

***Hoffman Plastic: An Organizing Opportunity on Immigrant Worker Issues***  
(Victor Narro - Sweatshop Watch, and Marielena Hincapié – National Immigration Law Center)

**Legal Background**

With the potential to chip away at many of the hard won rights for immigrant workers, the Supreme Court issued the *Hoffman Plastic Compounds v. National Labor Relations Board*<sup>1</sup> decision on March 27, 2002. In *Hoffman*, the Court held that undocumented workers are not entitled to recover back pay under the National Labor Relations Act (NLRA) when they are illegally fired from a job for an unfair labor practice.

The Court's reasoning relied heavily on the fact that the worker involved, Jose Castro, had admitted to using false documents to establish work authorization and that he was undocumented. Reversing the National Labor Relations Board (NLRB) and the Court of Appeals in a 5-4 decision, the Supreme Court held that the NLRB could not award back pay under the NLRA, "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 a criminal fraud."<sup>2</sup>

The last time the Supreme Court had addressed the issue of undocumented workers' right to back pay and reinstatement under the NLRA was in the *Sure-Tan, Inc. v. N.L.R.B.*<sup>3</sup> case which predates the Immigration Reform and Control Act of 1986 (IRCA).<sup>4</sup> In *Sure-Tan*, the employer reported the workers to the Immigration and Naturalization Service (INS) in retaliation for their union activities. The Court held that undocumented workers are included in the statutory construction of the term "employee" under the NLRA, and therefore enjoy its protections. Because the workers had voluntarily departed the U.S. after being detained by the INS, the Court held that the workers could not be reinstated unless they were authorized to reenter the country, and that the workers "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."<sup>5</sup> In deciding *Hoffman*, the Supreme Court focused on the legal landscape that significantly changed when Congress enacted IRCA -- approximately two years after the *Sure-Tan* decision -- which "'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.'"<sup>6</sup>

As Justice Breyer noted in his dissent, without the deterrence of a backpay remedy "the cost to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens)" is significantly lower. "It thereby increases the employer's incentive to find and to hire illegal-alien employees ... [offering] employers immunity in borderline cases, thereby encouraging them to take risks, *i.e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations."<sup>7</sup> The Supreme Court implicitly held that undocumented workers continue

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<sup>1</sup> 535 U.S. 137, 122 S.Ct. 1275 (2002).

<sup>2</sup> *Id.*, 122 S.Ct. at 1283.

<sup>3</sup> 467 U.S. 883 (1984).

<sup>4</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (amending Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*).

<sup>5</sup> *Hoffman*, 122 S.Ct. at 1280, *citing Sure-Tan*, 467 U.S. at 904.

<sup>6</sup> *Id.*, 122 S.Ct. at 1282.

<sup>7</sup> *Id.*, 122 S.Ct. at 1287.

to be protected by the NLRA, but in essence they are left with the right to organize and join a union without a meaningful remedy to enforce those rights.

This article seeks to address how the immigrant rights and labor advocate community has joined efforts to curtail the impact of the *Hoffman* decision, and how such a devastating decision has actually become a tremendous organizing opportunity.<sup>8</sup> First, we discuss the impact of the case on the immigrant community, with a particular focus on California. Second, we discuss how community organizing, legal advocacy, and legislative efforts have attempted to respond to the decision. Finally, we discuss the challenges currently facing immigrant worker advocates as we work to protect the rights of low-wage immigrant workers despite *Hoffman*.

## I. *Hoffman's Impact on the Community*

Exactly one week after the *Hoffman* decision came down, over 30 national advocacy organizations, unions, and litigators had a national conference call to discuss the impact of the anxiously awaited decision. As a result of the call, several national committees were formed which included a legal, legislative, and grassroots committee that the National Employment Law Project (NELP) and National Immigration Law Center (NILC) have taken the lead to coordinate.

One of the most important first steps was to ensure that immigrant workers were receiving proper information about the scope and limitations of the *Hoffman* decision, and to minimize any misconceptions. The grassroots committee developed organically as many community organizations and worker centers that organize immigrant workers received numerous questions and concerns from immigrants inquiring about their rights. There was a wide range of media reports on the decision and its impact on immigrant communities. Unfortunately, this mass media frenzy caused many ethnic media channels to misinterpret and misreport the impact of the decision.

For example, the Korean ethnic media in Los Angeles reported that the Supreme Court decided that undocumented immigrant workers have no labor rights. The Spanish language media displayed the same message. To make matters worse, there was media confusion as to the interpretation of back pay for purposes of this decision. Some media outlets interpreted the decision to mean that undocumented workers were not entitled to wages owed for work already performed. This misreporting of the *Hoffman* decision throughout the ethnic media added to the environment of fear and panic in immigrant communities throughout the country. Unfortunately, rather than serving as a tool for disseminating information on the decision, many of the media reports created much confusion among immigrants who thought that *Hoffman* took away all employment rights, and even confusion about the impact on documented immigrants as well. The hotlines of many organizations and worker centers were unable to handle the floods of phone calls from immigrant workers from low-wage industries who were fearful of their future.

This fearful environment was most prevalent in the major industries with an undocumented immigrant workforce, such as agricultural, construction, garment, janitorial, and restaurant.

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<sup>8</sup> This article does not discuss in detail the case law that has developed over the last year since *Hoffman*. See, *Hoffman Plastic Compounds v. NLRB and Immigrant Workers: Preserving Rights and Remedies* (May 2003), available at [http://www.nilc.org/immsemplymnt/Hoffman\\_NLRB/Hoffman\\_NELP\\_NILC\\_FINAL.PDF](http://www.nilc.org/immsemplymnt/Hoffman_NLRB/Hoffman_NELP_NILC_FINAL.PDF).

There are an estimated 8.5 million unauthorized immigrants in the U.S., 5.3 million of which are in the labor market.<sup>9</sup> For example, there are an estimated 1.2 million unauthorized workers in the agricultural industry, 620,000 in construction, 1.2 million in manufacturing, and an additional 1.3 in the service industry, including janitorial jobs.<sup>10</sup>

Many unscrupulous employers in these industries used reports of the *Hoffman* decision to create an environment of fear and intimidation without having to break any laws. On the other extreme, there were cases of employers who intentionally violated the rights of workers and used *Hoffman* as justification for their actions. The environment of fear and apprehension created by the *Hoffman* decision took us back to the days of Proposition 187 where many immigrants were afraid to seek social services and send their children to school even though legal advocates were able to get an injunction against its implementation. In the same way that many businesses took the law into their hands by denying services to immigrants during that time period, many employers used *Hoffman* as a license to intimidate and abuse their immigrant workers.

The Garment Worker Center (GWC) and the Korean Immigrant Worker Advocates (KIWA) in Los Angeles received numerous cases from restaurant workers and garment workers of employers taking adverse actions against them on the days immediately following the media frenzy over the *Hoffman* decision. For example, Korean restaurant owners were telling workers that they no longer had to pay wages and they were doing so voluntarily because they read in the Korean newspapers that undocumented workers no longer had any rights. Garment workers went to GWC with cases of employers telling them that they were lucky to have a job and they should not complain because they heard in the news about the Supreme Court decision that “immigrant workers have no rights.”

These cases are but a small fraction of what was taking place all over the country where employers were using the *Hoffman* decision to justify exploiting workers.

In an expansive interpretation of *Hoffman*, for example, an attorney in New York representing a Manhattan meat market cited *Hoffman* when he issued a written threat of litigation against Make the Road by Walking, a workers’ advocacy community organization in Brooklyn, because it publicly called for a protest against the employer on behalf of workers for unpaid wages. The letter stated, “any demonstration by your organization on behalf of [the worker] will be in violation of Federal law and my client will pursue direct action against your organization. I trust that your organization will immediately comply with the current law as annunciated (sic) by the Supreme Court of the United States.”

Similarly, NILC received a call from a plaintiff’s attorney in San Diego who had recently won a wage and hour case under the California Labor Code. Shortly after *Hoffman*, the judge *sua sponte* reopened the case and asked the parties to brief the question of *Hoffman*’s impact on an undocumented worker’s right to unpaid wages under state law. Fortunately, the Division of Labor Standards Enforcement (Labor Commissioner) of the California Department of Industrial Relations intervened on behalf of the worker, and the court upheld the worker’s judgment

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<sup>9</sup> B. Lindsay Lowell and Roberto Suro, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks*, The Pew Hispanic Center (Ma. 21, 2002) at 6-8.

<sup>10</sup> *Ibid.* at 8-9.

finding that *Hoffman* does not limit the right of undocumented workers seeking unpaid minimum wages and overtime under the California Labor Code.<sup>11</sup> Also immediately following the *Hoffman* decision, the defendant in *Rivera, et al v. Nibco* -- a language discrimination case under Title VII -- immediately filed a motion for reconsideration of an existing protective order granted by the magistrate judge which prohibits defendant from inquiring into plaintiffs' immigration status in the discovery process.<sup>12</sup>

## II. Community Response: Organizing and Legal Efforts

It was evident from the events that unfolded within the first two weeks, a critical component of responding to *Hoffman's* impact has been educating immigrant workers, advocates, and collaborative efforts to conduct legal research and develop litigation defenses.

**Organizing Efforts** - For immigrant worker advocates and organizers, *Hoffman* highlighted two central themes: 1) the importance of creating and maintaining a strong nexus between the legal, advocacy and organizing work; and 2) the importance of creating strong leadership with immigrant workers. Many organizers from worker centers such as the GWC and KIWA had to work with legal advocates to create outreach materials and engage in advocacy efforts to minimize the fear created by *Hoffman* and the media. While *Hoffman* posed many challenges to advocating for the rights of undocumented immigrant workers, it also created opportunities to engage workers and advocates in strong organizing efforts to reaffirm labor protections for the immigrant labor workforce.

Worker centers like GWC and KIWA used the *Hoffman* decision to strengthen its organizing work to empower garment workers and Koreatown restaurant workers in the Greater Los Angeles area and to create solidarity with other low wage immigrant workers from other industries. The organizers from these two organizations provided workshops for workers on the *Hoffman* decision and integrated the leadership base of their members in the proactive strategies to respond to the impact of this decision.

In order to engage in a comprehensive outreach effort to educate immigrant workers about their rights post-*Hoffman*, worker centers and immigrant worker advocates needed to develop basic outreach materials in different languages. The sharing of outreach information would also be a key part of this process. In Los Angeles, the immigrant groups like the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) and worker centers like GWC and KIWA worked on outreach information together for immigrant workers. These organizations created modules to use for know-your-rights workshops when educating workers about *Hoffman* and their rights under the laws.

The work of the Coalition of Immigrant Worker Advocates (CIWA) in response to *Hoffman* exemplifies how coalition-building became an effective strategy to minimize its negative impact. CIWA was started in 2001 by Sweatshop Watch, GWC, CHIRLA, KIWA, and the Maintenance

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<sup>11</sup> See, *Valadez v. El Aguila Taco Shop* (Case No. GIC 781170) (Apr. 18, 2002).

<sup>12</sup> This case has since gone up on appeal to the Ninth Circuit on defendant's interlocutory appeal. The argument was held on July 16, 2003, and a decision is pending. For copies of the briefs in *Rivera* are available at <http://www.nilc.org/immseplymnt/index.htm>.

Cooperation Trust Fund. Through organizing and advocacy, these organizations work together towards improving working conditions and increasing labor enforcement in the four major low wage industries predominant in the mostly unregulated underground economy of Los Angeles – garment, janitorial, day labor, and restaurant. During the past two years, CIWA held meetings with state labor officials and the California Department of Industrial Relations (DIR) to improve labor enforcement in these industries and engage in outreach efforts and public education to educate immigrant workers about their rights. This strong coalition work and relationship building with state agency officials became very instrumental in the community efforts to respond to *Hoffman*.

**Legal Efforts** – As mentioned earlier, the first national conference call resulted in the formation of a legal committee, which has served as a forum for litigators to come together and discuss pending cases where *Hoffman* issues are being raised. NELP and NILC developed a series of legal articles analyzing the decision to share with legal advocates across the country, conducted trainings for advocates in places such as Nebraska, North Carolina, Texas, Minnesota, Rhode Island, and numerous national conferences.

The legal committee has also focused its efforts on providing technical assistance to attorneys that considering bringing legal claims on behalf of undocumented workers, as well as drafting *amicus curiae* briefs in appropriate cases. Among the various *amicus* briefs that have been filed is a brief before the Inter-American Court that NELP, NILC, and 50 other labor, civil rights, and immigrant rights groups, filed at Mexico’s request for an Advisory Opinion regarding remedies available to undocumented workers under international law.

Additionally, the legal committee advocated for a favorable interpretation of *Hoffman* by the various federal agencies such as the NLRB, the Equal Employment Opportunity Commission, and the Department of Labor. This complemented the work being done by key community groups in California and Washington.

CIWA organization members met with top labor officials from the California Department of Industrial Relations to demand a strong and swift public response to *Hoffman*. The goal was for DIR to make a strong official public statement reaffirming its commitment to assist immigrant workers with wage and hour violations and that California labor laws apply to everyone regardless of immigration status. A strong letter writing campaign from the organizations of CIWA and the immigrant workers who they organize and represent caused DIR officials to understand the significance and urgency of issuing a public statement.

Within a one month period, the DIR issued a statement to the media and posted it on its website clarifying that it will “investigate retaliation complaints and file court actions to collect back pay owed to any worker who was the victim of retaliation for having complained about wages or workplace safety and health, without regard to the worker’s immigration status.”

During the same time period, the Director of the Washington State Department of Labor and Industries issued a statement that undocumented immigrants continue to be entitled to both time loss and wage replacement after the *Hoffman* decision:

The 1972 law that revamped Washington's workers' compensation system is explicit: All workers must have coverage. Both employers and workers contribute to the insurance fund. The Department of Labor and Industries is responsible for ...providing workers with medical care and wage replacement when an injury or an occupation disease prevents them from doing their job. The agency has and will continue to do all that without regard to the worker's immigration status.

Following *Hoffman*, many community organizations and immigrant worker advocates worked with state agencies to reaffirm their policies of enforcing the labor and employment rights of all workers, regardless of immigration status. Based on the administrative advocacy efforts in California and Washington, NELP and NILC developed a model state labor agency policy that advocates could try to get their state administrative agencies to adopt.<sup>13</sup>

**Legislative Efforts** - Another strategy that emerged fairly soon after the decision was a legislative proposal in California to respond to the impact of *Hoffman*. The California Federation of Labor, California Rural Legal Assistance, NILC, MALDEF, the CIWA coalition members, and others engaged in a statewide legislative effort to pass Senate Bill 1818.

The many organizations and labor unions sponsoring and supporting SB 1818 engaged in letter writing and public education campaigns to generate community support for it. SB 1818 became another excellent opportunity to organize immigrant workers to respond to the *Hoffman* decision. California Governor Davis signed this bill into law on September 29, 2002. With this legislation, California became the first state in the country post-*Hoffman* to adopt an affirmative state law that addresses the issue of labor protection for undocumented workers.

This new law amends the Civil, Government, Health and Safety and Labor Codes of California to reaffirm that “[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment or who have been employed, in [California]. This law also reaffirms that:

For purposes of enforcing state labor, employment, civil right, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.

At the federal level, NILC, the AFL-CIO, and other members of the legislative committee first worked together last summer and fall to advocate for a narrow and straightforward bipartisan fix of *Hoffman*. The proposed legislation would amend the Immigration & Nationality Act to allow for back pay and other monetary remedies under employment and labor laws even if a worker is undocumented or has used false documents to obtain his or her job. Unfortunately due to the

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<sup>13</sup> See, *Low Pay, High Risk:: State Models for Advancing Immigrant Workers' Rights* (Apr. 2003) at 45-46, available at <http://www.nelp.org/docUploads/Low%20Pay%20High%20Risk%20April%2025%2C%202003%2Epdf>.

2002 elections, we were unable to get bipartisan support and are once again seeking to introduce a federal bill to overturn *Hoffman*, which will also serve as a great organizing opportunity.

### **III. Challenges**

One of the main reasons *Hoffman* has developed into an opportunity rather than just a threat is because of a nascent infrastructure that coincided with the decision. Prior to *Hoffman*, the first national conference call of the Low-Wage Immigrant Worker (LWIW) coalition was scheduled for late April which ended up being less than a month after the decision.<sup>14</sup> By the time the first LWIW conference call took place, the three committees (legal, legislative, and grassroots) had already been set up and the LWIW became a natural space for regular updates and sharing of information.

However, it became evident that in addition to *Hoffman* the LWIW participants also had an urgent need to discuss and strategize on the impact of the SSA no-match letters that were causing hundreds of workers to be fired. These letters are sent by the SSA to employers when a worker's name and Social Security Number does not match its records meaning SSA cannot give that worker credit for her earnings.<sup>15</sup> While the letter has been sent to employers since 1994, in 2002 SSA sent over 950,000 letters to employers in comparison to approximately 40,000-110,000 in previous years. The sheer number of letters coupled with the political climate after 9/11 and the *Hoffman* decision led many employees and employers to assume that the SSA no-match letters meant that the listed workers were undocumented leading to many firings. As in previous years, advocates also noted many employers misusing the letters to retaliate against workers who engaged in union organizing, complained of unpaid wages, or otherwise asserted their workplace rights.

The *Hoffman* decision and the SSA no-match issue lit a flame in the immigrant worker community. Community organizations that had been working on the SSA no-match letter issue engaged in a proactive strategy to treat the SSA no-match issue as a way to curtail the effects of *Hoffman*. Coalitions of church groups, community organizations, immigrant worker advocates and labor groups held community hearings in Chicago, San Francisco and Los Angeles to educate immigrants and focus public awareness on the harsh consequences of *Hoffman* and the SSA No-Match Letter policy. In Chicago and San Francisco, these coalitions worked on getting the city councils and the Immigrant Rights Commission, respectively, to adopt local resolutions recognizing the contributions of immigrant workers and their rights under the laws, and opposing the SSA No-Match Letter policy. In Los Angeles, a strong coalition of labor and community groups is working on passing a similar resolution through City Council this summer. The advocacy efforts at the local and national level on the SSA no-match letter paid off when the SSA announced in December 2002 that it was rolling back the SSA no-match program. It

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<sup>14</sup> The LWIW is co-convened by the AFL-CIO, National Council of La Raza, and NILC, and calls are scheduled approximately every 6 weeks. The participants on the call range from state and national advocacy organizations to community and labor organizers as well as public interest lawyers.

<sup>15</sup> When a worker's earnings cannot be posted to their account, the earnings are posted in the Earnings Suspense Fund, which contains approximately \$374 billion as of July 2002. See, *SSA No-Match Letter Information Packet*, available at [http://www.nilc.org/immsemplymnt/SSA-NM\\_Pack/index.htm](http://www.nilc.org/immsemplymnt/SSA-NM_Pack/index.htm), and *Toolkit for Organizers: Social Security Administration's (SSA) No-Match Letters*, available at [http://www.nilc.org/immsemplymnt/SSA-NM\\_Pack/index.htm](http://www.nilc.org/immsemplymnt/SSA-NM_Pack/index.htm).

estimates that instead of the over 950,000 letters sent to employers last year, it will send approximately 130,000 letters in 2003.

Thus far in 2003, however, we have seen an increase in employers using the SSA no-match letters in the midst of NLRB proceedings in an attempt to raise *Hoffman* issues claiming that the SSA no-match letter is proof that the workers are undocumented and therefore not entitled to certain remedies. Additionally, advocates continue reporting employer misuse of the letters. As a means of influencing policy, NILC has partnered with Jobs with Justice, National Campaign for Jobs and Income Support, National Interfaith Committee for Worker Justice, and the University of Illinois at Chicago's Center for Urban Economic Development to conduct worker surveys throughout the country to be able to measure the impact of the no-match letters.

Given the current political climate and rapidly increasing anti-immigrant attitudes and policies, effecting change on the SSA no-match program and overturning the *Hoffman* decision through a federal legislative campaign are sure to be an uphill battle and one that we will need to wage over the next couple of years. The community responses to the *Hoffman* decision helped to strengthen the organizing and leadership development work with immigrant workers, and created strong community-based coalitions. Indeed, we need to continue strengthening this base in order to achieve these federal changes.

In a way, *Hoffman* may have been a blessing in disguise because it created the opportunity for immigrant worker advocates to develop a proactive strategy to reaffirm labor protections for undocumented workers and engage them in organizing campaigns for social and economic justice. Given the amount of organizing and energy that has developed over the last year, we are hopeful that we can achieve the necessary policy and legislative changes by bridging grassroots community groups and national organizations to work closely on these efforts.