

HOFFMAN PLASTICS AND RIGHTS AND REMEDIES FOR IMMIGRANT WORKERS WHO ENGAGE IN COLLECTIVE ACTION

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the United States' Supreme Court said that unauthorized workers who are fired from their job for organizing do not have the right to receive compensation for their lost work.

For immigrant workers, unions and workers centers who are engaged in organizing campaigns, *Hoffman* raised questions about how to defend labor rights in the face of aggressive employer tactics. Here are some facts to remember.

Although the decision makes it harder for immigrant and other workers to organize,

- ✓ Undocumented workers are covered by the National Labor Relations Act (NLRA) and nearly every other state and federal labor law;
- ✓ An employer who discharges an employee in violation of the NLRA has violated the law regardless of the employee's immigration status.

Will I have to disclose my immigration status in order to file an NLRB charge?

No. Following the decision, the National Labor Relations Board (NLRB or Board) General Counsel issued a memorandum outlining NLRB policy. The Memorandum says that evidence of work authorization or immigration status is "irrelevant to a respondent's liability under the Act and [] questions concerning that status should be left for the compliance stage of the case."

Regions are instructed to presume that employees are lawfully authorized to work. They are to refrain from conducting an immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.

What if my employer threatens to turn me in to ICE for filing a charge? It is illegal for your employer to retaliate against you, and it is unlikely that ICE would respond to the employer's call. Nonetheless, you should immediately tell your union, workers' center, or lawyer about the threat.

Can I be a voting member of the union without showing employment authorization?

Yes. Immigration status is not relevant in establishing whether a worker can belong to a bargaining unit, or in proceedings challenging the result of an election. (i.e. representation cases).

Is my immigration status relevant at any point in the case? What about after my employer has been found to have violated the law?

Immigration status is irrelevant during the merits stage of the proceeding, when the Board is deciding whether or not the employer has violated the law.

Once an employer is found to have violated the law, the Board may order that the employer make an offer of reinstatement to the workers it unlawfully fired, and that it pay those workers compensation for their lost work. An employer may legitimately raise the issue of immigration status at this stage – the compliance stage – to argue that it cannot re-hire workers who are unauthorized to work in this country.

An employer may also legitimately raise the issue of immigration status at the remedies state to argue that it is not required to pay workers compensation for their lost work. The Supreme Court decision in *Hoffman* said that unauthorized workers who are fired for organizing do not have the right to receive compensation for their lost work.

However, the burden is on the employer, not the Board, to show that immigration status is a genuine issue, and that it has a reasonable basis for believing that the workers are unauthorized. The Board should not inquire into a worker’s immigration status unless the employer has affirmatively established that it knows or has reason to know that a worker is undocumented.

What kind of proof raises a “genuine issue” about immigration status?

An employer cannot raise a “genuine issue” by simply claiming that workers are unauthorized. Nor is the fact that an employer may have received a social security no-match letter sufficient to provide this reasonable basis. If the employer legitimately raises the issue of immigration status and you are required, as described in the next section, to show that you are authorized to work, unauthorized workers may not be rehired.

Does it matter if the employer knew all along that a worker was unauthorized? What if it never asked for work authorization documents?

While the Supreme Court case saying that unauthorized workers aren’t entitled to lost wages is still valid, a more recent NLRB decision said that the employer may be required to pay this compensation in cases, unlike *Hoffman*, where the employer knew that its workers were undocumented, and where the workers did not give the employer false documentation. If the Board does order this compensation, the employer will be required to pay an amount for the work that the worker would have been performing from the date of his firing up until the date that the employer makes a valid and genuine offer of reinstatement.

If the NLRB tells the employer to rehire me, can the employer make me show

employment authorization?

If the NLRB tells the employer to offer reinstatement to the workers that the employer unlawfully fired, it may also allow the employer to “condition” this offer upon those workers showing proof of work authorization, but only if those workers never provided the proper documentation when they were initially hired. However, an employer cannot use this “conditional reinstatement” as a pretext to avoid reinstating workers who were asserting their rights. The employer must be requesting documentation in order to genuinely comply with the Board’s order and with the immigration laws, not just to harass and intimidate workers. And it must give workers a reasonable time to provide the proper documents. If the employer makes a proper conditional offer of reinstatement, and a worker is not able to provide the proper documentation in a reasonable time, then the worker may not be rehired.

What remedies are always still available to unauthorized workers?

The NLRB can always order the employer to cease and desist its unlawful practices, and to post a notice that it has violated the law, regardless of the immigration status of the workers affected.