

UNITED STATES SUPREME COURT RULES ILLEGAL ALIEN WORKER NOT ENTITLED TO BACKPAY

Court Nullifies Backpay Award to Undocumented Worker

In *Hoffman Plastic Compounds v. National Labor Relations Board*, 00-1595 (Mar. 27, 2002), the U.S. Supreme Court ruled that a foreign national who was not authorized to work in the United States was not entitled to backpay from the employer who fired him for union organizing activities. The National Labor Relations Board (“NLRB”) had ordered reinstatement and awarded backpay to the employee, to compensate for what it determined to be an unlawful retaliatory firing. Disagreeing with the NLRB and the federal Fifth Circuit Court of Appeals, the U.S. Supreme Court ruled, in a 5-4 decision, that the NLRB’s authority was limited by federal immigration policy, and that the NLRB could not award backpay to the undocumented worker.

In May 1988, Hoffman Plastics hired Jose Castro, a Mexican national, to operate various machines. In December 1988, Mr. Castro and other employees distributed union organizing material at the company. In January 1989, Hoffman fired Mr. Castro and the other employees involved in the union activities. Three years later the NLRB found that Hoffman had “unlawfully selected four employees, including Castro, ‘in order to rid itself of known union supporters’ in violation of § 8(a)(3) of the National Labor Relations Act (NLRA),” and determined reinstatement and backpay were the appropriate remedies. In June 1993, at an administrative hearing to set the amount of backpay, Mr. Castro revealed that he had not entered the United States legally, and that he had used the birth certificate of a friend born in Texas as proof of authorization to work in the United States to work for Hoffman. Citing prior U.S. Supreme Court law and Mr. Castro’s violation of the Immigration Reform and Control Act of 1986 (“IRCA”), the Judge at the hearing ordered that no backpay could be awarded. In 1998, seven years after Mr. Castro had been fired, the NLRB reversed the decision, and ordered \$66,951 of backpay, plus interest, up to the time Hoffman learned of Mr. Castro’s illegal status.

Immigration Law Prevails Over Labor Law

The case points out the tension between labor law and immigration law. Under the NLRA, § 8(a)(3), it is unlawful for an employer to fire an employee in retaliation for union organizing. 29 U.S.C. § 158(a)(3). The NLRB has broad discretion to fashion remedies, intended to deter future violations and be compensatory but not punitive in nature.

The primary policy of IRCA, the pertinent immigration law in this case, is to “diminish the attractive force of employment, which pulls like a ‘magnet’ toward the United States.” Under IRCA, employers cannot knowingly employ an alien who is not authorized to work in the United States. To determine authorization, employers must review documents the employee presents to provide evidence of authorization to work. Employers who knowingly hire unauthorized workers can be subject to fines and criminal penalties. Under IRCA, it is also unlawful for employees to present fraudulent documents as a basis for authorization to work in the United States.

In rejecting the backpay remedy, the Supreme Court compared working without authorization to other types of illegal employment-related conduct, which have precluded a backpay remedy. The Court determined the significant factors to be that Mr. Castro procured the job by fraud, that his wages would not have been lawfully earned, and that under the NLRB's ruling, Mr. Castro was eligible for the backpay only if he continued to remain in the United States illegally. The Court concluded that "awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer."

What This Means For Employers

Despite its decision in *Hoffman*, the Court noted that "lack of authority to award backpay hardly means that the employer gets off scot free." The Court upheld the NLRB orders to Hoffman to cease and desist NLRA violations and to post a notice to employees about its unfair labor practices and employees' rights. Both the majority and the dissent stress the objective of IRCA to deter employers from hiring workers who do not present documents that satisfy the IRCA requirements, as set forth on the Form I-9. In the spirit of the ruling, employers should remember that to request more documentation than is provided on the I-9, they can be subject to IRCA's anti-discrimination provisions.

Employers should also be aware that while the *Hoffman* decision addressed unfair labor practices, it did not address wage and hour law. Illegal status does not excuse employers from Fair Labor Standards Act compliance, which requires paying undocumented workers' wages actually earned prior to termination.

This is a complex area of law; employers with specific questions should consult their legal advisors.

Because of the changing nature of this area of the law and the importance of individual facts, this information is not meant to provide legal opinions and is not a substitute for the advice of legal counsel.

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