

# NO FREE PASS TO HARASS

Protecting the Rights  
of Undocumented  
Immigrant Women Workers  
in Sexual Harassment Cases



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# NO FREE PASS TO HARASS:

Protecting the Rights of Undocumented  
Immigrant Women Workers in  
Sexual Harassment Cases

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## INTRODUCTION

*Ms. L. is a Chinese national who was employed at a restaurant in New Jersey.<sup>1</sup> During her employment, Ms. L's co-workers hit and touched her against her will, and made humiliating and menacing sexually explicit comments. After she complained to management about these actions, the treatment became worse. The managers, who witnessed several of the egregious actions, refused to help. Eventually, Ms. L. resigned because of the intolerable working conditions and filed a lawsuit against her employers.*

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*In January 2002, the EEOC issued a determination that various supervisors employed by DeCoster Farms sexually assaulted and harassed female employees, especially those of Mexican and other Hispanic national origin—some of whom were undocumented workers at the time—and threatened retaliation if they complained of such conduct.<sup>2</sup>*

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*At a farm in Fresno, California, farmworker women referred to the farm as the “fil de calzon,” or “field of panties,” because so many women had been raped by supervisors there. A regional attorney for the EEOC in San Francisco said, “We were told that hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors.”<sup>3</sup>*

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## Background

The brave women who spoke out in these instances are just a few of the millions of immigrants who have faced exploitation and sexual harassment in the factories, fields, restaurants and construction sites where they labor. The burden these immigrant women workers bear is threefold: they toil in low-wage, often dangerous jobs; they are subjected to illegal and degrading treatment by co-workers and supervisors; and they risk lengthy court battles and deportation if they attempt to enforce their rights.

Immigrant women are exceptionally vulnerable to abusive workplace conditions. Their lack of familiarity with their rights under U.S. laws, language barriers, their often physical isolation in the workplace, and their race and gender make them targets for workplace abuse. In addition, these women work predominantly in low-wage sectors notorious for labor and employment law violations, including, agriculture, garment manufacturing, retail, hotel and restaurant services, home health care, and child care.<sup>4</sup>

Predictably, sexual harassment is much more prevalent in these workplaces. Despite federal and state law outlawing gender discrimination and sexual harassment in the workplace, verbal, physical and psychological harassment on the job is still a daily reality for many immigrant women working in these sectors. Unscrupulous employers, armed with the knowledge that their female employees lack the power, resources and awareness of their rights to hold them accountable for their actions take advantage of their employees without repercussion.

Immigration status is a factor that further exacerbates the vulnerability of immigrant women to sexual harassment.<sup>5</sup> When these workers seek to assert their legal rights, employers have sometimes advanced the position that undocumented workers who experience illegal harassment, discrimination, or other workplace violations are not entitled to legal remedies on account of their immigration status. These arguments often cite a 2002 Supreme Court decision, *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>6</sup> in which the Court held that the National Labor Relations Board (NLRB) did not have the authority to award the remedy of back pay to undocumented workers who were illegally fired for engaging in a protected labor organizing activity because they were not legally present in the United States. Although this decision was limited to collective bargaining rights and back pay, employers and their attorneys have attempted to extend this ruling to impair other fundamental rights and remedies undocumented workers are entitled to under labor and employment laws, including freedom from sexual harassment. Shockingly, some courts have relied on *Hoffman Plastic* to curtail some basic rights and remedies of undocumented workers.

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These efforts have chilled undocumented women workers' exercise of their workplace right to be free from harassment as these women fear that coming forward to complain of unlawful harassment and exploitation will expose their immigration status and, as a result, expose them to deportation, criminal prosecution and separation from their families without providing them a likelihood of prevailing on their claims. Even women who do assert their rights can sometimes be forced to drop their claims because of these fears.

Fortunately, across the country, courts are increasingly protecting plaintiffs from this kind of intimidation. Courts have repeatedly refused to allow discovery of immigration status in employment discrimination and other suits alleging workplace violations or to admit such information into evidence at trial. In doing so, courts have understood that the consequences of requiring workers to reveal their immigration status leads to untenable results: both undocumented workers and, in some instances, workers with lawful immigration status will forgo asserting their rights in court because of fear of immigration consequences, thus giving employers a "free pass" to exploit and harass.

In fact, as courts have recognized, placing barriers or impediments to enforcement of anti-discrimination laws for the poorest, most vulnerable workers would severely compromise the effectiveness and reach of Title VII<sup>7</sup> and other anti-discrimination laws.<sup>8</sup> So long as these vulnerable women remain unprotected from hostile and unlawful treatment, unscrupulous employers will have little motivation to comply with the law and all women's rights to be free from discrimination in the workplace will remain unrealized.

## **The Purpose of this Litigation Guide**

This guide is intended as a tool for effective litigation of sexual harassment claims brought on behalf of immigrant women workers. Defendant employers seek to use immigration status as a club to challenge these plaintiffs' standing, coverage under labor laws, and damage remedies. Attorneys representing immigrant women should anticipate these maneuvers and take precautionary measures, beginning with the client interview and continuing through the complaint drafting and the litigation process. If the attorney employs a careful approach in addressing the client's immigration status, the defendant will likely not have the opportunity to use immigration status as a strategy against the plaintiff.

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The authors of this guide are experienced immigrant worker advocates and lawyers with expertise in sexual harassment and gender discrimination law who saw an unmet need in the legal community for information about how to best plot a course of representation through the difficult terrain of representing immigrant women workers where the right to be free from gender discrimination often intersects with concerns about immigration status. We aim to provide guidance with respect to the most important issues to anticipate and the special considerations that may arise in representing undocumented women workers in cases alleging sexual harassment in the workplace.

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## PROVIDING EFFECTIVE REPRESENTATION

Immigration status should not bar immigrant women workers from enforcing their workplace rights. Undocumented workers are protected by most labor and employment laws, including laws setting minimum wage and overtime requirements, prohibiting discrimination, ensuring safety conditions and protecting workers' rights to organize.<sup>9</sup> However, as detailed below, undocumented workers may face some significant challenges in enforcing these rights. This guide will address the challenges in enforcing these workers' rights to be free from unlawful sex discrimination, and in particular, sexual harassment.

Two legal obstacles compound the difficulty undocumented women workers face in asserting discrimination claims under Title VII and comparable state anti-discrimination laws. In the background of these obstacles is the Immigration Reform and Control Act (IRCA), enacted in 1986,<sup>10</sup> which made it unlawful for an employer to knowingly hire a worker who is not authorized to work in this country and provided for employer sanctions against those who did. Subsequently, in a 2002 decision, *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court held that the NLRB cannot award undocumented workers back pay as a remedy when an employer unlawfully fires these workers in retaliation for exercising their labor rights under the National Labor Relations Act (NLRA). The Supreme Court reasoned that, "awarding back pay to illegal aliens runs counter to policies underlying IRCA."<sup>11</sup> The NLRB, the Court concluded, did not have the authority to award the worker back pay wages because the worker had originally obtained the employment unlawfully in violation of IRCA.<sup>12</sup> Following the *Hoffman Plastic* decision, employers' attorneys urged other courts to apply the Supreme Court's reasoning to justify limiting the rights and/or remedies of undocumented workers under other labor and employment laws.



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It has long been established that undocumented workers are protected by federal anti-discrimination laws, including Title VII.<sup>13</sup> Because of IRCA and *Hoffman Plastic*, however, unresolved legal questions exist as to whether undocumented workers are entitled to all the damages available to lawfully-employed workers under Title VII.<sup>14</sup> An attorney representing an immigrant woman worker should be aware of these unresolved questions so she can make informed decisions about what damages to seek in a Title VII action and which arguments are available for the plaintiff's entitlement to these damages regardless of immigration status.

A second legal obstacle has been created by employer use of the broad scope of discovery to attempt to force the plaintiff to reveal information about her immigration status during the process of litigation. By seeking such information, employers hope to intimidate the worker into dropping her claims altogether or accepting a less than fair settlement. Sometimes employers attempt to use this information to benefit from potential jury animus against immigrants at trial. Fortunately, courts have recognized the danger of allowing employers this advantage. As such, an attorney representing an immigrant worker can generally avoid disclosure of the client's immigration status by taking proactive steps and being aware of the tools at her disposal.<sup>15</sup>

## **Obtaining Relevant Information and Educating the Worker**

When representing immigrant women workers in litigation, an attorney must have some basic but vital information about her clients' immigration status so that she can anticipate the types of issues that may arise in the case and protect her clients from potential harm. The attorney should also inform her clients not only about their legal rights but also the legal consequences of their choices to pursue certain claims.

As noted above and set out in greater detail below, for example, there is some dispute about whether the remedy of back pay<sup>16</sup> is available to undocumented immigrants asserting discrimination claims. Thus, in deciding to seek back pay, a client should be made aware of the potential ramifications: i.e., a court may find her immigration status relevant to her claim for damages and require her to reveal this information to her employer. This potentiality should be weighed against the fact that, generally, an award of back pay for a low-wage worker will not be considerable. For many immigrant women workers the wages they receive while employed are low and their financial survival demands that they find jobs soon after they leave or are fired, thus reducing potential damages.<sup>17</sup> An

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attorney preparing to represent an immigrant woman worker should convey to the client that raising a back pay claim comes with the risk of making bad law, chilling the client's ability to seek other damages or raise other claims, and even deportation. At the same time, the client should be assured that she has legal rights and can obtain damages through other claims.

Understanding a client's immigration status will help an attorney determine how she should strategize, prepare, and plead her case. Counsel has an ethical duty to ensure that she does not inadvertently create negative consequences for her immigrant client. These potential negative consequences include placing the client at risk of being deported or impairing the client's ability to regularize her status in the future. For example, "[b]y revealing their immigration status, any plaintiffs found to be undocumented might face criminal prosecution and deportation."<sup>18</sup> While deportation proceedings are civil, not criminal, actions, immigrant women workers may face criminal prosecution as well as deportation for certain actions.<sup>19</sup>

It is important for counsel to inform her client of the attorney-client privilege and to explain that an attorney will not reveal information about the client's immigration status. Such reassurance will help the client feel more comfortable being forthcoming with this sensitive but important information. The immigration-related information counsel should obtain before filing any legal claims includes:

- (a) What is the client's current immigration status?<sup>20</sup>
- (b) What was the client's immigration status at the time she was employed by the defendant?
- (c) Was her employer aware of her status? How does she know that?
- (4) Did her employer make her fill out an I-9 form?<sup>21</sup>
- (5) Did she fill it out and sign it?
- (6) Did she give a Social Security Number (SSN)? How did the client obtain that number?
- (7) What documentation, if any, of identity, lawful presence, or citizenship did she provide to the employer?  
How did the client obtain that documentation?
- (8) Does the employer know the worker's current address?

The above is not an exhaustive list but instead is meant to elicit some basic information that will help counsel anticipate what immigration-related issues may arise during the lit-

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igation. It is important to note that information relevant to immigration status can take many forms so the attorney must ensure that all relevant information is obtained. If there are immigration issues that concern the client outside of the employment discrimination context, the attorney should refer the client to a reliable and competent immigration attorney.

Most importantly, counsel should determine exactly how the client's immigration status may be relevant to the claims the worker wishes to file. Immigration status can come up in a variety of circumstances presented in more detail below. For example, an employer may not seek immigration status information directly but will instead seek information about the plaintiff's driver's license, Social Security number, passport, entry into the United States, travel information, family immigration status, or tax payment history. Immigration status may be inadvertently be revealed or suggested through responses to such discovery requests.

While the client must be informed of the various potential consequences detailed above, she should also be assured that undocumented workers often assert their workplace rights without being forced to reveal their immigration status. Careful and responsible representation by an attorney will ensure that employers continue to be held accountable for sexual harassment and other forms of gender discrimination against immigrant women workers.

## **Protecting the Worker from Retaliation**

Unscrupulous employers sometimes seek to discourage immigrant women workers from asserting their workplace rights through threats or actual retaliation. The risk of losing a job can be sufficient to silence low-wage immigrant women workers because of the difficulty they face in finding jobs. Workers have reported that employers sometimes threaten physical abuse or violence to dissuade them from coming forward. In addition to these threats, which all workers may face, a threat that the employer will report the worker to immigration authorities and the worker will be deported may frighten many undocumented workers (or documented workers with undocumented family members) from proceeding with a lawsuit.

An attorney counseling a client who has been threatened with harm or deportation should be aware of several things. First, it is unlawful for an employer to take or threat-

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an adverse action in retaliation against a worker who has acted to enforce his or her rights under Title VII.<sup>22</sup> Thus, an employer violates the law if he reports an employee to immigration authorities *because of* the employee's efforts to enforce her legal rights. Analogous state anti-discrimination statutes and workers' compensation laws often contain similar anti-retaliation provisions. To dissuade the employer from taking such actions, it may be useful to explain to opposing counsel that immigration status is legally irrelevant to the underlying claim in the lawsuit and that any threats to report a worker to Immigration and Customs Enforcement (ICE) will be considered retaliation under many state and federal laws.<sup>23</sup>

Second, even when employers do follow through on these threats, immigration authorities rarely respond. According to the Immigration and Naturalization Service (the predecessor to ICE) Special Agents Field Manual,<sup>24</sup> when the government receives information concerning the employment of undocumented immigrants, officials must consider whether the information is being provided to retaliate against employees seeking to enforce their workplace rights.<sup>25</sup> If the government determines that the information may have been provided in order to interfere with employees' rights or to retaliate against them for the exercise of those rights, "no action should be taken on this information without the review of District Counsel and approval of the Assistant District Director for Investigations or an Assistant Chief Patrol."<sup>26</sup> In those limited instances in which immigration authorities do follow through on an employer's report and initiate deportation proceedings, an attorney should present to the government the Field Manual provisions set out above and inform the immigration official of the employer's retaliatory motive.

Finally, when employers exhibit a clear intention to retaliate against the worker, an attorney may be able to enlist the help of the court. A court may be willing to issue an injunction pursuant to Title VII's anti-retaliation provision,<sup>27</sup> prohibiting the employer from engaging in further retaliation where the worker can show a serious risk of retaliation or the employer has previously engaged in some retaliatory activity. In particular, an injunction prohibiting the employer from contacting or communicating with federal immigration authorities or other federal, state, or local law enforcement personnel about the plaintiff's immigration status may be warranted.<sup>28</sup> A court considering whether to grant a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure will consider "whether the Plaintiff will be irreparably harmed if the injunction does not issue; whether the defendant will be harmed if the injunction does issue; whether the public interest will be served by the injunction; and whether the plaintiff is likely to prevail on the merits".<sup>29</sup>

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Some forms of retaliation may be more subtle than others. For example, an employer's decision to require employees to complete I-9 forms for the first time after initiation of an action under Title VII may constitute retaliation and may be barred. On these facts, a federal court in Illinois granted a protective order barring an employer from seeking information regarding current employees' immigration status directly or indirectly until termination of the action or subsequent order.<sup>30</sup>

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## DEVELOPING A STRATEGY TO EXCLUDE IMMIGRATION STATUS INFORMATION

Once the attorney representing an undocumented immigrant woman has collected the relevant information from the client and taken necessary steps to protect the client from unlawful employer retaliation, the attorney should then assess the claims to be brought and determine the likely arguments that an employer might make in asserting that immigration status is relevant to the case. The attorney should develop a strategy to protect the information from discovery and from being admitted as evidence at trial.<sup>31</sup>

If a worker chooses to pursue a claim that makes immigration status relevant, the employer will likely be allowed discovery of immigration status unless the worker's attorney can obtain a protective order from the court excluding the information.

Even when immigration status is irrelevant to the claims pursued by a worker, employers may argue that it is relevant to the rights and remedies available to her as well as to the employer's defense against the worker's claims. As detailed below, employers are often aggressive in their pursuit of this information because it is an effective method of intimidating workers. Careful anticipation by the worker's attorney will usually result in exclusion of the information.

It is not possible to review all the arguments employers may make in support of their discovery of the plaintiff's immigration status. We discuss below the general framework for discovery, the relevance of immigration status both to the workers' claims and the employers' defenses, and steps to protect immigration status even when such information may be relevant. The tools set forth below should be useful in thwarting attempts by employers to bring immigration status into the litigation.

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## General Framework for Introducing and Obtaining Evidence in Litigation

To seek discovery of or introduce evidence related to plaintiffs' immigration status, employers must establish that such information is relevant to the litigation.<sup>32</sup> Under the Federal Rules of Civil Procedure, relevance in the discovery phase of litigation is defined by whether the information sought is "reasonably calculated to lead to the discovery of *admissible evidence*."<sup>33</sup>

Federal Rules of Evidence (FRE) 401, 402 and 403 govern the admissibility of evidence. FRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FRE 402 provides that only relevant evidence is admissible.

Federal Rule of Evidence 403 sets a further limit on the admissibility of evidence. FRE 403 provides that evidence, even though relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>34</sup>

Even if a defendant establishes that the information sought in discovery is *relevant* under Fed. R. Civ. P. 26(b)(1), a court may issue any order limiting the scope of discovery or forbidding discovery of that *relevant* information, upon a showing of good cause, to protect a plaintiff from annoyance, embarrassment, oppression, undue burden or expense, through the grant of "any order which justice requires."<sup>35</sup> In deciding whether the party seeking a protective order has made a showing of good cause, courts consider a variety of factors, depending on the jurisdiction in which the case is brought. Generally courts balance the interests of the parties along with the interests of the public.<sup>36</sup>

An attorney seeking to preclude the discovery of information about a client's immigration status has two choices: she can seek to exclude the information on grounds of relevance or demonstrate that discovery or introduction at trial of the information, though relevant, would be sufficiently harmful and prejudicial to the plaintiff so as to justify exclusion.

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## Anticipating Relevance Arguments

Irrelevant information has no place in litigation and its discovery can impose harassment on the opposing party as well as waste judicial resources. The most straightforward way for plaintiffs' counsel to keep out information relating to her clients' immigration status is to argue that it is irrelevant.<sup>37</sup> Courts repeatedly have refused to allow discovery of immigration status on the ground that such information is irrelevant to a variety of employment and labor rights claims.

### *Relevance of Immigration Status to the Worker's Claims*<sup>38</sup>

The worker's attorney must first determine whether any of her client's claims will put immigration status directly at issue. In the majority of situations, the worker's immigration status is irrelevant to proving sexual harassment or any other violations of Title VII or the equivalent state anti-discrimination laws.

However, *Hoffman Plastic*<sup>39</sup> has been used by some employers to argue that immigration status is relevant to a worker's standing to bring a claim for employment discrimination. In *Hoffman Plastic*, the Supreme Court determined that the NLRB did not have the authority to award back pay—pay for the time a worker was not working due to the illegal firing—to an undocumented worker who was illegally fired for engaging in protected union organizing activities. While the Supreme Court's ruling applied only to eligibility for back pay under the National Labor Relations Act, it relied on IRCA and the immigration policy contained in IRCA as the basis for holding that the National Labor Relations Board did not have the authority to award the remedy of back pay to undocumented workers.<sup>40</sup> In the wake of *Hoffman Plastic*, some employers and their lawyers have argued that immigration status is relevant to claims brought under Title VII and similar state anti-discrimination laws. They have argued that undocumented workers either do not have standing to assert discrimination claims or, more narrowly, that undocumented workers are not eligible for back pay remedies under anti-discrimination laws.

The argument that undocumented workers do not have standing to enforce anti-discrimination laws is largely unsupported. As reflected in the legislative history of IRCA, Congress did not intend to alter any existing entitlement to workplace protections, including anti-discrimination laws, by passage of the statute.<sup>41</sup> After *Hoffman Plastic*, the Equal Employment Opportunity Commission (EEOC), the agency charged with



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enforcing Title VII, stated clearly, “The Supreme Court’s decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work.”<sup>42</sup> Similarly, the vast majority of post-*Hoffman Plastic* courts ruling on these issues have held that undocumented immigrants are entitled to bring claims for workplace discrimination.<sup>43</sup>

Very few courts have held differently. None has done so in the context of sexual harassment claims. However, it is important to be familiar with these decisions in the event the employer seeks to use them to support its position. In *Egbuna v. Time-Life Libraries, Inc.*,<sup>44</sup> an employer was successful, pre-*Hoffman Plastic*, in arguing that undocumented workers are “unqualified applicants” and therefore do not have standing to sue under Title VII for discrimination in hiring and promotion. While employers may try to use this Fourth Circuit decision to argue that workers do not have standing to enforce any Title VII claims, *Egbuna* is inapplicable in sexual harassment claims, as well as any other on-the-job discrimination claims. Unlike the hiring and promotion claims at issue in *Egbuna*, which require a determination that the applicant was “qualified” for her position, a showing that a worker is qualified for her job is not an element of a *prima facie* case of on-the-job discrimination.<sup>45</sup> In sexual harassment cases, the woman has already been hired and thus determined by the employer to be qualified. The only question remaining is whether she was subjected to unlawful harassment in the workplace.

Another decision to be aware of is *Crespo v. Evergo Corp.*,<sup>46</sup> in which the New Jersey State Appellate Division dismissed a pregnancy discrimination claim alleging unlawful termination under the New Jersey Law Against Discrimination (LAD), a state analog to Title VII. The *Crespo* court stated that “where the governing workplace statutory scheme makes legal employment a prerequisite to its remedial benefits, a worker’s illegal alien status will bar relief thereunder.”<sup>47</sup> As acknowledged explicitly in the decision, however, this reasoning does not bar claims for discrimination that occurred on-the-job.<sup>48</sup> As explained by the court, “other circumstances, such as the aggravated sexual harassment . . . where the need to vindicate the policies of the LAD . . . to compensate an aggrieved party for tangible physical or emotional harm could lead to the conclusion that even a person who was absolutely disqualified from holding public employment should be allowed to seek compensation for harm suffered during that employment.”<sup>49</sup>

Aside from the anomalous cases of *Crespo* and *Egbuna*, courts consistently have acknowledged that undocumented workers are protected by Title VII and analogous state

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statutes and have standing to assert all claims available under these statutes. Further, no court has ever held that undocumented immigrants are not entitled to bring sexual harassment claims. As explained below, the most likely way in which immigration status could be seen as relevant to a sexual harassment case would be with respect to the damages sought by the plaintiff.

### *Relevance of Immigration Status to Damages Sought by the Worker*

As discussed above, whether the remedy of back pay is available to undocumented immigrants under Title VII and state anti-discrimination laws continues to be disputed. As such, if the worker chooses to seek back pay there is a significant possibility that her immigration status will be held relevant to the litigation.

After *Hoffman Plastic*,<sup>50</sup> a few courts relying on its rationale ruled that back pay is not available in Title VII cases brought by undocumented workers.<sup>51</sup> The EEOC also rescinded its pre-*Hoffman Plastic* guidance that asserted that all Title VII remedies were available to undocumented workers, but has not issued any clarification of its current position on damages available to undocumented immigrants.<sup>52</sup> In cases brought under other employment and labor laws, a few courts have held that the remedy of back pay is not available because the worker had no lawful right to keep her employment.<sup>53</sup>

To avoid discovery of immigration status, plaintiffs in discrimination cases have forgone claims for back pay, or even conceded that they were not entitled to back pay.<sup>54</sup> In determining what damages to plead and pursue, the attorney representing an undocumented worker should similarly consider forgoing such damages. As stated above, back pay damages will generally be minimal for low-wage workers who, out of economic necessity, must find employment immediately upon losing their jobs. The jurisdiction one plans to file in is an important consideration in determining whether or not to seek back pay. Another concern is whether one has the resources and expertise to litigate the immigration issues that will be brought to the forefront of any case where the remedy of back pay is sought. We recommend that any attorney considering pursuing a back pay claim consult with others experienced in litigating and strategizing around this issue.

Though we caution attorneys against proceeding with back pay claims without weighing the potential consequences of doing so, whether or not back pay is available to undocumented workers under Title VII is by no means a settled question of law. In fact, strong

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arguments exist in favor of allowing undocumented immigrants the remedy of back pay<sup>55</sup> and some states have taken the position that back pay awards are available under their state anti-discrimination laws.<sup>56</sup> Two courts addressing the issue of back pay recently expressed serious reservations about whether *Hoffman Plastic* precludes this remedy in cases brought by undocumented workers and more specifically whether *Hoffman Plastic* even applies to Title VII cases. In *Rivera v. NIBCO*,<sup>57</sup> the Ninth Circuit explained, “the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases. Thus, we seriously doubt that *Hoffman* applies in such actions.”<sup>58</sup> Similarly, in *De La Rosa v. Northern Harvest Furniture*,<sup>59</sup> the district court denied defendant’s request for immigration status information to determine whether the plaintiff was eligible for back pay remedies. The court explained that back pay may only be denied for reasons that “if applied generally, would not frustrate the central statutory purposes of eradicating discrimination ... and making persons whole.”<sup>60</sup> The court held that it could not “conclude at this time that *Hoffman* is dispositive of the issues raised in the motion to compel and plaintiffs’ response.”<sup>61</sup>

These cases signal positive legal developments as to the availability of back pay for undocumented workers bringing employment discrimination cases. Attorneys representing immigrant workers should be mindful of the range of decisions when making the determination whether to recommend that clients seek back pay.

### *Credibility and Other Possible Relevance Arguments*

Attorneys must think carefully about the facts of their cases to determine whether the workers’ immigration status will become relevant to proving their claims. For example, a worker may stay in a job where she is being sexually harassed only because she is undocumented and will have a hard time finding other employment. In this case, counsel may be called upon to reveal the worker’s immigration status to explain why she remained in the job so long, perhaps in rebuttal to an assertion by the employer that the alleged harassment must not have happened given that the worker stayed in the position. In other cases, an employer may threaten an employee with deportation as part of his harassment of the worker in order to pressure her to submit to his sexual advances. The lawyer and client may determine that immigration status is relevant and worth revealing

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so as to substantiate the claims.<sup>62</sup> In such a case, the attorney should consider seeking a protective order to limit the information revealed to that which is necessary to prove her case.

Moreover, despite the attorney's most careful planning in presenting her case, an employer may still attempt to argue that immigration status is important to their ability to properly defend against the employee's claims. One argument employers have raised is that immigration status and any untruthful representations the worker has made about her immigration status are relevant to assessing the credibility of the worker in the litigation. Courts have consistently rejected this argument. Some courts have found the information irrelevant to a determination of credibility, while others have acknowledged that the information could be relevant but refused to allow discovery because of public policy considerations.<sup>63</sup>

## **Excluding Relevant Information by Obtaining a Protective Order**

Even where the employer establishes relevance, a plaintiff's attorney still has a very important tool to protect her client under Fed. R. Civ. P. 26(c): the protective order. Rule 26(c) allows the court to limit discovery of relevant evidence in order to protect a person from annoyance, embarrassment, oppression, undue burden or expense through the grant of "any order which justice requires." As explained above, the party seeking the order must demonstrate good cause. The court will then weigh the relevant interests at stake to determine whether the discovery sought would cause unjust injury to the plaintiff.<sup>64</sup>

Repeatedly, courts have granted protective orders excluding immigration status and immigration status-related information from discovery. Some courts have excluded the information as a matter of public policy while others, balancing the interests at stake under FRE 403, have found that allowing discovery of immigration status would cause prejudice to the plaintiff that far outweighs its probative value to the defendant.

The most extensive discussion of this issue is found in *Rivera v. NIBCO, Inc.*<sup>65</sup> In denying the defendants' request for information about plaintiffs' immigration status in a Title VII case, the court explained,

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Granting employers the right to inquire into workers' immigration status in a case like this would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action. Indeed were we to direct the district courts to grant discovery requests for information related to immigration status in every case . . . under Title VII, countless acts of illegal and reprehensible conduct would go unreported.<sup>66</sup>

In *Rivera*, the court determined that a protective order was warranted “because the substantial and particularized harm of the discovery—the chilling effect that the disclosure of plaintiffs’ immigration status could have upon their ability to effectuate their rights—outweighed [defendants’] interests in obtaining the information.”<sup>67</sup> The court rejected defendants’ offer to guarantee that they would not use the information for purposes of intimidation, explaining that “[t]he fact that NIBCO has pledged not to use the plaintiffs’ immigration status to retaliate against them does not eliminate the substantial risk of chilling the rights of these and future plaintiffs.”<sup>68</sup>

Courts granting protective orders prohibiting discovery of information related to the plaintiffs’ immigration status or denying discovery of this information on grounds of relevance have used reasoning similar to that of *Rivera*. Below are some of these cases and the general reasoning of the courts.

Allowing discovery of immigration status information would deter workers from asserting their rights and consequently destroy the cause of action for that class of workers.

- *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (denying discovery of plaintiffs’ immigration status, noting that such discovery could inhibit the pursuit of their legal rights).
- *Rengifo v. Erevos Enterprises, Inc.*, 2007 WL 894376 (S.D.N.Y. Mar. 20, 2007) (granting protective order where immigration status only went to collateral issue because of *in terrorem* effect).
- *Avila-Blum v. Casa De Cambio Delgado, Inc., et al.*, 2006 WL 1378470, at \*2 (S.D.N.Y. May 16, 2006) (barring evidence of immigration status in the liability phase of a lawsuit because the inquiry would have a chilling effect on the rights of the plaintiff and because its probative value was questionable).

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- *E.E.O.C. v. The Restaurant Co.*, 448 F. Supp. 2d 1085, 1086-88 (D. Minn. 2006) (holding immigration status not relevant where no claim was made for either back pay or front pay and not relevant prior to damages phase of proceeding).
  - *De La O v. Arnold-Williams*, 2006 U.S. Dist. LEXIS 76816 (E.D. Wash. Oct. 20, 2006) (holding immigration status not relevant and stating that requiring disclosure would discourage civil rights plaintiffs from coming forward).
  - *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501 (W.D. Mich. 2005) (holding that a plaintiff must “articulate specific facts showing clearly defined and serious injury resulting from the discovery sought” in order to obtain a protective order, and finding that possibility of discharge, prosecution, deportation, and withdrawal of claim meets this standard).
  - *E.E.O.C. v. Bice of Chicago*, 229 F.R.D. at 583 (denying discovery as to immigration status “because questions about immigration status are oppressive, they constitute a substantial burden on the parties and the public interest and they would have a chilling effect on victims of discrimination from coming forward to assert discrimination claims”).
  - *E.E.O.C. v. First Wireless Group, Inc.*, 225 F.R.D. at 405 (holding that the probative value of the information does not outweigh the severe prejudicial effect such information would have on the abilities of immigrant workers to pursue their claims and thus that it would “constitute an unacceptable burden to the public interest”).
  - *Flores v. Albertsons, Inc.*, 2002 WL 1163623, at \*5 (C.D. Cal. Apr. 9, 2002) (denying the defendant’s motion to compel production of documents related to the immigration status of the plaintiffs because of the *in terrorem* effect it would cause).
  - *Flores v. Amigon*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) (stating that discovery of immigration status would effectively eliminate the Fair Labor Standards Act as a means for protecting undocumented workers from exploitation and retaliation).
  - *Liu v. Donna Karan International, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (denying discovery of immigration status based on risk of intimidation and chilling effect).

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- *Topo v. Dhir*, 210 F.R.D. 76, 79 (S.D.N.Y. 2002) (denying discovery of immigration status because of its *in terrorem* effect even though status could be “relevant to a collateral matter on cross examination”).

In balancing concerns under FRE 403, immigration status is not discoverable because the prejudicial effect on the plaintiff far outweighs the probative value to the defendant.

- *Lozano v. City of Hazleton*, 239 F.R.D. 397 (M.D. Pa. 2006) (determining harm to plaintiffs of disclosure of immigration status outweighs benefit to defendants of that information).
- *Avila-Blum v. Casaa De Cambio Delgado, Inc.*, 2006 WL 1378470, \*2 (S.D.N.Y. 2006) (balancing FRE 403 interests and concluding “[w]hile there can be little doubt about the highly prejudicial effect of such evidence at trial or its substantial social burden in other respects on the individual involved, the relevance and probative value of the discovery in addressing underlying claims that are the subject of this litigation are questionable at best, at least at the liability stage”).
- *Garcia-Andrate v. Madra's Cafe Corp.*, 2005 WL 2430195 (E.D. Mich. Aug. 3, 2005) (harm to plaintiff outweighs any relevance to the case).
- *Flores v. Amigon*, 233 F. Supp. 2d at 464-465 (granting plaintiff’s motion for a protective order because information was not relevant to defendant’s defense, and even if it were, the potential for prejudice far outweighed whatever minimal probative value such information would have).

Allowing inquiry into plaintiff’s immigration status would have the perverse effect of encouraging employers to hire undocumented workers so as to avoid accountability for unlawful workplace practices.

- *Patel v. Quality Inn South*, 846 F.2d at 704 (noting that chilling undocumented worker’s rights to assert claims under FLSA would be counterproductive to government efforts to discourage employer hiring of these workers).
- *E.E.O.C. v. City of Joliet*, 2006 WL 3421831 at \*4 (stating that safeguarding the rights of undocumented workers will strengthen immigration laws by eliminating unscrupulous motivations to hire them).

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- *Singh v. Jutla & C.D. & R's Oil*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002) (“[E]very remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers.”).
  - *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 826 (Md. Ct. App. 2005) (finding that if immigration status were discoverable, workers would be at the mercy of “unscrupulous employers who could, and perhaps, would, take advantage of this class of persons and engage in unsafe [and exploitative] practices with no fear of retribution, secure in the knowledge that society would have to bear the cost[s] of their unlawful conduct”).





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## OTHER USEFUL TACTICS

### **Bifurcating Proceedings into Liability and Damages Phases**

As discussed above, a plaintiff's immigration status should not be relevant to the question of the employer's liability for sexual harassment under Title VII but it could sometimes be relevant to the availability of back pay. As the Court of Appeals for the District of Columbia Circuit has explained,

[t]he questions of statutory violation and appropriate statutory remedy are conceptually distinct. An illegal act of discrimination—whether based on race or some other factor such as a motive of reprisal—is a wrong in itself under Title VII, regardless of whether that wrong would warrant an award of remedies.<sup>69</sup>

Because of this dichotomy, the worker's attorney may want to consider bifurcation of a case into liability and damages phases, a strategy that was favorably referenced by the Ninth Circuit in the *Rivera*<sup>70</sup> case described above. Several of the EEOC cases outlined above deny discovery of immigration status at an early stage of the proceedings. Some of them leave the issue open for further review at the damages phase of the proceedings. Thus, bifurcation may at least delay resolution of the issue of discovery of immigration status until the damages phase which could, in turn, help lead to a settlement.

### **Use of Other Privileges to Protect Immigration Status Information**

A variety of privileges that protect the disclosure of information in the litigation process may also be invoked to protect immigration status information. Spousal, attorney-client, doctor-patient, priest-penitent and the 5<sup>th</sup> Amendment privileges are the most prevalent.

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Before asserting any of these privileges the attorney should research the pitfalls and contours of the privilege.

The Fifth Amendment privilege is perhaps the most important of the various privileges and is available to everyone, regardless of immigration status.<sup>71</sup> The privilege protects an individual from being compelled to provide testimony that would incriminate her.<sup>72</sup> While deportation proceedings are civil, not criminal actions, individuals may fear criminal punishment as well as deportation for certain actions, such as: use of false or someone else's identification documents;<sup>73</sup> failure to depart the U.S. within 90 days of an order of deportation;<sup>74</sup> unlawful entry or attempted entry into the country;<sup>75</sup> unlawful re-entry after being deported or denied admission;<sup>76</sup> false representation of self as a U.S. citizen,<sup>77</sup> as well as others. This fear of criminal punishment is significant because the Fifth Amendment privilege only protects a person from being compelled to testify against him or herself with regard to any matter that could result in his or her conviction for a crime.<sup>78</sup>

Increasingly, courts have respected a Fifth Amendment plea in the context of disclosure of immigration status recognizing the validity of the plaintiff's fear of criminal prosecution.<sup>79</sup> Even where courts reached the questionable conclusion that immigration status may be relevant to the claim, they have rejected defendant's motion to compel disclosure of immigration status where plaintiffs have claimed a Fifth Amendment privilege.<sup>80</sup>

Attorneys representing immigrant women workers have an obligation to inform their clients of the availability of these privileges and to be aware that privileges must be asserted in a timely manner or they can be waived. Like other privileges, there are other pros and cons associated with invoking the Fifth Amendment. In some cases, adverse inferences can be drawn against someone who pleads the Fifth Amendment.<sup>81</sup> Pleading the Fifth Amendment may also have an impact on the credibility of a witness.

## ***In Camera* Disclosure and Confidentiality Agreements**

Although revealing immigration status *in camera*<sup>82</sup> and/or with a confidentiality agreement is certainly better than unrestricted disclosure, the worker's attorney should take great caution in considering this option and consult extensively with her client before opting for such a process. As the district court recognized in *Liu v. Donna Karan*, "even if the parties were to enter into a confidentiality agreement restricting the disclo-

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sure of such [immigration status related] discovery” a danger of intimidation would remain that could “inhibit plaintiffs in pursuing their rights.”<sup>83</sup>

### **Motions *in Limine***<sup>84</sup>

Because discovery is the primary phase of litigation during which employers seek to use immigration status to intimidate workers, this guide has focused on excluding the information during discovery. However, should the case proceed to trial, the attorney should file a motion *in limine* to ensure that immigration status issues are excluded from trial as well. Such a motion will present many of the same issues and arguments outlined above.<sup>85</sup>

### **Using Pseudonyms**

In some circumstances, attorneys may be able to protect the identity of undocumented plaintiffs by filing suit under pseudonyms or fictitious names.<sup>86</sup> In many jurisdictions, the attorney may first have to seek the court’s leave to proceed under a fictitious name before filing a complaint. Proceeding under a pseudonym will likely be more feasible and more effective in cases involving employers with many employees, where it will be difficult for the employer to identify the worker or workers bringing the claim.



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## How the Worker Might Qualify for Legal Status

Some women who have suffered egregious forms of sexual harassment may be able to obtain a visa in exchange for cooperating with criminal prosecutions flowing from the harassment or because of the serious abuse they have suffered. These visas are available even if removal/deportation proceedings have already been initiated against the worker. The most appropriate visa, the U visa, is potentially available to victims of crimes who have suffered substantial physical or mental abuse as the result of criminal activity conducted in the U.S. or who have information concerning such criminal activity.<sup>87</sup> Covered crimes for the grant of a U visa include, rape, torture, domestic violence, sexual assault, and abusive sexual contact.<sup>88</sup> The availability of U visas is limited, but workers' attorneys are well-advised to consult with knowledgeable immigration attorneys before assuming that their clients would not qualify for U visas.



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## CONCLUSION

Increasingly, immigrant women workers who are victims of sexual harassment understand that harassment is not only an attack on their dignity and humanity, but is also a serious violation of the law in the United States. Private attorneys and E.E.O.C. offices throughout the country are working with victims', women's and community groups to address this prevalent workplace reality and businesses are being held accountable.

Attorneys representing undocumented immigrant women workers should support their clients' courage in coming forward and help them to navigate the treacherous waters in which immigration status collides with anti-discrimination protections. Fortunately, a growing body of case law, in addition to traditional legal tools such as injunctions, motions for protective orders, motions *in limine*, and assertion of the Fifth Amendment privilege, exist to support them. In some cases, victims may be able to gain lawful immigration status in the process. This guide aims to help immigrant victims of sexual harassment and their attorneys fulfill the promise of gender equality and fairness that is guaranteed by federal and state civil rights laws in the United States.



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## ENDNOTES

<sup>1</sup> See Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America, Petition to the Inter-American Commission on Human Rights, 33-34 (No. P-1190-06), filed Nov. 1, 2006 (on file with authors).

<sup>2</sup> From EEOC AND DECOSTER FARMS SETTLE COMPLAINT FOR \$1,525,000, available at <http://www.eeoc.gov/press/9-30-02-b.html> (last modified Sept. 30, 2002).

<sup>3</sup> *Close to Slavery: Guestworker Programs in the United States*, Birmingham, AL: Southern Poverty Law Center (2007), available at <http://www.splcenter.org/pdf/static/SPLCguestworker.pdf>.

<sup>4</sup> *New Immigrants in the Labor Force and the Number of Employed New Immigrants in the U.S. from 2000 to 2003: Continued Growth Amidst Declining Employment Among the Native Born Population*, Center for Labor Market Studies, Northeastern University (Dec. 2003); see also *Trends in the Low-Wage Immigrant Labor Force 2000-2005*, Urban Institute and Migration Policy Institute (Mar. 2007).

<sup>5</sup> As of 2006, women represented 35 percent of all undocumented immigrants in this country. *U.S. Women Immigrant Workers: Invisible And Abused But Making Their Voices Heard* (Dec. 2006), available at [http://www.bostonmayday.org/migrant\\_women.html](http://www.bostonmayday.org/migrant_women.html).

<sup>6</sup> 535 U.S. 137 (2002).

<sup>7</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

<sup>8</sup> See *Rivera v. NIBCO*, 364 F.3d 1057, 1065-66 (9th Cir. 2004), *reh'g and reh'g en banc denied*, 384 F.3d 822 (2004), *cert. denied*, 125 S.Ct. 1603 (2005).

<sup>9</sup> As noted, some courts have placed limits on the rights and remedies of undocumented workers under a variety of workplace protections. This guide focuses only on gender discrimination claims, specifically sexual harassment claims. An attorney representing an undocumented worker should become familiar with the case law on the relevance of immigration status to other claims.

<sup>10</sup> Immigration and Nationality Act, Pub. L. No. 99-603, 8 U.S.C. § 1101, *et. seq.* (amended 2006).

<sup>11</sup> *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149.

<sup>12</sup> *Id.*

<sup>13</sup> *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding that Title VII was clearly intended to apply with respect to the employment of aliens inside any state); *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (concluding, in agreement with the Ninth Circuit, that undocumented workers who have remained in the country are eligible for back pay as of the time of a violation); *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986) (finding such awards to be consistent with *Sure-Tan's* holding that the protections of the NLRA — and by analogy, Title VII — must apply to undocumented workers, at least to the extent that those protections do not conflict with immigration laws); *EEOC*

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*v. Switching Systems Division of Rockwell Int'l Corp.*, 783 F. Supp. 369, 374 (N.D. Ill. 1992) (holding that plaintiff plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally); *EEOC v. Tortilleria La Mejor*, 758 F. Supp. 585 (E.D. Cal. 1991) (finding that Title VII extends coverage to undocumented aliens, and IRCA did not alter the coverage of Title VII); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988) (holding that undocumented alien was "employee" entitled to employment protections and that IRCA did not repeal or amend these protections); *Murillo v. Rite Stuff Foods, Inc.*, 77 Cal. Rptr. 2d 12 (Cal. App. 1998) (holding that employment discrimination statutes apply to undocumented alien employees notwithstanding the illegality of employing them).

<sup>14</sup> U.S. Equal Employment Opportunity Commission, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (explaining that *Hoffman Plastic* required the EEOC to reexamine its former position that back pay is available to undocumented workers filing workplace discrimination charges).

<sup>15</sup> The attorney should proceed with caution even if her client is documented at the time of representation. If an attorney allows the employer access to her client's lawful immigration status, undocumented workers seeking to assert their rights in the future will have greater difficulty in refusing to reveal their immigration status.

<sup>16</sup> The remedy of back pay under Title VII allows a plaintiff to recover an amount equal to the wages the employee would have earned from the date of the unlawful discharge to the date of reinstatement or new employment. See *Landgraf v. USI Film Products*, 511 U.S. 244, 253-254 (1994). Title VII imposes a duty on the employee to mitigate back pay damages by making reasonable efforts to find suitable employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-232 (1982).

<sup>17</sup> Undocumented immigrants are not eligible for the safety net provided by the unemployment insurance system to cushion job loss and support a work search. See National Employment Law Project, *Immigrants' Eligibility for Unemployment Compensation - Fact Sheet for Workers* (2002), available at <http://www.nelp.org/document.cfm?documentID=85>.

<sup>18</sup> *Rivera v. NIBCO*, 364 F.3d at 1064.

<sup>19</sup> For example, use of false or another person's identification documents, 18 U.S.C. § 1546(b) (2002); failure to depart the U.S. within 90 days of an order of deportation, 8 U.S.C. § 1253 (1996); unlawful entry or attempted entry into the country, 8 U.S.C. § 1325(a) (1991); unlawful re-entry after being deported or denied admission, 8 U.S.C. § 1326 (1996); false representation of self as a U.S. citizen, 18 U.S.C. § 911 (1994) are all crimes under federal law.

<sup>20</sup> It is important to note that a person's status may have changed. Even if a client is lawfully present now, she may not have been during the events in question. If a client believes she is lawfully present, she should be able to provide counsel with a copy of immigration documents so that counsel can better assess the exact status of her client at the time of the discriminatory employment.

<sup>21</sup> The Department of Homeland Security Citizenship and Immigration Service requires that employers verify the employment eligibility status of newly hired employees by submitting Form I-9 upon hiring the employee. The I-9 form is available at <http://www.uscis.gov/files/form/i-9.pdf>.

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<sup>22</sup> “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, *to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.*” 42 U.S.C. § 2000e-3(a) (1972) (emphasis added).

<sup>23</sup> See, e.g., *Sure-Tan v. NLRB*, 467 U.S. 883 (1984); *Centeno-Bernuy v. Perry*, 302 F.Supp.2d 128 (W.D.N.Y. 2003); *Singh v. Jutla*, 214 F.Supp.2d 1056, 1061 (N.D. Cal. 2002); *Contreras v. Corinthian Vigor Ins. Co.*, 25 F.Supp.2d 1053 (N.D. Cal. 1998).

<sup>24</sup> INS Special Agent Field Manual, 33.14(h); “Questioning Persons During Labor Disputes,” published in 74 Int. Releases 199 (Jan. 27, 1997).

<sup>25</sup> *Id.* The Field Manual section was originally designated an Operating Instruction, and numbered 287.3, but has been redesignated and renumbered.

<sup>26</sup> *Id.*

<sup>27</sup> 42 U.S.C. § 2000e-3(a).

<sup>28</sup> See *Centeno-Bernuy v. Perry*, 302 F.Supp.2d 128 (granting preliminary injunction prohibiting employer from contacting local, state and government agencies where employer had evidenced intention to contact these authorities to deport workers in retaliation for their assertion of a FLSA claim).

<sup>29</sup> *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981).

<sup>30</sup> *E.E.O.C. v. City of Joliet*, 2006 WL 3421831 (N.D. IL, May 5, 2006).

<sup>31</sup> This guide focuses primarily on the introduction of information about immigration status during the discovery phase because few employment discrimination cases reach trial. Whether or not immigration status is successfully excluded from discovery, the attorney should consider filing a motion *in limine* to exclude the information at trial. See *infra* note 83.

<sup>32</sup> Fed. R. Civ. P. 26 (b)(1).

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> See, e.g., *United States v. Benavidez-Benavidez*, 217 F.3d 720, 725 (9th Cir. 2000) (stating that “[o]nce the probative value of a piece of evidence is found to be substantially outweighed by the danger of unfair prejudice, there is no other evidentiary rule that can operate to make that same evidence admissible”).

<sup>35</sup> Fed. R. Civ. P. 26(c).

<sup>36</sup> See, e.g., *Arnold v. Pennsylvania, Dept. of Transp.*, 477 F.3d 105 (3d Cir. 2007) (explaining that a demonstration of good cause requires balancing: “(1) the interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) the prevention of embarrassment, and whether that embarrassment would be particu-

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larly serious; (4) whether the information sought is important to public health and safety; (5) whether sharing of the information among litigants would promote fairness and efficiency; (6) whether the party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public”); *United States v. Microsoft Corp.*, 165 F.3d 952, 960 (D.C. Cir.1999) (holding that Rule 26(c)’s “‘good cause’ standard ... is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case”).

<sup>37</sup> Before the Plaintiff is deposed by the Defendant it is important to set the parameters of the deposition. The attorney should generally seek to exclude immigration status information on the basis of relevance in advance of a deposition. In most courts, it is improper to instruct the witness not to answer a question during a deposition on the grounds of relevancy. *See, e.g., Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697 (S.D.Fla.,1999) (It is “arguable whether objections based on relevancy should even be made during the deposition.”); 7 James Wm. Moore et. al., MOORE’S FEDERAL PRACTICE § 30.43 [1] (3d ed. 2003).

<sup>38</sup> For a more extensive discussion of the irrelevance of immigration status to claims under other labor and employment laws, see *Undocumented Workers: Preserving Rights and Remedies After Hoffman Plastic Compounds v. NLRB*, at <http://www.nelp.org/docUploads/wlghoff040303%2Epdf>.  
<sup>39</sup> 535 U.S. 137 (2002).

<sup>40</sup> *Id.* at 148-149.

<sup>41</sup> *See* H.R. REP. NO. 99-682(I), at 58 (1986), reprinted in 1986 U.S. C.C.A.N. 5662 (House Judicial Committee expressing the intent that IRCA would not “undermine or diminish in any way labor protections in existing law”); H.R. REP. NO. 99-682 (II), at 8-9 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5758 (report of the House Labor and Education Committee emphasizing that “the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Equal Opportunity Employment Commission . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies”).

<sup>42</sup> U.S. Equal Employment Opportunity Commission, *supra* note 14.

<sup>43</sup> *See, e.g., Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-70 (9th Cir. 2004) (“We . . . specifically believe it is unlikely that [Hoffman] applies in Title VII cases”); *De La Rosa v. N. Harvest Furniture*, 210 F.R.D. 237, 238 (C.D. Ill. 2002); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 406-07 (E.D.N.Y. 2004) (following *Rivera* and denying discovery of charging parties’ immigration status in Title VII case); *EEOC v. Bice of Chicago*, 229 F.R.D. 581, 583 (N.D. Ill. 2005) (same); *Garcia v. Monument Management Group*, 2006 U.S. Dist. LEXIS 48532 (D. Neb. May 19, 2006) (holding that Title VII protects undocumented immigrants).

<sup>44</sup> 153 F.3d 184, 186-188 (4th Cir. 1998).

<sup>45</sup> *Escobar v. Spartan Security Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (finding *Egbuna* did not preclude undocumented worker’s claim alleging on-the-job harassment and retaliation because “[n]either claim is dependant upon proof that Escobar was qualified for the position he held when he was allegedly sexually harassed and retaliated against”).

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<sup>46</sup> 366 N.J. Super. 391, 399 (App. Div. 2004).

<sup>47</sup> *Id.* at 399.

<sup>48</sup> *Id.* at 473 (“[The complaint] does not allege . . . that any . . . LAD misconduct occurred during the course of plaintiff’s employment. This appeal, then, does not call upon us to determine whether an employee’s illegal alien status would shield a LAD-offending employer from non-economic damages”); *id.* at 473 n.2 (“Neither the complaint nor plaintiff’s legal arguments in her brief assert a claim for workplace harassment or any other misconduct during the course of her work for defendants.”).

<sup>49</sup> *Id.* at 400. Furthermore, it is likely that *Crespo* is no longer good law. The New Jersey Division on Civil Rights, the state agency charged with enforcing the NJLAD, the state anti-discrimination law at issue in *Crespo*, has found that the NJLAD covers undocumented workers. See N.J. Div. on Civil Rights, *Know Your Rights As An Immigrant* (Feb. 2006), available at <http://www.state.nj.us/lps/dcr/downloads/KYRImmigrants.pdf> (emphasizing that “[a]ll immigrants - no matter what your immigration status is- can file a complaint with us [under the NJLAD]”).

<sup>50</sup> Prior to *Hoffman Plastics*, the Court of Appeals for the Ninth and Second Circuits had held that back pay was available to undocumented immigrants. See *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (affirming district court’s award of back pay to undocumented workers in Title VII action); *Rios v. Enter. Assoc. Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988) (concluding that undocumented workers may receive back pay in Title VII class action).

<sup>51</sup> See, e.g., *Escobar*, 81 F. Supp. 2d at 895 (dismissing back pay claims in a Title VII case because at the time the plaintiff was not authorized to work).

<sup>52</sup> U.S. Equal Employment Opportunity Commission, *supra* note 14.

<sup>53</sup> See, e.g., *Renteria v. Italia Foods, Inc.*, 2003 WL 21995190 (N.D. Ill. Aug. 2, 2003) (held that back pay and front pay were unavailable for a Fair Labor Standards Act retaliatory discharge claim after *Hoffman*).

<sup>54</sup> See, e.g., *Lopez v. Superflex*, 2002 WL 1941484 (S.D.N.Y. 2002) (plaintiff voluntarily withdrew back pay claims in American with Disabilities Act case after *Hoffman*).

<sup>55</sup> For a more extensive treatment of arguments supporting back pay awards, see Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Immigrant Workers in the Title VII Context and Beyond*, 22 Hofstra Lab. & Emp. L.J. 473 (2005).

<sup>56</sup> Post-*Hoffman*, some state agencies have made statements indicating that back pay continues to be available under state anti-discrimination laws. California Department of Industrial Relations clarified that it will continue to seek back pay for undocumented workers. That statement was followed by enactment of a state law that reaffirms 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 who are or who have been employed, in this state.” It also reaffirms that: “For purposes of enforcing state labor,

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employment, civil rights, 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." See Cal. Civ. Code § 3339 (2002); Cal. Gov't Code § 7285, *et seq.* (2002); Cal. Health & Safety Code § 24000, *et seq.* (2002); Cal. Lab. Code § 1171.5 (2002). Similarly, the Washington State's Human Rights Commission also clarified in a letter that it will continue to seek back pay as a remedy for violation of Washington State's Law Against Discrimination. (Both statements on file with authors).

<sup>57</sup> 364 F.3d 1057.

<sup>58</sup> *Id.* at 1067.

<sup>59</sup> 210 F.R.D. 237 (C.D. Ill. 2002),

<sup>60</sup> *Id.* at 239.

<sup>61</sup> *Id.*

<sup>62</sup> For example, in *Flores v. Lawton, Sr.*, 2006 WL 1028593, at \*2 (D.S.C. Jan. 27, 2006), the court found immigration status relevant to a retaliation claim because plaintiffs claimed the defendant threatened to call immigration authorities when plaintiffs warned they would notify authorities of the unlawful treatment.

<sup>63</sup> See, e.g., *First Am. Bank v. Western DuPage Landscaping, Inc.*, 2005 WL 991892, \*2-3 (N.D. Ill. Apr. 11, 2005) ("With regard to the citizenship status of witnesses, GM has not identified any authority under Rule 608(b) standing for the broad proposition that the status of being an illegal alien impugns one's character for truthfulness or untruthfulness . . . Accordingly, the court will not allow impeachment of witnesses on the basis of a witness' undocumented status"); *E.E.O.C. v. Bice of Chicago*, 229 F.R.D. 581 (granting protective order where defendants sought immigration status information for credibility); *Galiviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499 (W.D. Mich. 2005) (denying discovery of immigration status even though it was arguably relevant to the issue of plaintiffs' credibility because the court concluded that the damage and prejudicial effect was too great); *E.E.O.C. v. First Wireless Group, Inc.*, 225 F.R.D. 404 (denying discovery of tax returns and immigration status even though marginally relevant to credibility); *Mischalski v. Ford Motor*, 935 F. Supp. 203 (E.D.N.Y. 1996) (holding that status of being undocumented immigrant is not probative of a witness' character for truthfulness under the federal rules).

<sup>64</sup> See *Rivera*, 364 F.3d at 1063 ("[a]fter a showing of good cause, the district court may issue any protective order 'which justice requires' to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including any order prohibiting the requested discovery altogether, limiting the scope of the discovery or fixing the terms of disclosure." (*quoting* Fed. R. Civ. P. 26(c)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1064-5.

<sup>67</sup> *Id.*

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68 *Id.* at 1066.

69 *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981).

70 364 F.3d at 1068.

71 *Matthews v. Diaz*, 426 U.S. 67, 77 (1976).

72 *Garner v. United States*, 424 U.S. 648,654 (1976).

73 18 U.S.C. § 1546(b).

74 8 U.S.C. § 1253.

75 8 U.S.C. § 1325(a).

76 8 U.S.C. § 1326.

77 18 U.S.C. § 911.

78 *Garner v. United States*, 424 U.S. at 652.

79 *See, e.g., Andrade, et al. v. Madra's Café Corp., et al.*, 2005 WL 2430195 (E.D. Mich. 2005); *Pontes v. New England Power Company*, 2004 WL 2075458, at \*1-2 (Mass. Super., Aug 17, 2004).

80 *Xinic v. Quick*, 2005 WL 3789231 (Va. Cir. Ct., Nov 14, 2005).

81 *See, e.g. Escobar v. Baker*, 814 F. Supp. 1491, 1495 (W.D.Wash.1993) (assuming, for the purposes of summary judgment motion, that plaintiffs were undocumented because they had refused to answer questions about their immigration status relying on their 5<sup>th</sup> Amendment privilege).

82 *In camera* proceedings are those held in a place not open to the public. A judge may also inspect documents *in camera* prior to ruling whether such documents will be admissible.

83 207 F. Supp. 2d at 193.

84 “*In limine*” literally means at the threshold. Motions *in limine* are motions made before the beginning of trial requesting the judge rule that certain evidence may or may not be introduced at trial.

85 *See, e.g., Rodriguez v. The Texan, Inc.*, 2002 WL 31103122 (N.D. Ill. Sept. 20, 2002) (granting plaintiffs’ motion *in limine* to prohibit the defendants from introducing evidence regarding the plaintiffs’ immigration status or their inability to mitigate damages because defendants failed to raise it as affirmative defense); *Romero v. Boyd Bros. Transp. Co., Inc.*, 1994 WL 287434 (W.D. Va., June 14, 1994) (excluding evidence of plaintiff’s immigration status finding its probative value was far outweighed by potential of prejudice before a jury).

86 *See, e.g., Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 504 (M.D.Pa. 2007) (allowing immigrant plaintiffs challenging an anti-immigrant ordinance to proceed anonymously to protect immigration status information); *Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000) (granting workers’ request for anonymity where they faced risk of severe retaliation, including termination from employment, deportation, and arrest and imprisonment); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (discussing factors relevant to decision to allow plaintiff to proceed

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anonymously, including “whether identification poses a risk of retaliatory physical or mental harm to the requesting party or . . . innocent non-parties”); *Coe v. U.S. Dist. Court for the Dist. Of Colorado*, 676 F.2d 411 (10th Cir. 1981) (noting that plaintiffs have been permitted to proceed anonymously or under a fictitious name where they would have had to divulge “personal information of the utmost intimacy,” or that they “had violated state laws or government regulations or wished to engage in prohibited conduct”); *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) (identifying factors relevant in determining whether plaintiffs should be permitted to proceed under fictitious names, including whether they would be compelled to “disclose information of the utmost intimacy . . . [or] (2006).