The Breadth of *Hoffman Plastic*

*By Michael T. Taylor**

In *Hoffman Plastic Compounds, Inc.*, v. NLRB*,* 122 S.Ct. 1275 (2002), the Supreme Court was presented with the following question: Can the National Labor Relations Board award backpay to a worker who has never been legally authorized to work in the United States? The Court held that awarding backpay under these circumstances is not within the Board's remedial discretion.

There have been several proclamations in the legal community regarding the breadth of *Hoffman Plastic*. For instance, shortly after the Court rendered its decision, the General Counsel for the National Labor Relations Board issued a memorandum to provide guidance to the Regions. In GC Memorandum 02-06, the GC stated that the "clear thrust of the [decision] precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstance of their hire." The GC instructed the Regions to seek backpay even if an employer knowingly employed an undocumented worker who was unlawfully discharged. However, the GC also stated that the decision does not apply to work "already performed." Stated another way, the decision does not apply to non-discharge situations. The GC stated that an example is where there has simply been a unilateral change of pay or benefits. The GC instructed the Regions to seek backpay for work "already performed." (These are just a few areas in which the GC provided guidance to the Regions in light of the decision.)

The U.S. Department of Labor also responded to *Hoffman Plastic*, issuing a fact sheet regarding the breadth of the decision. In Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastic* decision on laws enforced by the Wage and Hour Division, the DOL took the position that the decision does not apply to laws that the DOL enforces, such as the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). Those laws require the DOL to seek backpay for work "already performed." The DOL stated that it would continue to enforce those laws regardless of whether a worker is documented or undocumented.

The Equal Employment Opportunity Commission provided guidance on the impact of *Hoffman Plastic* as well. In its June 27, 2002, "Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws," the EEOC stated that in light of *Hoffman Plastic*, and the fact that it had previously relied on Board cases in concluding that undocumented workers are entitled to all forms of monetary relief**,** it was rescinding prior guidance stating that undocumented workers subject to unlawful discrimination are entitled to post-discharge backpay. The EEOC stated that it would still seek other forms of equitable relief for undocumented workers, however.

Because the Board and the courts will eventually have to grapple with these issues, this article analyzes the breadth of *Hoffman Plastic*. The author contends that in terms of the Board's remedial discretion, the decision is a broad rather than a narrow one. That is, the decision applies when an employer knowingly employs an undocumented worker, and the decision also applies to work "already performed." The author also contends that the logic of the decision is applicable to the remedial authority of other federal agencies as well, such as the DOL and the EEOC.

This article starts with a brief description of the facts of *Hoffman Plastic*, followed by narrative of the Board's reasoning for the decision. The article then discusses the breadth of the decision. Finally, this article draws a conclusion and briefly depicts the impact of the decision.

BACKGROUND

In *Hoffman Plastic*, the National Labor Relations Board determined that the employer had discharged employee Jose Castro in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. The Board ordered backpay and other equitable relief. At the compliance hearing, which was held in order to determine the amount of backpay that was due, Castro testified that he had never been legally authorized to work in the United States. The Administrative Law Judge found that based on this testimony, the Board was precluded from awarding backpay to Castro according to *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and by the Immigration Reform and Control Act of 1986 (IRCA), which makes it unlawful for employers knowingly to hire undocumented workers or for workers to use fraudulent documents to establish employment eligibility. The Board reversed the ALJ's decision with respect to the award of backpay, citing its precedent holding that the most effective way to further the immigration policies embodied in IRCA is to provide the NLRA's protections and remedies to undocumented workers in the same manner as to other employees.

The Supreme Court was subsequently presented with the following question: Can the National Labor Relations Board award backpay to an unlawfully discharged worker who has never been legally authorized to work in the United States? In addressing this question, the Court stated that although the Board has broad discretion in selecting and fashioning remedies for violations of the National Labor Relations Act (NLRA), the Court has never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.

As authority for awarding backpay to employees who violate federal law, the Board had first relied on *ABF Freight System, Inc. v. NLR*, 510 U.S. 317 (1994). In *ABF*

Freight, the Court had held that an employee's false testimony at a compliance proceeding did not require the Board to deny reinstatement with backpay. The *Hoffman Plastic* Court determined that the Board's reliance on *ABF Freight* is misplaced for several reasons: (1) that case involved employee misconduct related to internal Board proceedings; (2) that case did not involve a situation where federal statutes or policies administered by other federal agencies were implicated; and (3) that case did not involve employee misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law. The Court concluded that the appropriate line of inquiry here was whether the Board's remedial preferences trench upon federal statutes and policies unrelated to the NLRA.

The Board had taken the position that *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) only applies to undocumented workers who left the United States and cannot claim backpay without lawful reentry. In *Sure-Tan*, the Court had held that the Board was prohibited from effectively rewarding a violation of the Immigration and Nationality Act (INA) by reinstating an unlawfully discharged worker not authorized to reenter the United States. The Court had opined that in order to avoid "a potential conflict with the INA," the Board's reinstatement order had to be conditioned on proof of the workers' legal reentry. The Court determined that with respect to the award of backpay, "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

The *Hoffman Plastic* Court determined that addressing the merits of the Board's position was unnecessary in the instant matter and that the question presented would be "better analyzed through a wider lens." The Court explained that in 1986, Congress enacted the IRCA, "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." The IRCA "'forcefully' made combating the employment of illegal aliens central to the '[t]he policy of immigration law.'" Under the IRCA, employers are required to verify the identity and eligibility of all new hires by examining specified documents before they begin work. If a worker is unable to present the required documentation, the worker cannot be hired. If the employer unknowingly hires an undocumented worker, or if the worker becomes undocumented while employed, the employer is compelled to discharge the worker on the discovery of such status. Employers who violate the IRCA are punished by civil fines and may be subject to criminal prosecution. The IRCA also makes it a crime for an undocumented worker to subvert the employer verification system by tendering fraudulent documents. Undocumented workers who use or attempt to use such documents are subject to fines and criminal prosecution.

The Court observed that the Board's award of backpay to "an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud" runs counter to the policies underlying IRCA, which the Board has no authority to enforce or administer. Thus, the award is not within the Board's remedial discretion.

The Court disagreed with the Board's position that awarding backpay to the unlawfully discharged employee "reasonably accommodates" the IRCA. The Court explained:

> What matters here . . . is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There 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. Far from 'accommodating' IRCA, the Board's position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.

The Court stated that awarding backpay in a case like this also condones and encourages *future violations* of the IRCA. For instance, noted the Court, "had the INS detained Castro, or had Castro obeyed the law and departed to Mexico, Castro would have lost his right to backpay. Castro thus qualifies for the Board's award only by remaining inside the United States illegally." Similarly, explained the Court, "Castro cannot mitigate damages, a duty our case law requires, without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers."

The Court concluded:

> [A]llowing 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 of apprehension by immigration authorities, condone prior violations of 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.

The Court noted that the Board had already imposed other significant sanctions against the employer. Those sanctions included orders that the employer cease and desists its violations of the NLRA and that the employer conspicuously post a notice to employees setting forth their rights under the NLRA. The employer would be subject to contempt proceedings should it fail to comply with these orders. The Court also noted that in light of the practical workings of the immigration laws, any perceived deficiency in the NLRA's existing remedial arsenal must be addressed by the congressional action, not the courts.

ANALYSIS

In determining the breadth of *Hoffman Plastic*, the first issue that needs to be addressed is whether the decision is applicable to a situation where an employer knowingly employed an undocumented worker. This author agrees with the General Counsel of the National Labor Relations Board that the decision is applicable to this type of situation.

The GC correctly notes, "[T]he clear thrust of the majority opinion precludes backpay for all unlawfully discharged undocumented workers regardless of the circumstances of their hire." More specifically, Congress has expressly made it illegal for an undocumented worker to be employed in the United States; consequently, awarding backpay under these particular circumstances would simply trivialize federal immigration law, which the Board has no authority to enforce or administer. It would encourage undocumented workers to successfully evade immigration authorities, condone prior violations of immigration laws by undocumented workers, and encourage future violations by undocumented workers.

Now some may take the position that awarding backpay under these circumstances would discourage some employers from recruiting and hiring undocumented workers. Thus, the award would be consistent with federal immigration policy. Theoretically speaking, that may be true. But in practical terms, employers who engage in this type of activity will already be subject to civil and criminal penalties under IRCA. It is highly unlikely that an employer would take the following position: "Well, I am going to be subject to a fine and the possibility of confinement in prison if I hire this undocumented worker, but because I may be subject to additional labor law costs sometime in the future, I am not going to hire them." In short, an additional cost of a labor law violation under these circumstances is not going to actually deter employers from engaging in this type of activity.

The next issue that needs to be addressed is whether the decision is applicable to work "already performed." An example of work already performed is where there has simply been a unilateral change of pay or benefits. This author disagrees with the General Counsel's position on this issue.

The GC focuses on the Court's use of the phrase "work not performed" to support his position that the decision is indeed a narrow one. This author contends that while, to be sure, the Court uses the phrase "work not performed" in the decision, the Court also uses the phrase "for wages that could not lawfully have been earned" immediately thereafter. The GC conveniently ignores this latter phrase used by the Court. And, again, the clear thrust of the decision is that Congress has expressly made it illegal for an undocumented worker to be employed in the United States; consequently, awarding backpay under these particular circumstances would trivialize federal immigration law, which the Board has no authority to enforce or administer. It would still encourage undocumented workers to successfully evade immigration authorities, condone prior violations of immigration laws by undocumented workers, and encourage future violations by undocumented workers.

The only difference here is that because the backpay award would be for work already performed, an undocumented worker would not be required to mitigate damages. As noted by the Court, an "[undocumented worker] cannot mitigate damages, a duty [that] case law requires, without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore IRCA and hire illegal workers." Thus, awarding backpay under these particular circumstances would not encourage future violations of immigration laws in terms of undocumented workers mitigating damages. It would still encourage future violations of immigrations laws, however, in terms of undocumented workers remaining inside the United States illegally in order to maintain the right to backpay. As noted by the Court in the decision, if the INS detains an undocumented worker, or if an undocumented worker obeys the law and leaves the country, an undocumented worker loses his or her right to backpay.

The next question is whether the logic of *Hoffman Plastic* is applicable to other federal agencies as well, such as the Department of Labor and the Equal Employment Opportunity Commission. This author contends that it is. Regardless of whether it is the DOL or the EEOC that is seeking backpay, the clear thrust of *Hoffman Plastic* is that Congress has expressly made it illegal for an undocumented worker to be employed in the United States; consequently, awarding backpay under *any* circumstances would trivialize and frustrate federal immigration law.

Some may contend that as a matter of public policy we need undocumented workers in our workforce. They, the argument goes, are the ones who perform the menial labor that citizens in this country refuse to perform. This author contends that if that is indeed the case, it is a matter of public policy. And Congress addresses matters of public policy, not the courts. Thus, if this is indeed a legitimate concern, Congress could pass legislation expanding our immigration laws so that we will have more lawful immigrants to perform those menial jobs that citizens in this country do not want to perform.

Some may also contend that with respect to employers who fail to pay undocumented workers for work "already performed," basic fairness dictates that employers should not benefit from cheap or free labor. This author agrees. However, this author also believes that undocumented workers should not benefit from violating current federal immigration law; otherwise, current federal immigration law would be meaningless. That said, in order for employers not to benefit from cheap or free labor, this author suggests that Congress should enact legislation that requires employers who fail to

pay undocumented workers for "work already performed" in violation federal law to pay the amount owed to some kind of immigration fund. The money could be used to fight illegal immigration and to help people who have lawfully immigrated to this country. The latter would include helping them becoming citizens of this country. This would be an equitable approach to what this author acknowledges is a very difficult situation.

CONCLUSION

In terms of the National Labor Relations Board's remedial discretion, *Hoffman Plastic* is a broad decision. The decision applies when an employer knowingly employs an undocumented worker, and also applies to work "already performed." The logic of the decision is applicable to the remedial authority of other federal agencies as well, such as the Department of Labor and the Equal Employment Opportunity.

As stated above, this author proposes that to prevent employers from benefiting from cheap or free labor, Congress should enact legislation requiring employers who fail to pay undocumented workers for work "already performed" in violation of federal law to pay the amount owed into a kind of immigration fund. That money could be used to fight illegal immigration and help *legal* immigrants by, among other things, assisting them in becoming U.S. citizens.

Because backpay awards serve as strong deterrents to employers' violations of federal law, *Hoffman Plastic* will have profound impact on the remedial authority of federal agencies. (The decision may even impact state law as well, affecting everything from backpay for wrongful discharge causes of action to backpay for workers' compensation claims.) Unless Congress acts in the near future, there is going to be a tidal wave of cases in which the courts will have to decide the breadth of *Hoffman Plastic*. This article has attempted to aid the courts in their future task.

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