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CLAIMS BY ILLEGAL IMMIGRANTS

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A 2008 report by the Pew Hispanic Center estimated that 11.9 million unauthorized immigrants live in the United States. Although the undocumented immigrant population grew rapidly between 1990 and 1996, the number of undocumented immigrant workers has declined recently due to economic conditions. It is nevertheless estimated that unauthorized immigrants constitute 4% of the population and 5% of the workforce in the United States.¹

Since many of these immigrants are employed in high risk occupations, it is not surprising that they become involved in industrial accidents resulting in claims for pain and suffering, medical bills, wage losses, and other economic losses.

The courts in the United States are open to all, including illegal immigrants and illegal immigrants have the right to sue those who injure them. Hagl v. Jacob Stern & Sons, Inc., 396 F. Supp. 779 (E.D. Pa. 1975). In New Jersey it has been held that illegal aliens have rights of access to courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries. Montoya v. Gateway Ins. Co., 168 N.J. Super. 100, 401 A.2d 1102 (App. Div.), *cert. denied*, 81 N.J. 402, 408 A.2d 796 (1979). On the other hand, an illegal alien or alien who is unauthorized to become gainfully employed cannot lawfully work in the United States. There is no constitutional right to work illegally. Bastas v. Bd. of Review in Labor & Indus., 155 N.J. Super. 312, 382 A.2d 923 (App. Div. 1978) (unemployment compensation benefits not available to illegal alien because of statutory requirement that employee be eligible for work.)

The Supreme Court in the United States has spoken authoritatively on this subject in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002). The Supreme Court's decision precluding a claim for backpay by an undocumented alien seeking relief for violations of the National Labor Relation Act was predicated on the enactment in 1986 of the Immigration Reform and Control Act, 8 U.S.C. §1324 (IRCA). The Supreme Court described IRCA as a comprehensive scheme enacted by Congress to prohibit the employment of illegal aliens in the United States. The court stated that IRCA "forcefully" made combating the employment of illegal aliens central to "the policy of immigration law." The court recognized that the statute established an extensive "employment verification system" in §1324a(a)(1) designed to deny employment to aliens who (a) are not lawfully present in the United States or (b) are not lawfully authorized to work in United States, §1324a(h)(3). If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status, §1324a(a)(2). Aliens who use or attempt to use false documents to procure employment are subject to fines and criminal prosecution. 18 U.S.C. §1546(b).

In view of the provisions of the IRCA, the Supreme Court of the United States stated the

¹ Portrait of Unauthorized Immigrants in the United States - Pew Research Center Publications, April 14, 2009.

following:

We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion or apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.

Although the Supreme Court of Pennsylvania has not addressed the entitlement of illegal aliens to assert claims for past or future wage benefits, the Supreme Court has addressed the issue in context of claims for future disability under the Workers' Compensation Act. The Reinforced Earth Company v. Workers' Compensation Appeal Board (Astudillo), 810 A.2d 99 (Pa. 2002). In the Reinforced Earth case, the Supreme Court of Pennsylvania held that because the employer established that the claimant was an unauthorized alien, his loss of earning power was caused by his immigration status, not his work injury. The Supreme Court distinguished between wage benefits and medical benefits, holding that although Astudillo was not entitled to wage benefits as an unauthorized alien, he was entitled to recover Workers' Compensation medical benefits. See also Morris Painting, Inc. v. WCAB, 814 A.2d 879 (Pa. Commw. 2003).

Holding that immigration is a matter of exclusive federal jurisdiction, and recognizing that unless an alien possesses a current or valid USCIS work authorization for employment, the Commonwealth Court has upheld the denial of unemployment compensation benefits because an unauthorized alien is not eligible for work. Ruiz v. Unemployment Compensation Board of Review, 911 A.2d 600 (Pa. Commw. 2006).

Following the US Supreme Court's decision in the Hoffman case, the Superior Court of New Jersey has also concluded that, in view of the comprehensive scheme set forth in IRCA prohibiting the employment of illegal aliens, all damages resulting from a claim under New Jersey's Law Against Discrimination (LAD) N.J.S.A. 10:5-1 et seq. were barred. Crespo v. Evergo Corp., 366 N.J. Superior 391, 841 A.2d 471 (2004).²

In Veliz v. Rental Service Corporation USA, Inc., 313 F. Supp. 2d 1317 (M.D. Fl. 2003) the court held that to allow a plaintiff to recover for an illegal alien decedent's lost earnings would be "tantamount to violating the IRCA" and would be "contrary to both the letter and spirit of IRCA, whose salutary purpose it would simultaneously undermine." Courts in other jurisdiction have reached a similar conclusion. Majlinger v. Cassino Contracting Corp., 1 Misc. 3d 659, 766 N.Y.S.2d 332 (N.Y. Sup. Ct. 2003); Hernandez-Cortez v. Hernandez, 2003 U.S. Dist. Lexis 19780, 19 (D. Kan., 2003); Villasenor v. Martinez, 991 So. 2d 433, Fla. App. Lexis

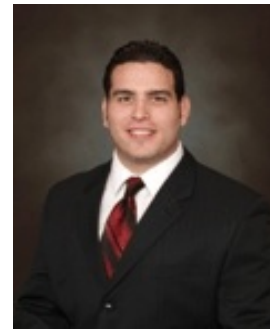
²Emery Mishky of our Berkeley Heights office (908-790-1401) provided pertinent New Jersey case law.

1466 (Fl. Ct. App., 5th Dist. 2008).

Although some courts have been inclined to allow lost wage claims by illegal immigrants to be decided by the jury with cautionary instructions about the illegality of continuing employment in the United States, we believe that such claims should be precluded by a motion for summary judgment, or appropriate motion in limine, based upon the comprehensive ruling of the Supreme Court in the Hoffman case and the statutory scheme set forth in the IRCA.



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