

UNDOCUMENTED WORKERS HAVE EQUAL RIGHTS
UNDER WAGE AND HOUR LAWS

by Steven G. Pearl

“Do not withhold the wages due to your poor or destitute hired hand, whether he is one of your brethren or a stranger living in a settlement in your land.” Deuteronomy 24:14.

Statutory changes over the last several years, and a 2007 Second District decision, (*Reyes v Van Elk* (2007) 148 CA4th 604, 56 CR3d 68), make clear that all workers have the right to enforce California’s wage and hour laws, regardless of their immigration status. Indeed, questions about immigration status have no place in wage and hour litigation, and discovery directed at a worker’s immigration status is expressly prohibited.

California Labor Code section 1171.5, enacted in 2002, “finds and declares” the following:

- (a) All 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 are or who have been employed, in this state.
- (b) For purposes of enforcing state labor and employment 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 the inquiry is necessary to comply with federal immigration law.
- (c) The provisions of this section are declaratory of existing law.

California Civil Code section 3339, and Government Code section 7285 contain similar language, but include civil rights and employee housing laws under the protection afforded by Labor Code section 1171.5.

The Legislature enacted these statutes in response to *Hoffman Plastic Compounds, Inc. v NLRB*, the decision in which the United States Supreme Court held that the NLRB may not award “backpay” to undocumented workers.¹ *Hoffman* concerned remedies available to undocumented workers under the NLRA and not their standing to file a claim before the NLRB. In fact, the Supreme Court in *Hoffman* reaffirmed its earlier holding in *Sure-Tan, Inc. v. NLRB*,² that undocumented workers do have standing to file claims under the NLRA, and are considered “employees” within the meaning of that statute.³

In March of 2007, in *Reyes v Van Elk*,⁴ the Second District held that the Immigration Reform and Control Act of 1986 and *Hoffman* do not preclude undocumented workers from asserting claims for unpaid prevailing wages, and do not preempt California’s immigration status privacy statutes. In a case brought by employees on public works projects subject to California’s prevailing wage law, (Lab Code, §§ 1720-1861), the Second District began by recognizing that prevailing wages

are minimum wages, and that an employee has a private statutory right to recover unpaid prevailing wages from an employer. The court then wrote: “Earned but unpaid salary wages are vested property rights, [cite omitted]. Noncitizens are guaranteed the same property rights as citizens. (Cal Const, art I, § 20).” *Hoffman*, the Second District continued, “does not prohibit plaintiffs from having standing to raise claims for prevailing wages, as those claims are ... for work already performed.”⁵

Concerning non-preemption by the IRCA, the Second District emphasized that the historic police powers of the states are not to be superceded by federal act unless that is the clear and manifest purpose of Congress.⁶ The court further explained:

We conclude there is no actual conflict between the IRCA and the prevailing wage law as the state law is not an obstacle to the accomplishment and execution of the full purposes and objectives of the IRCA.... [¶] The ultimate goal of the IRCA is to control illegal immigration into the United States by prohibiting the employment of unauthorized aliens... Allowing employers to hire undocumented workers and pay them less than the wage mandated by statute is a strong incentive for the employers to do so, which in turn encourages illegal immigration...⁷

Reyes confirms a number of important points for California employees, both documented and undocumented. First, employees have a private right of action to pursue prevailing wage claims, just as they do to pursue other wage claims. Second, undocumented workers have the same right as documented workers to enforce California’s wage and hour laws. Finally, all workers have the right to prosecute such actions without intrusive and irrelevant inquiries into their immigration status.

1. (2002) 535 US 137, 122 S Ct 1275, 152 L Ed 2d 271. The Supreme Court reasoned that awarding backpay would run counter to the policies underlying the Immigration Reform and Control Act of 1986, 8 USC §§ 1101 et seq., because it would be for “years of work not performed, for wages that could not lawfully have been earned, and for a job a job obtained in the first instance by a criminal fraud.” 535 US at 149.

2. (1984) 467 US 883, 104 S Ct 2803, 81 L Ed 2d 732.

3. *Hoffman*, 535 US at 149-150, fn. 4. See also *Martinez v Mecca Farms, Inc.* (SD Fla 2002) 213 FRD 601, 604 (rejecting suggestion that *Hoffman* eliminated right of undocumented workers to file charges with NLRB).

4. (2007) 148 CA4th 604, 56 CR3d 68.

5. *Reyes*, 148 CA4th at 615. See also *Patel v Quality Inn South* (11th Cir 1988) 846 F2d 700 (IRCA does not limit remedies for unpaid wages available to undocumented workers under the Fair Labor Standards Act).

6. *Reyes*, 148 CA4th at 618. See also *Farmer Brothers Coffee v Workers’ Compensation Appeals Bd* (2005) 133 CA4th 533, 539-541 (IRCA does not preempt California’s Workers’ Compensation Act).

7. *Reyes*, 148 CA4th at 617-618.

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