLRB can order an employer to stop violating the law, pay workers back wages and benefits, reinstate employees, or undo any adverse action taken against workers because of their union or organizing activities.[65]

2. Fair Labor Standards Act

The Fair Labor Standards Act of 1938 (FLSA) is the federal law designed to eliminate substandard working conditions by establishing minimum wage, overtime pay, record keeping, and child labor standards.[66] The FLSA protects all covered employees without considering their citizenship or work eligibility.[67] Courts have recognized that undocumented workers are entitled to file complaints against employers and enjoy the same protection against retaliation as legal workers when they assert their FLSA rights.[68]

Undocumented workers may be eligible for remedies such as back pay and punitive damages because nothing in the FLSA limits the remedies

62. *Id.* § 152(3).

63. Sure-tan v. NLRB, 467 U.S. 883, 892 (1984); NLRB v. Apollo Tire Co., 604 F.2d 1180, 1182-83 (9th Cir. 1979). The NLRA defines "[employee] broadly and provides specific exceptions, but illegal aliens are not among the exceptions." *Apollo Tire Co.*, 604 F.2d at 1182.

64. *See Sure-tan*, 467 U.S. at 891-92. Workers who do not fall within the definition of employee include agricultural laborers, domestic employees, individuals employed by parents or spouses, independent contractors, supervisors, and individuals employed by an employer subject to the Railway Labor Act. 29 U.S.C. § 152(3) (2004).

65. *See Memorandum from Fred Feinstein, General Counsel, to All Regional Directors, Officers-in-Charge and Resident Officers*, *available at* www.nlrb.gov/gcmemo/gc98-15.html (last visited on December 6, 2004), wherein the NLRB stated that it would seek reinstatement and back pay for undocumented aliens. *Id.* The Board was concerned that "[u]nscrupulous employers would hire undocumented aliens because they could terminate them with no risk of backpay as soon as union activity commenced and the IRCA's fines for improper hiring might be considered by those employers . . . a reasonable cost of doing business." *Id.*

66. 29 U.S.C. §§ 206(a)(b), 207(a), 211(c) (2004); Hudson & Schenck, *supra* note 27, at 366.

67. *See* Patel v. Quality Inn. South, 846 F.2d 700, 704-05 (11th Cir. 1988). Undocumented aliens are "employees" covered by the FLSA. *Id.*; In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987). The protections of the FLSA are applicable to citizens and aliens alike. *In re Reyes*, 814 F.2d at 170. Whether the alien is documented or undocumented is irrelevant. *Id.*

68. *Patel*, 846 F.2d at 704-05.

available to any workers under the FLSA.[69] Thus, the FLSA protects the health, efficiency, and general well-being of all workers.[70]

3. Federal Antidiscrimination Laws

Title VII of the Civil Right Act of 1964 (Title VII) prohibits employers from discriminating against an individual on the basis of race, color, religion, sex, or national origin.[71] This Act bars employers from discriminating against employees in the workplace, which is consistent with other federal laws including the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967 (ADEA), Title I of the Americans with Disabilities Act of 1990 (ADA), and the Civil Rights Act of 1991.[72] The Equal Employment Opportunity Commission (EEOC) enforces these federal laws.[73]

Generally, these laws protect all individuals from employment discrimination in the United States without considering those individuals' legal status.[74] The EEOC and most courts allow this federal antidiscrimination to protect undocumented workers.[75]

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69. *See* Contreas v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053, 1059-60 (N.D. Cal. 1998).

70. Baldwin, *supra* note 24, at 241.

71. 42 U.S.C. § 2000e et seq. (2004).

72. Equal Pay Act, 29 U.S.C. § 206(d) (2004); ADA, 42 U.S.C. § 12101 (2002); Civil Rights Act of 1991, 42 U.S.C. § 1981(a) (2004).

73. 42 U.S.C. § 2000e-4 (2004). The EEOC was established by Title VII of the Civil Rights Act of 1964 and began operating on July 2, 1965. *Id.* The EEOC enforces the following federal statutes: 1) Title VII of the Civil Rights Act of 1964, as amended, prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin; 2) the Age Discrimination in Employment Act (ADEA) of 1967, as amended, prohibiting employment discrimination against individuals forty years of age and older; 3) the Equal Pay Act (EPA) of 1963 prohibiting discrimination on the basis of gender in compensation for substantially similar work under similar conditions; 4) Title I and Title V of the Americans with Disabilities Act (ADA) of 1990, prohibiting employment discrimination on the basis of disability in the private sector and state and local governments; 5) Section 501 and 505 of the Rehabilitation Act of 1973, as amended, prohibiting employment discrimination against federal employees with disabilities; and 6) the Civil Rights Act of 1991 providing monetary damages in cases of intentional discrimination and clarifying provisions regarding disparate impact actions. U.S. Equal Employment Opprtunity Commission, *available at* http://www.eeoc.gov (last visited on December 6, 2004).

74. *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (noting that Title VII protects non-citizens against discrimination on the basis of race, color, sex, religion, and national origin); EEOC v. Switching Systems Div. of Rockwell Int'l Corp., 783 F. Supp. 369, 374 (N.D. Ill. 1992) (explaining Title VII's protections extend to aliens who may be in this country either legally or illegally). However, the Fourth Circuit has decided illegal aliens have no cause of action under Title VII. Egbuna v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998). The *Egbuna* court held an applicant unauthorized to work in the United States has no cause of action under Title VII for an allegedly discriminatory refusal to hire. *Id.* The EEOC has stated publicly that it disagrees with the Fourth Circuit and it has declared that it will work to ensure that unauthorized workers are protected to the same degree as all other

Title VII bars employers from discriminating in virtually all aspects of employment.[76] An employer cannot discriminate against any individual "when he or she hires, fires, transfers, promotes, assigns work, lays-off, advertises for jobs, recruits, trains, provides fringe benefits, compensates, or awards disability leave."[77] The remedies for employers' violation may include relief such as back pay or reinstatement.[78] Undocumented workers victimized by discrimination after being hired are generally entitled to the same types of remedies as legal employees.[79] Further, employers may be subject to penalties if they take retaliatory action against undocumented workers, even though the employer can be sanctioned under IRCA for continuing to employ the undocumented worker.[80] In sum, even a limited review of the federal labor and employment law indicates Congress' desire to deter employment discrimination, and when discrimination occurs, to create mechanisms compensating the injured employees, even if those employees are undocumented workers.[81]

4. Other labor laws (State Worker's Compensation)

While enforcing immigration legislation is undeniably an exclusively federal power, states may impose controls on undocumented workers in a manner that "mirrors federal objectives and furthers a legitimate state goal."[82] Therefore, States, while extending labor protecting their labor work force in the form of worker's compensation states, must comply with federal immigration laws like IRCA.[83]

A worker is eligible for worker's compensation if he or she suffers injuries within the course and scope of employment.[84] Several state legislatures have made an effort to extend the meaning of "employees" under their

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workers. Hudson & Schenck, *supra* note 27, at 367 ("EEOC says Discrimination Laws Protect Illegal Aliens.")

75. Hudson & Schenck, *supra* note 27, at 367.

76. 42 U.S.C. § 2000e-2 (2004) (Unlawful employment practices); *id.* § 2000e-3 (Other unlawful employment practices).

77. Herring, *supra* note 51; 42 U.S.C. §§ 2000e-2, e-3.

78. Hudson & Schenck, *supra* note 27, at 367-68.

79. 42 U.S.C. § 2000e-5(g) (2004) (injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders); Albermarle Paper Co. v. Moody, 422 U.S. 405, 418-21 (1975) (holding the purpose of Title VII to end discrimination is not changed if the victims of the discrimination happen to be undocumented workers).

80. 42 U.S.C. § 2000e-5(g); *see* Hudson & Schenck, *supra* note 27, at 367-69.

81. Baldwin, *supra* note at 24, at 242.

82. DeCanas v. Bica, 424 U.S. 351, 354 (1976); Plyer v. Doe, 457 U.S. 202, 225 (1982).

83. *See supra* note 36.

84. Herrling, *supra* note 51. The injury does not have to be someone else's fault; an employee can receive worker's compensation even if his or her own mistake caused the injury. *Id.* Also, a worker can obtain benefits whether the injury or sickness is temporary or permanent. *Id.*

state workers compensation laws.[85] The rationale behind this effort is to provide adequate, predictable, and efficient remedies to employees affected by work-related conditions that lead to work-related injuries.[86]

In Wyoming, for instance, because undocumented workers are typically employed in areas that expose them to high-risk working hazards without sufficient training, they are likely candidates for workers compensation claims.[87] However, Wyoming is one of few states which has not adopted the majority of states' approach to protecting undocumented workers under its worker's compensation laws. In *Felix v. Wyo. Worker's Safety & Comp. Div.*, the Wyoming Supreme Court held an alien not authorized to work in the United States is not an "employee" under Wyoming state law and therefore is not entitled to workers compensation benefits.[88] The Wyoming statute at issue defined an "employee" as "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 and *aliens authorized to work by the United States department of justice, immigration and naturalization service.*"[89] The statute further provided a list of sixteen exclusions of persons who were not regarded as "employees."[90] Unauthorized aliens were not one of these exclusions.[91]

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85. CAL. LAB. CODE §§ 3351, 3357 (LexisNexis 2004). In California, the term "employee" is defined broadly to include every person in the service of an employer under any appointment, contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully. *Id.* In *Artiga v. M.A. Patout and Son*, 671 So. 2d 1138 (La. Ct. App. 1996), the court held that the Louisiana Worker's Compensation Act does not exclude illegal aliens from securing worker's compensation benefits when justified. The court in *Lang v. Landarous* held that there is no provision in the Workers Compensation Act that precludes compensation for an employee who is an illegal alien. *Lang v. Landarous*, 918 P.2d 404. *See also* Gene's Harvesting v. Rodriguez, 421 So. 2d 701 (Fla. App. 1 Dist. 1982) (holding an alien illegally in this country is entitled to Chapter 440 benefits for a work-related injury notwithstanding his immigration status). The Florida court interpreted FLA. STAT. ch. 440.02(2)(a) (1980 Supp.), "which specifically includes aliens among those 'employees' entitled to benefits, and nothing in the statute suggests that workers not lawfully immigrated are excluded." *See Rodriguez*, 421 So. 2d 701.

86. Baldwin, *supra* note 24, at 242.

87. Lynn Neary, *New Immigration Reform Proposals Announced by President Bush Today*, National Public Radio, Jan. 7, 2004 (3:00 PM ET.)

88. Felix v. Wyo. Worker's Safety & Comp. Div., 986 P.2d 161, 162 (Wyo. 1999).

89. WYO. STAT. ANN. §27-14-102(a)(vii) (LexisNexis 2003) (emphasis added).

90. *Id.* "Employee" does not include:

> (A) Any individual whose employment is determined to be casual labor; (B) A sole proprietor or a partner of a business partnership; (C) An officer of a corporation unless coverage is elected . . . ; (D) Any individual engaged as an independent contractor; (E) A spouse or dependent of an employer living in the employer's household; (F) A professional athlete, except as provided in W.S. 27-14-108(q); (G) An employee of a private household; (H) A private duty nurse engaged by a private party; (J) An employee of the federal government; (K) Any volunteer unless covered

However, the court concluded that, in order to give effect to all language in the statute, an alien who is not authorized to work in the United States is not an "employee."[92] The Court also looked at the statute's legislative history and noted that before 1996, the legislature added the phrase "authorized to work by the United States department of justice, immigration and naturalization service," thus evidencing its intent that only aliens authorized to work in the U.S. be considered "employees" eligible for workers compensation.[93]

Wyoming's workers compensation statute is similar to at least eight other state statues. Those states have interpreted their respective statutes to include undocumented workers as "employees."[94] Because state workers

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> pursuant to W.S. 27-14-108(e); (M) Any adult or juvenile prisoner or probationer unless covered . . . ; (N) An elected public official or an appointed member . . . ; (O) The owner and operator of a motor vehicle which is leased or contracted . . . ; (P) A member of a limited liability company; (Q) A foster parent providing foster care services . . . ; (R) An individual providing child day care or babysitting services . . . .

Id.

91. *Id.*

92. *Felix*, 986 P.2d at 163.

93. *Felix*, 986 P.2d at 164.

94. *See* Shumann, *supra* note 52, at 719-23 for an analysis of whether undocumented workers are typically included in the definition of "employee" for coverage. Eleven states explicitly include the words "unlawfully employed" and "alien" in the definition of "employee" for worker's compensation coverage, including Arizona, California, Colorado, Florida, Montana, Nevada, North Carolina, South Carolina, Texas, Utah, and Virginia. ARIZ. REV. STAT. § 23-901(5)(b) (West 2004); CAL. LAB. CODE § 3351 (West 1989) (amended 1996); COLO. REV. STAT. § 8-40-202(b) (West 2002); FLA. STAT. ch. § 440.02(15)(a) (2002); MONT. CODE ANN. § 39-71-118(1)(a) (2001); NEV. REV. STAT. § 616A.105 (West 2004); N.C. GEN. STAT. § 97-2(2) (2001); S.C. CODE ANN. § 42-1-130 (Law. Co-op 1985) (West 2004); TEX. LAB. CODE ANN. § 406.092 (West 2004); UTAH CODE ANN. § 34A-2-104(1)(b)(ii) (2001) (West 2004); VA. CODE ANN. § 65.2-101 (West 2004) (amended 2003). Eight states included the word "alien" in their respective statutory definition of "employee" "without a specific inclusion of 'unlawfully (or legally) employed' workers, including Alabama, Illinois, Michigan, Minnesota, Nebraska, North Dakota, Ohio, and [*Wyoming.*]" ALA. CODE § 25-5-1(5) (West 2004); 820 ILL. COMP. STAT. 305/1(b)(2) (West 2004); MICH. COMP. LAWS 418.161(l) (2004) (amended 2002); MINN. STAT. 176.011 subd. 9(1) (West 2004); NEB. REV. STAT. § 48-115(2) (West 2004) (amended 2003); N.D. CENT. CODE § 65-01-02(16)(a)(2) (West 2004) (amended 2003); OHIO REV. CODE ANN. § 4123.01(A)(1)(b) (West 2004); WYO. STAT. ANN. § 27-14-102(a)(vii) (West 2004). Courts and agencies in Nebraska, Michigan, and Minnesota interpreted their worker's compensation statutes as including undocumented workers in their respective definitions of alien, and it is likely other states which have similar statutes from those states will follow this interpretation. Some argue the Wyoming Statute says alien *authorized* to work, hence, it does differentiate lawfully and unlawfully employed workers. *See supra* note 93 and accompanying text. However, this is a different reading of the Wyoming statute compared to the majority interpretation. *See supra* note 93. Thirty-one states and the District of Columbia contain no mention of "aliens" in their definition of "employee." These states include Alaska, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York,

compensation statutes usually include an enumerated list of persons excluded from coverage, most courts and agencies interpreting the statutory definition of "employee" find undocumented workers qualify as "employees" until their state legislature adds "illegal aliens" or "undocumented workers" to its exclusion list under the statute.[95] In contrast, the definition the *Felix* court interpreted included only "aliens authorized to work by the United States Department of Justice, Immigration and Naturalization service."[96] Therefore, Wyoming's interpretation is against the majority rule.[97]

In sum, Wyoming's treatment of undocumented workers could be another barrier, particularly after September eleventh and the USA Patriot Act.[98]

Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and the District of Columbia. ALASKA STAT. § 23.30.395(12) (West 2004); ARK. CODE ANN. § 11-9-102(10)(a) (West 2004); CONN. GEN. STAT. § 31-275(9)(a) (West 2004); DEL. CODE ANN. tit., § 19 2301(9) (West 2004) (amended 2002); GA. CODE ANN. § 34-9-1(2) (West 2004) (amended 2000); HAW. REV. STAT. § 386-1 (West 2004); IDAHO CODE § 72-102(11) (West 2004); IND. CODE § 22-3-6-1(b) (West 2004); IOWA CODE § 85.61(11) (West 2004); KAN. STAT. ANN. § 44-508(b) (West 2004); KY. REV. STAT. ANN. § 342.640 (West 2004); LA. REV. STAT. ANN. § 23:1035 (West 2004); ME. REV. STAT. ANN. tit. 39-A, § 102(11) (West 2004); MD. CODE ANN., LAB. & EMPL. § 9-202(a) (West 2004); MASS. GEN. LAWS ch. 152, § 1(4) (West 2004); MISS. CODE ANN. § 71-3-3(d) (West 2004); MO. REV. STAT. § 287.020(1) (West 2004); N.H. REV. STAT. ANN. § 281-A:2(VI)-(VII) (West 2004); N.J. STAT. ANN. § 34:15-36 (West 2004); N.M. STAT. ANN. § 52-1-16 (West 2004); N.Y. WORKERS' COMP. LAW § 2(4) (West 2004) (amended 2003); OKLA. STAT. tit. 85, § 3(8) (West 2004); OR. REV. STAT. § 656.027 (West 2004); 77 PA. CONS. STAT. § 22 (West 2004); R.I. GEN. LAWS § 28-29-2(4) (West 2004) (amended 2002); S.D. CODIFIED LAWS § 62-1-3 (West 2004); TENN. CODE ANN. § 50-6-102(9)(A) (West 2004) (amended 2002); VT. STAT. ANN. tit. 21, § 601(14) (West 2004) (amended 2002); WASH. REV. CODE § 51.08.180(1) (West 2004); W. VA. CODE § 23-2-1a(a)(West 2004); WIS. STAT. § 102.07(1)(a) (West 2004) (amended 2001); D.C. CODE ANN. § 32-1501(9) (West 2004). Four states, Arkansas, Kentucky, Mississippi, and Tennessee, expressly include "unlawfully [or illegally] employed" workers. ARK. CODE ANN. § 11-9-102(9)(A) (2004) (amended 2001); KY. REV. STAT. ANN. § 342.640(1) (Michie 1997) (amended 1998); MISS. CODE ANN. § 71-3-3(d) (2000); TENN. CODE ANN. § 50-6-102(9)(A) (1999). The only exceptions to this pattern of including illegal workers occurs in Virginia and Wyoming. *See* Felix v. Wyo. Worker's Safety & Comp. Div., 986 P.2d 161, 163-64 (Wyo. 1999).

95. Fernandez-Lopez v. Jose Cervino, Inc., 671 A.2d 1051, 1055 (N.J. Super. Ct. App. Div. 1996).

96. *Felix*, 986 P.2d at 162.

97. *See* Sure-tan v. NLRB, 467 U.S. 883, 893-95. (1984); Michael Riley, [*Police*] *Crackdown Tired, Huddled Masses Yearn for Better Days Immigrants Chafe Under Tighter Scrutiny, Laws Designed to Thwart Domestic Terror*, DENV. POST, Sept. 8, 2002 (page numbers not available). The Social Security Administration wrote 750,000 employers nationwide, warning them of potentially false Social Security numbers. *Id.* The agency billed the campaign as an effort to clean up its books. *Id.* But in Colorado alone, advocates for immigrants estimates thousands of undocumented immigrants have lost their jobs as a result. *Id.*

98. *See* Part III.

III. THE AFTERMATH OF SEPTEMBER ELEVENTH

A. The Effect of the USA Patriot Act.

The USA Patriot Act of 2001 was designed to reduce the nation's risk of exposure to future acts of terrorism.[99] Before the Patriot Act, most of our immigration and employment law tended to facilitate commerce, spread democracy, and promote knowledge and international understanding.[100] However, actions by the judiciary and INS after September eleventh reflect a dramatic shift in attitude toward immigrants, especially undocumented workers, in the United States.[101] This section will examine the USA Patriot Act's significant provisions, as well as past changes in judicial attitudes, toward undocumented workers.

1. The USA Patriot Act: Expanded Powers of the INS

On October 26, 2001, President Bush signed the USA Patriot Act, a law passed for the purpose of "deterring and punishing terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools and for other purposes."[102] This Act "passed with overwhelming bipartisan support, in part to ensure the Attorney General and the Justice Department could effectively respond to future unforeseeable terrorist threats."[103]

In particular, two sections of the Act have had an impact on America's immigration laws. First, section 402 supports funds for heightened enforcement of the Northern border with Canada, responding to the fear that terrorists might try to enter the United States from Canada.[104] Section 402 provides that INS agents patrolling the border may consider race as one of the factors in determining whether a person is a likely "terrorist."[105]

Second, section 411 of the Act expands the definitions of "terrorist activity," "engaging in terrorist activity," and "terrorist organization" con-

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99. James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C.J. INT'L L. & COM. REG. 419, 419-20 (2002).

100. *Id.*

101. *Id.*

102. *See* Pub. L. No. 107-56, § 412, 201-25, 115 Stat. 272, 278-96, 350-52 (2001); *see also* Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63, 68 (2002).

103. *See* Talylor, *supra* note 101, at 68.

104. USA Patriot Act § 402. Pub. L. No. 107-56, § 412, 201-25, 115 Stat. 272, 278-96, 350-52 (2001).

105. *See* USA Patriot Act § 402. Using racial factors on patrol may be lead to an expansion of race based immigration enforcement. *See* Johnson, *supra* note 3, at 857.

tained in section 212 (a)(3)(B) of the INA.[106] Section 411 also expands the scope of fundraising activities, membership solicitation, or provision of material support that would constitute "engaging in terrorist activity."[107] The expansion of the definition of terrorist activity offers the INS expanded powers to deport noncitizens, including undocumented workers.[108]

After passing the USA Patriot Act, Congress enacted the Enhanced Border Security and Visa Reform Act to improve the monitoring of noncitizens in the United States.[109] This act provides $2.7 billion dollars of INS funding for enforcement and border affairs, including 570 Border Patrol agents "paying particular attention to the northern border."[110] The INS indicated that it may review persons strictly entering through the Southern Border with Mexico.[111]

Finally, the most dramatic change after the passage of the USA Patriot Act may be the incorporation of the INS into the new Department of Homeland Security, the proposal of which came from the aftermath of September eleventh.[112] This new Department's major goal is to protect this country from future terrorist attacks, and it may emphasize strict immigra-

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106. USA Patriot Act § 411 (*amending* INA § 212(a)(3)(B)); 8 U.S.C. §1182 (a)(3)(B) (2004). Section 411 (a)(1)(F)(iv) defines terrorism actions as follows:

> (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
>
> (II) to prepare or plan a terrorist activity;
>
> (III) to gather information on potential targets for terrorist activity;
>
> (IV) to solicit funds or other things of value . . . .

Id.

107. *Id.* A foreign national who unsuspectingly contributes financial support to an organization that is listed or is in the future listed as a terrorist organization by the State Department must show that he or she "did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity." INA § 212 (a)(3)(B)(iv)(IV)(cc).

108. *See* Johnson, *supra* note 3, at 857. In line with the national mood after September eleventh, the federal government can be expected to aggressively exercise such powers especially against undocumented workers. *Id.*

109. H.R. 543, 107th Cong. § 2 (2002). Enhanced Border Security and Visa Entry Reform Act Of 2002; H.R. 2500, 107th Cong. (2002); Barbara Hines, Comment, *So Near Yet So Far Away: The Effect of September 11th on Mexican Immigrants in the United States*, 8 TEX. HISP. J. L. & POL'Y 37, 44 (2002). President George W. Bush increased the INS budget to $5.6 billion dollars, which marked an eighteen percent increase over the previous year's appropriation. *Id.*

110. *President Signs INS Funding Bill, Lawmakers Continue to Sponsor Terrorism-related Measures*, 78 Interpreter Releases 1855 (Dec. 10, 2001).

111. *Id.*

112. Johnson, *supra* note 3, at 859-60.

tion enforcement for the purpose of "homeland security."[113] As will be discussed, this stricter enforcement of immigration laws has affected the way the judiciary decides cases involving undocumented workers' rights with respect to labor laws.[114]

2. The USA Patriot Act: Impact on Immigrants Including Undocumented Workers

After September eleventh, it was necessary that the Federal government find an efficient method to find and eliminate potential terrorists present in this country.[115] In an effort to do that, civil rights advocates assert "the Justice Department and other law enforcement officials made race, ethnicity, religion, and national origin key components of immigration enforcement activities."[116] Because of expanded powers for the INS after the passage of the U.S.A. Patriot Act, undocumented workers face the greater fear of exploitation.[117] For example, the enforcement activities of the INS and the Justice Department single out young men of Arab, Middle Eastern, and South Asian descent as part of this country's strict immigration enforcement.[118] These acts, which aim at the specific nationalities and ethnicities of Al Qaeda countries, impact not only Arab or Muslim non-citizens, but also the general immigrant community.[119] Consequently, most undocumented workers are adversely affected because of their ethnicity and national origin.

3. The USA Patriot Act: Inconsistency Arises

As stated before, undocumented workers tend to have two major concerns: deportation by the INS and exploitation of their labor without adequate compensation.[120] This comment will focus on the specific conflict between traditional immigration and labor policy and current increased de-

113. U.S. Department of Homeland Security, *available at* http://www.dhs.gov/dhspublic/theme_home1.jsp (last visited on December 6, 2004).

114. *See infra* Part III. B.

115. Taylor, *supra* note 101, at 74.

116. *Id.*

117. *See* Part III. B.

118. *Id. See also* Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 443 (2002).

119. *See* Johnson, *supra* note 3, at 859-60 (explaining targeting immigrant society by the INS).

120. *See* Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 363 (2001); Alan A. Stevens, Comment, *Give Me Your Tired, Your Poor, Your Destitute Laborers Ready To Be Exploited: The Failure of International Human Rights Law to Protect the Rights of Illegal Aliens in American Jurisprudence*, 14 EMORY INT'L L. REV. 405, 450 (2000) (Asserting that "[o]ur treatment of the alien or the stranger in our midst . . . is a measure of our humanity," and "we should therefore extend basic workplace protections to all individuals currently employed within [U.S.] borders . . . .").

portation power of INS, as well as changes in the judiciary after passage of the USA Patriot Act.

a) The INS's Increased Deportation Power is Inconsistent with the NLRA's Protection of Illegal Workers

Before September eleventh, although Congress criminalized the employment of undocumented workers, Congress retained the NLRA's protections for those workers.[121] In fact, Congress expressly recognized protection for undocumented workers in the workplace.[122] In *Sure-Tan v. NLRB*, the Supreme Court made clear that undocumented immigrants "[p]lainly come within the broad [definition] of employee" under the NLRA.[123] The Court also stated that "[e]nforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA."[124]

Some courts have found the INS's deportation power consistent with the traditional notion of its legitimately exercising power against undocumented workers.[125] In *Montero v. INS*, the Second Circuit reviewed whether undocumented workers were deportable.[126] Unlawful evidence of alien status was obtained by the INS because of a raid initiated in part on a tip from the employer given in retaliation for organizing efforts by particular undocumented workers.[127] This employer's act was a clear violation of the

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121. *See supra* note 44 for a discussion of how criminal penalties in IIRRA established to control employers' illegal behaviors; *see also* Nessel, *supra* note 120, at 363.

122. H.R. REP. No. 99-682, pt. 2, at 58 (1986). The House Education and Labor Committee Report on the Immigration Reform and Control Act ("IRCA") states:

> In addition, the committee does not intend that any provision of the Act would limit the powers of State or Federal labor standards agencies such as . . . the National Relations Board . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counterproductive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

Id.

123. Sure-tan v. NLRB, 467 U.S. 883, 892 (1984).

124. *Id.* at 893-94.

125. *See* Montero v. INS, 124 F.3d 381 (2d Cir. 1997); *cf.* Velasquez-Tabir v. INS, 127 F.3d 456 (5th Cir. 1997) (holding that evidence obtained as a result of an unfair labor practice is admissible in a civil proceeding to assess a fine against the undocumented immigrant for working without INS authorization). It seems that those courts found that even though INS obtained evidence of undocumented workers illegally it was legitimate exercise of INS's deportation power.

126. *Montero*, 124 F.3d at 384. Montero challenged the INS's efforts to deport her on both policy and legal grounds. *Id. See also* Nessel, *supra* note 120 at 371.

127. *See Montero*, 124 F.3d at 381.

NLRA.[128] The undocumented worker argued that her deportation was contrary to the legislative history of IRCA.[129] Further, the worker argued that immigration law should not be enforced in a manner that undermines an employee's rights under labor law.[130] The court in *Montero* rejected the undocumented worker's contention and affirmed the Board of Immigration Appeal's decision to admit the unlawfully obtained evidence for Montero's deportation.[131]

Later courts and legal commentators criticized the *Montero* decision.[132] Professor Nessel, a Clinical Associate Professor and Director of Immigration & Human Rights Clinic in Seton Hall University School of Law, who analyzed the undocumented worker's labor rights, criticized the *Montero* court for "[failing] to assess the impact of the IRCA on the employer's effort to police the workplace" because the purpose of the IRCA is to protect undocumented workers by controlling employers' illegal behaviors.[133] Simply put, Montero, an undocumented worker, would not be deported but for the employer's violation of the NLRA.[134] Therefore, Professor Nessel argued that "[m]eaningful protection under the NLRA must necessarily extend beyond NLRA remedies and provide protection from deportation."[135]

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128. *See* Nessel, *supra* note 120, at 371.

129. *Montero*, 124 F.3d at 387. The undocumented worker in *Montero* argued the INS's action in undertaking a workplace investigation and raid, based solely on a tip from the former INS district director representing that employer in the midst of an intense labor dispute, followed by the INS's initiation of deportation proceedings against her based solely on evidence obtained from the raid, constituted precisely the sort of activity contemplated and prohibited by the IRCA. *See* Nessel, *supra* note 120, at 371-72.

130. *Montero*, 124 F.3d at 387.

131. *Id.* at 385. The court characterized Montero's claim as one of an "entitlement" to remain in the United States, concluding that "excluding evidence of an alien's illegal presence in the United States because the evidence was obtained in connection with the unfair labor practice of an employer is wholly inconsistent with enforcement of the INA." *See* Nessel, *supra* note 120, at 371-72. The court deemed the suppression of illegally obtained evidence in deportation proceedings as creating an "impediment to the deportation of illegal aliens." *Id.*

132. Westover v. Reno, 202 F.3d 475, 480 (1st Cir. 2000) (holding an INS agent's actions in arresting the petitioner without obtaining a warrant "appeared from the record to be in direct violation of the [INA]"); *cf.* N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997). The Second Circuit characterized 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 employees in violation of [NLRA]." *Id.* at 52. The Second Circuit held that the IRCA does not limit the NLRB's power to grant remedies when undocumented workers' NLRA rights are violated, and the NLRB's conditional reinstatement and backpay orders in these instances were appropriate. *Id.* at 57.

133. Nessel, *supra* note 120, at 379.

134. *See supra* notes 132-33 and accompanying text.

135. Nessel, *supra* note 120, at 380. The article further argues that "[b]ecause the courts refuse to interpret overlapping labor and immigration laws in a way that guarantees meaning-

In line with Professor Nessel's reasoning, before September eleventh undocumented workers could be protected by the judiciary when they were at risk of deportation because of an employer's tip regarding the worker's illegal status.[136] After September eleventh, employers will sometimes act like INS agents and readily report the illegal status of undocumented workers when these workers demand legal rights.[137] As a result, workers who report labor law violations are often deported.[138] This phenomenon has worsened after the passage of the USA Patriot Act and is contrary to the historical legislative and judicial intent to protect undocumented workers in the workplace.[139]

b) The USA Patriot Act is Inconsistent with Title VII's Underlying Policy.

Title VII prohibits discrimination against employees on the basis of race, color, gender, national origin, and religion.[140] "Employees" are defined as "individuals" employed by an employer subject to the Act.[141] The Supreme Court in *Espinoza* held that Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.[142] As Professor Ontiveros pointed out in her article regarding undocumented worker's rights under Title VII, "[a]lthough not articulated by the Court, the reliance on the terms 'individual' and 'employee' implies that there are certain rights that attach to and grow out of the status of being an employee, separate from the rights and protections associated with citizenship."[143]

Two Circuit Court cases support the view that Title VII protection extends to undocumented workers who experienced Title VII violations. In *EEOC v. Hacienda Hotel,* the EEOC initiated a discrimination action against the Hotel, alleging its supervisory personnel had engaged in unlawful employment practices against female employees by sexually harassing them

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ful protection to all workers regardless of immigration status, changes are needed in immigration policy, legislation, or both." *Id.*

136. *See* N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc, 134 F.3d 50, 55 (2d Cir. 1997), where the court held the purpose of IRCA was to protect the rights of employees in the American work place.

137. *See, e.g.*, Nessel, *supra* note 120, at 372.

138. *Id.*

139. *See* Martinez-Camargo v. INS, 282 F.3d 487 (10th Cir. 2002). *See also supra* Part II for a discussion of Congress' legislative intent in INA and IRCA; Sure-tan v. NLRB, 467 U.S. 883 (1984); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

140. *See supra* note 71.

141. 42 U.S.C. § 2000 e(f) (Supp. IV 1992).

142. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973). Espinoza brought suit against Defendant employers alleging the employer's refusal to hire Mrs. Espinoza because of her Mexican citizenship violated Title VII of the Civil Right Act of 1964. *Id.* at 86.

143. Ontiveros, *supra* note 37, at 613.

and failing to accommodate their religious beliefs.[144] The Ninth Circuit affirmed the undocumented workers' back pay awards because the employer violated Title VII.[145]

Similarly, in *Rios v. Enterprise Assoc. Steamfitters Local Union 638 of U.A.*, the EEOC filed an action against the employer for a discrimination based on immigration status.[146] Like the Ninth Circuit, the Second Circuit in *Rios* allowed the backpay claims of undocumented workers under Title VII.[147]

The bottom line is that Title VII's focus on the employer's discriminatory conduct is not altered by an employee's immigration status.[148] This view of the immigration and employment laws is consistent with envisioning the immigrant as a valuable member of the society without considering their legal status.[149]

With this focus on controlling employer's conduct, employers have subjected undocumented workers to various forms of discrimination prohibited by Title VII, including discrimination based on race, national origin, pregnancy, religion, and sex, after they hired undocumented workers.[150] Therefore, it is necessary to impose actions against the employers who violate Title VII because Title VII's deterrence value can only be achieved when there is a clear message that employers' actions will be penalized if employers hire undocumented workers.[151] Therefore, protecting the rights of undocumented workers is an important part of America's civil rights protec-

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144. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1514 (9th Cir. 1989).

145. *Id.* at 1517-18.

146. Rios v. Enterprise Assoc. Steamfitters Local Union 638 of U.A., 860 F.2d 1168 (2d Cir. 1988). In this case, private plaintiffs and the Equal Employment Opportunity Commission ("EEOC") brought this suit pursuant to Title VII of the Civil Rights Act of 1964. *Id.* at 1169.

147. *Id.* The court granted the EEOC's claim. *Id.*

148. Ontiveros, *supra* note 37, at 616.

149. *Id. See also* Elise Bronzovich, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 HAMLINE J. PUB. L. & POL'Y 403, 436-37 (2002), where she states:

> Immigrants constantly infuse new life into the economy and culture . . . . Undoubtedly, there is more than a mere tangible, economic contribution that non-citizens make to our country . . . additionally immigrants raise the income of native-born workers by at least $10 billion a year . . . . The assumption, therefore, that non-citizens do not contribute to the progress of this country or at least not enough is quite a misconception.

Id. (internal quotations omitted).

150. *See* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1507-09 (9th Cir. 1989). In this case, the undocumented Plaintiff was told that "women get pregnant because they like to suck men's dicks." *Id.* at 508.

151. *See* Ontiveros, *supra* note 37, at 622.

tions.[152] The deterrence function of Title VII, which clearly benefits society as a whole, is served whether the plaintiff is documented or not.[153]

As previously explained, prior to September eleventh, the Supreme Court held in *Espinoza* that "aliens were included in this [protected] class [of Title VII] because of the breadth of the term individual."[154] However, after September eleventh, violations of Title VII directed toward undocumented workers have escalated because the INS uses evidence of illegal status to deport workers who report violations of Title VII.[155] This undermines the long-standing Title VII policy of deterring employer discriminatory conduct regardless of legal status.[156]

B. The Hoffman Plastic Decision: The Impact of Changed Judicial Attitudes

INS's increased deportation power has left undocumented workers without meaningful remedies for exploitative employer behavior and vulnerable to deportation if they assert their legal rights.[157] The problem of whether to report the illegal labor activity of the employer and risk deportation has become acute due to the increased negative sentiment toward undocumented workers after September eleventh.[158]

The final blow to undocumented workers' vulnerability to employers' illegal work activity came via the Supreme Court's decision in *Hoffman*

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152. Williams R. Tamayo, *Defending the Rights of the Undocumented: A Challenge to the Civil Rights Movement and Local Governments*, 16 N.Y.U. REV. L. & SOC. CHANGE 145, 153-55 (1987-88).

153. Albermarle Paper Co. v. Moody, 422 U.S. 405, 418-21 (1975). The Supreme Court described Title VII's compensatory mandate as one to make the employee "whole" or to put her in the same place she would have been in had she never been discriminated against. *Id.*

154. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973).

155. *See* Martinez-Camargo v. INS, 282 F.3d 487 (10th Cir. 2002); *See also* Nessel, *supra* note 120, at 142-46.

156. *See supra* Part II. B.

157. *See* Nessel *supra* note 120, at 363, for a critique of INS's deportation power under the IRCA. Generally, when undocumented workers assert their legal rights under labor law, the INS under the IRCA will deport the undocumented workers. *Id.*

158. *See, e.g.*, Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Work Place Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L.L. REV. 407, 419 (1995). The burden of employer sanction is not borne by employers. *Id.* In practice, employer sanctions empower employers to terrorize their workers. *Id.* If the immigrants attempt to organize or otherwise defend their rights, employers often threaten to turn them into the INS. *Id.* Thus these sanctions have enabled employers to maintain an intimidated workforce and cheap labor pool whose members never complain to the authorities about mistreatment. *Id.*

Plastic Compounds v. NLRB.[159] In *Hoffman Plastic*, the Supreme Court seriously questioned what remedies undocumented workers have.[160]

In May, 1988, Hoffman Plastic Compounds hired Jose Castro to operate various blending machines.[161] Castro and several other employees supported the union organizing campaign of the Hoffman Plastic workers and distributed authorization cards to co-workers.[162] Hoffman laid off Castro and other employees because they were engaged in these organizing activities in 1989. Upon investigation, the National Labor Relations Board (NLRB) found that Hoffman had unlawfully selected Castro and the other employees for being laid off because they were union supporters.[163] Therefore, Hoffman Plastic engaged in wrongful termination in violation of section 8(a)(3) of the National Labor Relations Act (NLRA), which allowed Castro to be awarded back pay.[164]

In its five-to-four decision, the Supreme Court held that awarding undocumented aliens back pay under the NLRB violates and undermines immigration policy, as expressed by Congress in the IRCA, which makes it illegal for undocumented immigrants to be employed or to obtain employment.[165] Chief Justice Rehnquist stated that "[t]here is no reason to think that Congress nonetheless intended to permit backpay where but for an employer's unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities."[166]

This opinion denoted a shift in judicial attitude toward undocumented workers because the Supreme Court emphasized that the policies of IRCA would trump a backpay award under existing labor law. Also, the circumstances in *Hoffman Plastic* persuaded the Court that awarding the backpay would "trench upon" the policies of the IRCA.[167] As explained in

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159. Hoffman Plastic v. NLRB, 535 U.S. 137 (2002).

160. *See* Eric Schnapper, *Righting Wrongs Against Immigrant Workers*, TRIAL, Mar. 2003, at 46.

161. *Hoffman*, 535 U.S at 140.

162. *Id.*

163. *Id.*

164. *Id.*; *see* Baldwin, *supra* note 24, at 233.

165. *See supra* note 36 (IRCA); 8 U.S.C. § 1324 (2004) (Bringing in and harboring certain aliens (a) Criminal penalties).

166. *Hoffman*, 535 U.S at 149.

167. *See* Schnapper, *supra* note 160, at 47. In this article, Schnapper explained three ways the Court found awarding backpay to Castro would "trench upon" the policies of the IRCA. *Id.* Schnapper states:

> First, the Court reasoned a back pay award would "subvert" IRCA because it would require "recognizing employer misconduct [under the NLRA] but discounting the misconduct [under the IRCA] of illegal alien employees." Second, the availability of a back pay award would create

Part II, this reasoning is consistent with the get-tough immigration policy after the USA Patriot Act.[168] Due to this decision, undocumented workers will face a two-fold problem: either they will be deported or they will not be compensated, even though their employer violates labor laws.[169] Accordingly, undocumented workers have lost their motive to report employers' illegal activities.[170]

1. *Hoffman Plastic*: Frustrating Congress's Intent Regarding IRCA and the Labor Laws

The *Hoffman* decision frustrated Congress' intent regarding several immigration and labor laws.[171] Specifically, it has allowed employers to limit their liability for unlawful acts directed toward undocumented workers.[172]

In his opinion in *Hoffman Plastic*, Chief Justice Rehnquist reasoned that his decision was to preserve Congress' intent with IRCA.[173] However,

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> an incentive for dismissed workers to unlawfully remain in the United States because the NLRB does not make back pay awards for periods during which an individual is outside the country. Third, the board's requirement that dismissed workers try to mitigate their wage losses would, in combination with the obligation to remain in the United States, compel aliens to work here, which would in turn involve an IRCA violation.

Id.

168. *See Hoffman Plastic*, 535 U.S. at 147. Chief Justice Rehnquist reasoned while distinguishing *Sure-tan* (holding that undocumented workers are protected by the NLRB) and upholding the *Southern S.S. Co.* (holding where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield) that "whether or not this was the situation at the time of *Sure-Tan* [to protect undocumented workers], *it is precisely the situation today* [to hold that undocumented workers could not be protected by federal labor laws.]" *Id.* (emphasis added).

169. *See supra* Part III. A. 1- 3.

170. *See infra* Part IV.

171. Baldwin, *supra* note 24, at 250-51. Baldwin explained:

> *Hoffman* is confusing and misleading . . . . Some employer defendants have already begun to argue that undocumented workers have "no labor rights at all." As a result, undocumented workers are being dissuaded from bringing labor law claims for fear of exposure to [immigration authorities]. This reluctance to litigate claims will make undocumented workers more attractive to employers.

Id.

172. This part will review a number of cases where employers used the *Hoffman* decision as a shield against charges of labor law violations.

173. *Hoffman Plastic*, 535 U.S. at 149.

his statement of Congress' intent, as stated in Part III regarding the IRCA and NRLA, was contrary to Congress' actual intent.[174]

First, nothing in the legislative history of IRCA indicates that undocumented workers should be precluded from obtaining the remedies available for an employer's illegal acts.[175] In fact, the history indicates the opposite. As Justice Breyer stated in his *Hoffman* dissent, "[T]he general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a 'magnet' pulls illegal immigrants toward the United States."[176] Further, Justice Breyer reasoned that "to deny the Board the power to award backpay, however, might very well increase the strength of this magnetic force."[177]

Justice Breyer's reasoning is consistent with immigration law, which is designed to deter the illegal entry of foreigners looking for a job by controlling the employer's conduct.[178] As Justice Breyer explained, the *Hoffman* decision will give employers more incentive to hire undocumented workers because employers will no longer fear paying for remedies that result from their violation of labor laws.[179] This will likely create more demand for undocumented workers and is likely to result in an increased incentive for illegal aliens to enter the United States looking for jobs.[180] In sum, Congress' intent when drafting the IRCA was to focus on employers' illegal labor practices, not employees, and *Hoffman* directly countered that purpose.[181]

Second, Congress did not view awarding backpay to an undocumented worker as counter to the policies of IRCA.[182] Rather, IRCA's underlying policy is consistent with NLRA's remedial discretion policy.[183] The court in *Sure-Tan* recognized that "enforcement of the NLRA with respect to undocumented employees is compatible with "polices of the INA."[184] With

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174. *Id.* Justice Rehnquist assumed that "awarding backpay in a case like this not only trivializes the immigration laws, it condones and encourages future violations." *Id. at 150. See also supra* Part III.

175. *See* Baldwin, *supra* note 24, at 264-65.

176. *Hoffman Plastic*, 535 U.S. at 155 (Breyer, J. dissenting) (quoting H.R. Rep. No. 99-682 pt.1, p. 45 (1986)).

177. *Id.*

178. *See supra* Part II. A. 2.

179. *Hoffman*, 535 U.S. at 155.

180. *Id.*

181. *Id.*; Baldwin, *supra* note 24, at 266. The House Judiciary's immigration subcommittee stated "the U.S. employer, unlike the illegal alien, is amenable to deterrence vis-à-vis economic and criminal sanctions." *Id.*

182. *See supra* Part II. A-B.; *cf.* Sure-tan v. NLRB, 467 U.S. 883, 892 (1984). The court held "we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA)." *Id.*

183. *See supra* Part II. B.

184. Sure-tan v. NLRB, 467 U.S. 883, 884 (1984). The court reasoned:

that policy in mind, the Second Circuit in *A.P.R.A. Fuel* stated that the NLRA and IRCA "must read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace."[185] Ironically, the decision in *Hoffman Plastic* will encourage employers to hire undocumented workers, as the cost of their labor is now even cheaper because employers will not be liable for back pay even if they wrongfully discharge undocumented workers.[186]

2. *Hoffman Plastic* Created Lower Court Confusion

In addition to the NLRA problems, the *Hoffman Plastic* decision has created confusion among lower courts when interpreting its decision.[187] In *Martinez v. Mecca Farms, Inc.*, the defendant employer argued that, as per *Hoffman Plastic*, undocumented workers should be precluded from recovering the remedies they sought under the Migrant and Seasonal Agricultural Worker Protection Act.[188] The *Martinez* court held that illegal immigrants were not precluded from asserting a claim for uncompensated labor while distinguishing *Hoffman*.[189]

Similarly, in *Singh v. Jutla & C.D. & R's Oil, Inc.*, the defendant employer argued that undocumented workers could not receive remedies

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> [A]pplication 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 standard terms of employment . . . . The Board's enforcement of the NLRA for undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigrant laws as presently written.

Id. at 893-94.

185. *See* N.L.R.B. v. A.P.R.A Fuel Oil Buyers Group, Inc., 134 F.3d 50 (2d Cir. 1997). The court reasoned that in referring to a "mutuality of purpose," the NLRB concluded the best way to effectuate the policies of the immigration and labor statutes was by virtuously enforcing the NLRA, including providing traditional Board remedies, with respect to all employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or individuals. *Id.* at 56, 58.

186. *See* Baldwin, *supra* note 24, at 266-67. Baldwin wrote, the result of *Hoffman Plastic* "does nothing but make undocumented immigrants more attractive to employers, a result that constitutes the exact inverse of what Congress intended when it passed the IRCA." *Id.* at 267. Baldwin also criticized that "Justice Rehnquist clearly preferred his own vision of how to best achieve the goals of the IRCA—despite the fact that the democratically elected Congress had spent years determining the most appropriate way to design and focus the Act." *Id.* at 268. The author characterized Justice Rehnquist's upsetting result as "judicial activism," which is so often criticized. *Id.*

187. *See infra* note 190-95 and accompanying text.

188. Martinez v. Mecca Farms, Inc., 213 F.R.D. 601, 604 (S.D. Fla. 2002). The laborers, working in packing houses for the farmers, alleged that they were not paid overtime wages and that social security deductions taken from their checks were not paid to the government. *Id.* at 603.

189. *Id.* at 604.

under the FLSA because of the *Hoffman* decision.[190] Like the *Martinez* court, the court in *Singh* refused to extend the *Hoffman* rule to bar the remedies the illegal immigrant sought.[191]

In contrast, in *Majlinger v. Cassino Contr. Corp* the undocumented worker brought a claim for lost wages asserting the employer's negligence and violations of New York labor law.[192] The defendant employers argued the undocumented worker could not claim his lost wages because he could not establish his eligibility for employment in this country, primarily based on *Hoffman Plastic*.[193] Unlike *Martinez* and *Singh*, the *Majlinger* Court held that "[o]n constraint of *Hoffman*, it is therefore the determination of this court that the plaintiff's claim for lost wages must be dismissed."[194]

These conflicting decisions interpreting *Hoffman* evidence confusion among the lower court's regarding when an employer's illegal act can be remedied. Because of this confusion, employers may take a chance hiring undocumented workers because they can raise a defense under *Hoffman*. In the mean time, they save money hiring undocumented workers, which typically costs less than hiring documented workers.[195] Meanwhile, undocumented workers are discouraged from reporting employer violations of immigration and employment laws because they fear discovery and exposure of their immigrant status, which may result in deportation without remedies.[196]

3. *Hoffman Plastic*: Agency Reaction

Agencies which are directly affected by the *Hoffman* decision have sought to clearly define its scope.[197] For example, the NLRB's Office of General Counsel issued a memorandum which explains that, despite *Hoff-*

190. Singh v. Jutla & C.D. & R's Oil, Inc., 214 F. Supp. 2d. 1056, 1059 (N.D. Cal. 2002). The undocumented workers filed a wage claim against the employer seeking unpaid wages and overtime for work and further alleged that the employer contacted the INS and provided them with information of their status in an act of retaliation. *Id.* at 1057.

191. *Id.* at 1061.

192. Majlinger v. Cassino Contr. Corp, 2003 N.Y. Misc. LEXIS 1248, at *4 (N.Y. Sup. Ct. Oct. 1, 2003).

193. *Id.* at *2-3. The injured undocumented worker sought damages for injuries when he fell while installing siding. *Id.* at *1-2.

194. *Id.* at *6.

195. Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *see* Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002) (holding there was no such impediment to awarding repayment for work the plaintiff already performed even though the plaintiff was not lawfully permitted to be in the United States); *but see Majinger*, 2003 N.Y. Misc. LEXIS 1248, at *1 (holding completely opposite to *Flores* and *Zeng Liu* courts). *See* Baldwin, *supra* note 24, at 269-70.

196. Baldwin, *supra* note 24, at 269-70.

197. *Id.* at 252-53.

man Plastic, undocumented workers are still employees under the NLRB.[198] The memo clarified *Hoffman's* scope and limited the holding to its facts.[199]

Further, other agencies, such as the EEOC and the Department of Labor (DOL), have sought to limit the *Hoffman* decision to its facts.[200] The EEOC, in a press release, reconfirmed their commitment to preventing discrimimation against immigrants despite the *Hoffman* Decision.[201] Likewise, the DOL issued a fact sheet explaining "[t]he Department's Wage and Hour Division will continue to enforce [the FLSA] without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA."[202]

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198. Office of General Counsel, NLRB, Memorandum GC 02-06, *Procedures and Remedies for Discriminates Who May Be Undocumented Aliens after Hoffman Plastic Compounds, Inc.* (July 19, 2002), *available at* http://206.16.201.226/nlrb/shared_files/gcmemo/-gcmemo/gc02-06.asp?useShared= (last visited December 6, 2004).

199. *Id.* The memo states that *Hoffman* did not prohibit compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions. *Id.* Second, the backpay for an employee who has been unlawfully demoted into a lower paying position presents an open question, and the memo requested those cases be referred to the central office for advice. *Id.* Third, the court states *Hoffman* had no effect on other sanctions that may be imposed under current law. *Id.* With respect to investigative procedures, the memo added that *Hoffman* does not shift the burden to the NLRB to conduct an immigration investigation in the first instance. *Id.*

200. U.S. Department of Labor, Employment Standards Administration Wage and Hour Division, *available at* http://www.dol.gov/esa/ (last visited on December 6, 2004).

201. The EEOC press release, June 28, 2002, *EEOC Reaffirms Commitment To Protecting Undocumented Workers From Discrimination*, *available at* http://www.eeoc.gov/press/6-28-02.html (last visited on December 6, 2004). Commissioner Leslie E. Silverman noted:

> By this action, the Commission recognizes that the Hoffman decision required our Agency to step back and re-examine our policy on remedies for undocumented workers. While Hoffman affects the availability of some forms of relief to undocumented workers, make no mistake, it is still illegal for employers to discriminate against undocumented workers.

Id.

202. U.S. Department of Labor, Employment Standards Administration Wage and Hour Division, *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division*, *available at* http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm (last visited December 6, 2004). The fact sheet explained:

> In *Hoffman Plastics*, the NLRB sought back pay for time an employee *would* have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Under the FLSA or MSPA, the Department (or an employee) seeks back pay for hours an employee has *actually worked*, under laws that require payment for such work. The Supreme Court's concern with awarding back pay "for years of work not performed, for wages that could not lawfully have been earned," does not apply to work actually performed. Two federal courts already have adopted this approach.

In sum, the agencies' and lower courts' attempts to clarify the *Hoffman* decision show the inconsistency between traditional notions of immigration and employment laws and new policy reflected in *Hoffman Plastic*, which has resulted in part because of 'get-tough' immigration policy after September eleventh.[203]

C. *The Result: Undocumented Workers Who Have Nothing to Do with Terrorism Suffer*

The USA Patriot Act's purpose is to deter terrorism in the United States, but its goal to "intercept and obstruct terrorism" triggers negative sentiment toward immigrants in general.[204] Further, changes in judiciary attitudes toward undocumented workers have had a negative impact on immigration and labor laws' policy to protect undocumented workers.[205] This adverse effect has already reached a level such that traditional labor and immigration policy aimed at protecting undocumented workers is in grave danger under the name of the national security.[206] However, the dilemma between protecting undocumented workers and preventing terrorist activities remains.

IV. ALTERNATIVES: HOW TO RECONCILE THE DILEMMA OF PROTECTING UNDOCUMENTED WORKERS WHILE COMBATING TERRORISM IN THE UNITED STATES

In order for federal agencies to achieve the intended policies of immigration and labor laws, they must be able to penalize employers who harm their employees, including undocumented workers.[207] On the other hand, there is an ample and legitimate fear of terrorism in the United States.[208]

Current law does not successfully protect undocumented workers or deter illegal immigration.[209] To protect undocumented workers and ward off terrorism, this comment proposes the following alternative solutions, which are expected to achieve two policies. The first policy is that employers will be punished for violations of federal labor and employment laws directed toward their undocumented employees.[210] Second, illegal immigration will

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Id.; *see also* Baldwin, *supra* note 24, at 254.

203. *See supra* Part III. A.

204. *See supra* Part III.

205. *See* Hoffman Plastic v. NLRB, 535 U.S. 137, 155 (2002).

206. *See supra* Part III.

207. *See supra* Part II. A. and B.

208. *See supra* Part III for a discussion of the USA Patriot Act and its purpose.

209. *See supra* Part II.

210. *See supra* Part II. B.

decrease because there is less incentive for employers to hire undocumented workers.[211]

A. Proposed Solution: Provide an Incentive for Undocumented Workers to Report Employers' Illegal Activities

Undocumented workers must have an incentive to report employers' illegal activities because they are especially vulnerable to exploitation.[212] Exploitation adversely affects the work environment of documented workers who may be silent when their own rights are violated.[213] This silence results from the fear of being replaced by undocumented workers.[214] In order to enforce the laws with which they are charged, though, federal enforcement agencies are heavily dependent upon workers' self reporting when their rights are violated.[215] Thus, incentives to report illegal behavior are an integral part of any solution to the problem of exploitation of undocumented workers.

1. Alternative One: Limited Amnesty Program

Under a limited amnesty program, undocumented workers would be given an incentive to report the illegal activities of employers by being granted lawful residency status.[216] Under such a program, an undocumented worker could bring a labor practice claim.[217] The claim need not be success-

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211. Sure-Tan v. NLRB, 467 U.S. 883, 893-95 (1984). The court reasoned:

> [I]f 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 incentives for aliens themselves to enter in violation of the federal immigration laws. The [NLRB]'s enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws as presently written.

Id.

212. *See infra* notes 217-220 and accompanying text.

213. *Id.*

214. Hudson & Schenck, *supra* note 27, at 379.

215. Marshall v. Whirpool Corp., 593 F.2d 715, 722 (6th Cir. 1979). The court recognized employees to be a valuable and knowledgeable source of information regarding OSHA compliance in the workplace, saying, "Congress was aware of the shortage of federal and state occupational safety inspectors, and *placed great reliance on employee assistance in enforcing the Act*." *Id.* (emphasis added).

216. *See supra* Part II. B for a discussion of labor laws that protect undocumented workers by controlling employers' illegal acts.

217. *See* Hudson & Schenck, *supra* note 27, at 378. This article asserts that undocumented workers must be classified as a protected class so that they can qualify for protected class status by bringing a good faith unfair labor practice or discrimination claim under a limited amnesty program. *Id.* at 379.

ful, but it should be a claim with merit.[218] While the claim is investigated, the petition for citizenship would be initiated.[219] The citizenship application process would be based on a background check, consistent with those used for legal aliens applying for citizenship.[220] If the undocumented worker is suspected of terrorist or other criminal activities, the citizenship application would be denied.[221]

One beneficial effect of this type of the program would be the identification of undocumented workers who otherwise would go undetected.[222] If the undocumented worker's claim has merit and the background check reveals no problem, the worker is then granted citizenship and full remedies, such as back pay and reinstatement.[223] However, if the worker is denied citizenship, remedies would be limited to those currently allowed by law and the worker would be deported or prosecuted.[224]

A limited amnesty program would cause fewer unfair labor practice claims because employers would no longer have an incentive to hire undocumented workers.[225] Therefore, employers would be forced to adhere to the standards set by federal labor and employment law.[226] Further, the Federal Government would have a more efficient mechanism for identifying the undocumented workers who are suspected of terrorist activities and who might otherwise go undetected.[227]

It is also imperative to note that immigration has often been conferred as an incentive and reward.[228] For instance, by winning a lottery,

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218. *Id.* at 385.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 386.
223. *Id.* The new citizen obtains all rights and responsibilities, without limitation, attendant to his or her status. *Id.*
224. *Id.*
225. *See generally* Part IV. Some might argue the program actually provides a greater incentive for undocumented workers to enter the country because, if they do so and happen to work for an employer that breaks a labor law, it may be easier for them to get citizenship than it otherwise would be. *See* Part IV. However, if employers knew they might have to pay substantial amounts in remedies due to violations of the labor laws with respect to these workers, they probably would not hire these workers because they would no longer be cheaper than legal workers. *See* Part IV.
226. *See generally* Part IV.
227. *Id.*
228. *See* 8 U.S.C. §1440-1 (2004) which provides posthumous citizenship through death while on active-duty service in the armed forces during World War I, World War II, the Korean hostilities, the Vietnam hostilities, or in other periods of military hostilities:

> (a) Permitting granting of posthumous citizenship. Notwithstanding any other provision of this title, the Secretary of Homeland Security shall provide, in accordance with this section, for the granting of posthumous citi-

55,000 people per year are granted permanent residency.[229] Further, an immigrant can file an adjustment request for permanent residency.[230] IRCA also provides a broad amnesty program that allows permanent residency for undocumented workers who reside in the United States.[231] The IRCA also provides that the Attorney General may grant temporary stay and work authorization to undocumented workers if they establish their status under the amnesty program.[232]

2. Alternative Two: Temporary Visa Status

Forty-nine abused deaf Mexicans were forced to sell trinkets on the subway, turn over their wages, and live in slave-like conditions in New York in 1998.[233] These undocumented workers were held in detention for a year in order to assist prosecuting their "employers."[234] They were allowed to stay in the United States because of their cooperation as witnesses.[235] This situation illustrates one example of undocumented workers who risked deportation by going to the police for help.[236]

Because of the uncertainties associated with relying upon the INS to exercise its discretion in order to further labor law policies, a temporary visa status for undocumented workers who provide material information to assert their rights under labor laws should be considered. The "S" visa category model would work well to protect undocumented workers who report the illegal labor activities of employers.[237] The "S" visa provides that a state or federal law enforcement agency must apply for the visa on the undocu-

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zenship at the time of death to a person described in subsection (b) if the Secretary of Homeland Security approves an application for that posthumous citizenship under subsection (c).

Id.

229. 8 U.S.C. § 1151(e) (2004) (explaining worldwide level of diversity immigrants). The worldwide level of diversity immigrants is equal to 55,000 for each fiscal year. *Id. See also* Nessel, *supra* note 120, at 390.

230. 8 U.S.C. § 1255 (2004) (explaining adjustment of status of nonimmigrant to that of person admitted for permanent residency).

231. 132 CONG. REC. H9708-2 (1986); *see also* Nessel, *supra* note 120, at 390.

232. 8 U.S.C. § 1324(a) (2004) (adjusting the Status of Certain Entrants Before January 1, 1982 to that of a Person Admitted for Lawful Residence to addressing temporary stay of deportation and work authorization for certain applicants).

233. Mirta Ojito, *U.S. Permits Deaf Mexican, Forced to Peddle, to Remain*, N.Y. TIMES Abstracts 1, June 20, 1998, at A3; Mirta Ojito, *Out of Servitude, Deaf Mexicans Languish in Limbo of Motel*, N.Y. TIMES Abstracts 35, Mar. 22, 1998, § 1, at 2; *see also* Nessel, *supra* note 120, at 392.

234. *See supra* note 233.

235. *See supra* note 233.

236. *See also* Part II. In this way, the INS actually furthered the purpose of labor law to protect undocumented workers by punishing employers who violate labor laws. *Id.*

237. 8 U.S.C. § 1101(s) (2004); *see also* Nessel, *supra* note 120, at 392-94 (explaining S and T visa as models for Congressional action).

mented worker's behalf, certifying the need for and the nature of the proposed cooperation.[238] The employer must also provide certain required information.[239] If the undocumented worker has provided information that has materially contributed to successful criminal or terrorist prosecution or related investigation, the Attorney General may grant a lawful permanent resident for the undocumented worker.[240]

Using the "S" visa category as a model, undocumented workers who are willing to report the illegal labor activities of employers would be granted permanent residency or lawful status to work.[241] Thus, for example, the NLRB might sue an employer who violates the law based on information provided by the exploited undocumented worker.[242] Under this proposed system, the undocumented worker who is harmed by the employer would be entitled to the traditional remedies available under the NLRA.[243] Further, as an incentive to report the employer's illegal activity, the INS can subsequently give the undocumented worker lawful residency.[244]

A temporary visa providing lawful status in the United States would be consistent with the goals of IRCA.[245] IRCA was based on the idea that the ultimate way to curb illegal immigration is to penalize the employer.[246] Reporting employers who exploit undocumented workers would decrease the incentive to hire undocumented workers and thus further the purpose of IRCA.[247]

3. How to Implement These Programs

To implement one of these programs successfully, they must achieve two purposes. First, undocumented workers who provide information should be protected unless they are shown to have engaged in criminal or

238. 8 U.S.C. § 1101(s) (2004).
239. *Id.*
240. *Id.* § 1255(j) (2004) (explaining adjustment to permanent resident status). Lawful resident and citizens are different things. The latter is person who by place of birth, nationality of one or both parents, or by going through the naturalization process, has sworn loyalty to a nation. While the former is a person who legally lives in a particular place. *See* Law Com's Dictionary, *available at* http://dictionary.law.com/-default2.asp?letter=R (last visited on November 15, 2004).
241. *See* 8 U.S.C. § 1101 (T) (2004). "T" visa standard provides for the "Protecting and Assistance for Victims of Trafficking" through the creation of new nonimmigrant "T" visa for an alien who is a victim of trafficking. *Id.*
242. *See* Part II.
243. *See* Part II.
244. Nessel, *supra* note 120, at 394-95.
245. *See supra* notes 36-43 and accompanying text for a discussion of IRCA and its purpose of immigration policy.
246. *Id.*
247. Sure-Tan v. NLRB, 467 U.S. 883, 893-95 (1984). *See also* Hudson & Schenck, *supra* note 27, at 378-79.

other terrorist activities.[248] Second, the program should provide some material evidence to prove the incentives will produce the desired outcome.[249]

To achieve the first objective, the information provided by undocumented workers should be protected as privileged.[250] Accordingly, information provided by undocumented workers may not be obtained or used by any agency, department, or individual for the purposes of deportation.[251] The Fair Housing Act provides a good example of how to protect the information as privileged.[252] This Act provides that, if a person meets certain conditions, any report or results shall be privileged and may not be used by any department or agency in any proceeding or civil action in which one or more violations of the Act is alleged.[253] The scope and test of the privilege should be set by the legislature, but it should be consistent with the purposes of IRCA and labor law, which are to control the employers' illegal conduct while protecting undocumented workers from exploitation.[254] In this way, undocumented workers can police the employer's illegal conduct without fearing deportation.[255] Once securing the information as privileged, the programs would be the next step.[256] However, if an undocumented worker is engaged in criminal or terrorist activities, the information should not be privileged.[257]

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248. *See* Part III.

249. *See* Part III. As explained so far, the desired outcome should be decreasing illegal entry of foreigners desiring a job in the United States by controlling the employer's conduct. *See* Part III.

250. *See infra* notes 252-60 and accompanying text.

251. *Id.*

252. *See* reporting incentives provided in 42 U.S.C. § 3614-1 (2004). The statute provides rules for self-testing and self-correction:

> (a) Privileged information
>
> (1) Conditions for privilege: A report or result of a self-test (as that term is defined by regulation of the Secretary) shall be considered to be privileged. (2) Privileged self-test, If a person meets the conditions specified . . . with respect to a self-test described in that paragraph", any report or results of that self-test—
>
> (A) shall be privileged; and (B) may not be obtained or used by any applicant, department, or agency in any (i) proceeding or civil action in which one or more violations of this subchapter are alleged; or (ii) examination or investigation relating to compliance with this subchapter.

Id.

253. *Id.*

254. 42 U.S.C. § 3614-1 (2004).

255. *Id.*

256. *Id.*

257. *Id.*

The program must also provide some material evidence to show that its desired outcome will be achieved. Therefore, it is cost-wise to implement pilot programs to judge the effectiveness of the suggested alternatives.[258] Guidance for pilot programs can be found in "Pilot Programs of Employment Eligibility Confirmation" (Eligibility Program), where Congress authorized the Attorney General to conduct three pilot programs.[259] Under this Eligibility Program, the Attorney General would implement the pilot programs for a minimum of four years.[260] The scope of the program should be, at a minimum, five or seven states with the highest estimated populations of illegal aliens.[261]

The pilot program would be conducted as outlined in the Eligibility Program.[262] For example, the program would be conducted in several states where undocumented workers are highly populated as the Eligibility program has done.[263] Then, the Attorney General, after checking the workers' backgrounds, would give the temporary visas or limited amnesty to those undocumented workers who report illegal labor acts of employers.[264] The pilot program would gauge the success of the program by analyzing statistics such as the reporting rate of employers' violations, the inflow of illegal aliens who intend to get jobs in the United States, and the identification of undocumented workers who have engaged in criminal or terrorist activities as determined by the background check.[265] These statistics could be compared to those existing before implementation of the pilot program. Thus, Congress could assess the viability of these amnesty or temporary visa programs in terms of a cost-benefit analysis.[266]

In conclusion, providing limited amnesty or temporary visa status to undocumented workers who report employers' illegal acts can achieve the underlying policies of labor and immigration laws.[267] Further, these programs give the federal government the ability to recognize undocumented workers who otherwise may not be identified. Therefore, the proposals can also further the purpose of the USA Patriot Act.[268]

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258. *See supra* Part IV. A. 1-3.
259. Pub. L. No. 104-208, 1996 H.R. 3610 § 401 (2004).
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. PL 104-208 H.R. 3610 § 401 (2004).
266. *Id.*
267. *See supra* Part IV A for a discussion of benefits of these alternatives.
268. *See supra* Part II.

CONCLUSION

Congress' response to the horrible terrorist acts of September eleventh, in particular the USA Patriot Act, has had and continues to have a devastating impact on immigrant workers, especially undocumented workers in the workplace. However, legislative history and court decisions make clear that undocumented workers are entitled to and need the legal protections afforded by immigration and labor laws. These laws focus on an employer's violative conduct and not on employees, regardless of the employees' legal status in the United States.

The effect of September eleventh and the USA Patriot Act on immigration and labor laws, in particular the condonation of an employer's violation of the labor laws, has resulted in increased exploitation of undocumented workers who fear retaliation from employers. However, one must not ignore the countervailing argument regarding the need to prevent terrorist activities.

Therefore, in order to protect undocumented workers in the workplace and deter the illegal entry of aliens in the United States, certain programs should be implemented to provide an incentive to undocumented workers to report employers' violations of labor laws. As suggested, possible programs include a limited amnesty program or a special type of visa that grants lawful residency, or both.

Implementing such programs will achieve the immigration and labor laws' purpose to punish the employers who violate the laws. Logically, this creates less incentive for employers to hire undocumented workers, which, in turn, prevents illegal entry of unauthorized workers. Additionally, the federal government would have a chance to check the backgrounds of the reporting undocumented workers who otherwise might remain undetected, thus furthering the purpose of deterring terrorism while protecting undocumented workers from exploitation.

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