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Fighting a Losing Battle: IRCA's Negative Impact on Law-Abiding Employers

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FIGHTING A LOSING BATTLE: IRCA'S NEGATIVE IMPACT ON LAW-ABIDING EMPLOYERS

*Joseph D. Layne**

The Immigration Reform and Control Act of 1986 (IRCA) made it illegal for employers to hire undocumented workers, and it shifted the responsibility and power of enforcement to employers' hands. Because employers are ultimately concerned about their bottom-line profit margins, IRCA has created an inherent conflict of interest that incentivizes unscrupulous employers to take advantage of undocumented workers because, by doing so, the employers realize significant savings in the form of lower wages. In addition, recent judicial decisions have limited employers' liability for violating federal labor laws, which has resulted in an overall dilution of undocumented workers' labor-law rights. In short, unscrupulous employers are subject to less labor-law liability by hiring undocumented workers. This Article argues that Congress should repeal IRCA and take enforcement power out of employers' hands, thereby restoring all employers to a level playing field.

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I. INTRODUCTION

Employer A is a "law-abiding" employer in the construction industry.[1] Pursuant to the Immigration Reform and Control Act of 1986 (IRCA),[2] Employer A verifies that each of its employees possesses the necessary documentation to legally work in the United States.[3] Employer A also complies with all minimum wage, overtime pay, and tax requirements. Recently, Employer A's employees decided to form a union. As required by the National Labor Relations Act (NLRA),[4] Employer A does not interfere with their efforts to form a union.[5] As a result of the unionization of its employees, Employer A's labor costs will significantly increase.[6] To continue to compete in the marketplace, Employer A will have to either lower its profit margin or increase its prices to pass along the additional labor costs to its customers.

Employer B, who competes directly with Employer A, is an "unscrupulous" employer. Hoping to gain a competitive advantage by any means possible, Employer B purposefully seeks out and hires only undocumented workers, in direct violation of IRCA.[7] Employer B pays most of its employees less than minimum wage and never pays them overtime. If an employee confronts Employer B and complains about wage violations, Employer B threatens to call Immigration and Customs Enforcement (ICE), the administrative

1. For the purposes of this Article there are two types of employers, "law-abiding" employers and "unscrupulous" employers. In essence, law-abiding employers are those employers who seek to properly enforce IRCA and comply with the documentation requirements contained therein. Contrastingly, unscrupulous employers are employers who knowingly or purposefully underenforce or choose not to enforce IRCA or any of its documentation requirements. Also, unscrupulous employers seek to gain a competitive advantage over their law-abiding counterparts by seeking out and exploiting undocumented workers.

2. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1324a (2006)).

3. 8 U.S.C. § 1324a(b).

4. 29 U.S.C. §§ 151–69 (2006).

5. *Id.* § 158(a)(2).

6. In the private sector, as of the end of 2010, unionized workers in the construction industry earn 51.9 percent more than nonunionized construction workers earn. *See Union Member Summary*, BUREAU LAB. STAT. NEWS RELEASE (U.S. Dep't of Labor, D.C.) Jan. 21, 2011, *available at* http://www.bls.gov/news.release/pdf/union2.pdf. Moreover, this does not take into account Employer A's increased Federal Insurance Contribution Act (FICA) tax burden as a result of higher wages.

7. *See* 8 U.S.C. § 1324a(a).

agency in charge of overseeing employer enforcement of IRCA, to have the employee deported.[8] Also, Employer B terminates any employee who engages in union-organizing activities. By exploiting its employees, Employer B substantially decreases its labor costs. This, in turn, increases its profits and allows Employer B to invest in other areas, such as advertising and market expansion, as well as outbid Employer A for employment contracts.

This Article argues that IRCA's employer-enforced immigration policies have placed law-abiding employers at a competitive disadvantage to unscrupulous employers for two reasons. First, by making it illegal for employers to hire undocumented workers, IRCA has had a diluting effect on undocumented workers' labor-law rights. The U.S. Supreme Court has held that undocumented workers cannot collect back pay—the only monetary remedy available under the NLRA[9]—as a remedy for an employer's violation of the NLRA.[10] In addition, IRCA has had a chilling effect on undocumented workers exercising their existing labor-law rights because they fear exposure to immigration authorities. Thus, IRCA gives unscrupulous employers an incentive to hire undocumented workers because, by doing so, the employers realize significant savings not only in the form of lower wages but also in the form of diminished labor-law liability. Second, the government's history of inconsistent application and under-enforcement of IRCA fails to disincentivize unscrupulous employers from hiring undocumented workers. Because unscrupulous employers face little risk of sanctions under IRCA, they are essentially permitted to hire and take advantage of undocumented workers by paying the employees wages below what is lawfully required. This creates a competitive advantage for unscrupulous employers by allowing them to pay lower labor costs than they would pay if they employed documented workers.

8. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT 16–17 (2008), *available at* https://www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf.

9. Hoffman Plastic *Decision: Bad for Workers; Bad for Business*, NAT'L IMMIGRATION LAW CTR. 1 (Mar. 2003), http://www.nilc.org/immsemplymnt/Hoffman_NLRB/Hoffman_TPs.PDF.

10. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 151 (2002).

While Congress initially believed sanctions would ensure employer compliance with IRCA,[11] this aspiration has never been, and is currently far from becoming, a reality. Congress must recognize that employer-enforced immigration law negatively affects law-abiding employers and take enforcement power out of employers' hands completely. This Article suggests legal reform that restores all employers to a level playing field, thus removing any competitive advantage unscrupulous employers have obtained by exploiting undocumented workers.

Part II of this Article explains the current state of employer-enforced immigration law, focusing on IRCA and its enforcement history, other statutes that regulate employment, and case law. Part III argues that IRCA has a diluting effect on undocumented workers' labor-law rights, in the context of not only the NLRA but also other labor laws. Part IV shows that the government's under-enforcement of IRCA allows unscrupulous employers to flout immigration laws while they face little threat of meaningful consequences. Part V suggests that to remove the competitive advantage, Congress should repeal IRCA and grant equal employment rights to all workers, regardless of documentation status. This part also explores the costs and benefits of such action. Finally, Part VI concludes that while increasing enforcement is a possibility, ultimately, employer-enforced immigration law is counterproductive to our economic principles and immigration policy.

II. ORIGIN OF A COMPETITIVE DISADVANTAGE

Although business is inherently competitive, fundamental principles of business ethics dictate that all businesses should compete on a level playing field.[12] This notion seeks to prevent employers from gaining unfair advantages over their competitors.[13]

11. *See* H.R. Rep. No. 99-682, pt.1, at 45–46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649–50.

12. *See* THE GLOBAL COMPACT, GUIDANCE DOCUMENT: IMPLEMENTATION OF THE 10TH PRINCIPLE AGAINST CORRUPTION 11–12 (2004), *available at* http://www.unglobalcompact.org/docs/issues_doc/7.7/guid_a-corr_081204.pdf; *see, e.g.*, Doris Meissner, *Immigration Reform and Policy in the Current Politically Polarized Climate*, 16 TEMP. POL. & CIV. RTS. L. REV. 309, 314 (2007).

13. CLARENCE C. WALTON, CORPORATE ENCOUNTERS: ETHICS, LAW AND THE BUSINESS ENVIRONMENT 188 (1992).

Although successful businesses establish and maintain a competitive advantage over other businesses, the former should not establish and maintain their advantage over the latter by illegally using and exploiting undocumented labor.[14] While pre-IRCA legislation and case law placed all employers on a level playing field, post-IRCA case law coupled with the lack of government oversight of employers has had the opposite effect.

A. The Immigration and Nationality Act: A Level Playing Field

The Immigration and Nationality Act of 1952 (INA),[15] was not directly concerned with the employment of undocumented workers.[16] In fact, the employment of undocumented workers was not even illegal under INA.[17] While employers could legally hire undocumented workers, these workers were nevertheless subject to deportation in the event they were caught working without the necessary labor certification.[18]

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14. In addition to hindering development, corruption is "a costly business risk for companies. It can lead to environmental mismanagement, undermining of labour standards and restricts access to basic human rights." THE GLOBAL COMPACT, *supra* note 12, at 3.

> [Discrimination] leads to social tensions that are potentially disruptive [to the business environment] within the company and in society. A company that uses discriminatory practices in employment and occupation denies itself access to talents from a wider pool [of workers, and thus] skills and competencies. The hurt and resentment generated by discrimination will affect the performance of individuals and teams in the company. Discriminatory practices result in missed opportunities for development of skills and infrastructure to strengthen competitiveness in the national and global economy. Finally, discrimination can damage a company's reputation, potentially affecting profits and stock value.

THE GLOBAL COMPACT, THE LABOUR PRINCIPLES OF THE UNITED NATIONS GLOBAL COMPACT: A GUIDE FOR BUSINESS 33 (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/—-ed_emp/—-emp_ent/—-multi/documents/instructionalmaterial/wcms_101246.pdf.

15. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

16. Richard E. Blum, Note, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers after* Sure-Tan*, IRCA, and* Patel, 63 N.Y.U. L. REV. 1342, 1359–60 (1988).

17. Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883, 892–93 (1984); Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL'Y INST. (Sept. 1, 2005), http://www.migrationinformation.org/usfocus/display.cfm?ID=332 ("[T]he 1952 law against 'harboring' undocumented aliens contained the 'Texas Proviso,' which spelled out that employment was not considered 'harboring' and was therefore legal.").

18. Blum, *supra* note 16, at 1359–60. The Secretary of Labor only granted labor certification when there were not enough willing and able workers to fill the position and when such employment would not "adversely affect the wages and working conditions of the workers in the United States similarly employed." 8 U.S.C. § 1182(5)(A)(i)(II).

Under INA, there was little chance that law-abiding employers were disadvantaged solely based on the immigration laws. Because employers could hire workers regardless of immigration status, the pool of potential employees was open to all employers. Moreover, all employers were required to observe other labor laws, such as the Fair Labor Standards Act (FLSA), which mandates payment of minimum wages and overtime, regardless of their employees' documentation statuses.[19] In sum, the only risk an employer faced when hiring an undocumented worker was that its employee could be deported from the country at any time if caught without the required labor certification.[20]

B. Sure-Tan, Inc. v. National Labor Relations Board*: A Chink in the Armor*

In passing INA, Congress was also concerned about the "treatment of aliens lawfully in the country."[21] Until the Supreme Court decided *Sure-Tan, Inc. v. National Labor Relations Board*,[22] undocumented employees were entitled to the full protection of the country's labor laws.[23] This meant that all employers faced the same labor-law liabilities whether or not they chose to hire undocumented workers.

In *Sure-Tan*, called "the most important development in pre-IRCA case law,"[24] a group of employees participated in a union organizing campaign.[25] Most of the employees were undocumented workers.[26] After they certified their union, their employer became upset and wrote a letter to the Immigration and Naturalization Service[27] (INS) asking it to verify the workers' immigration

19. Patel v. Quality Inn S., 846 F.2d 700, 702–03 (11th Cir. 1988).

20. 8 U.S.C. § 1227(a)(1)–(2) (outlining several classes of deportable aliens, many of which encompass those who are ineligible for employment).

21. *Sure-Tan*, 467 U.S. at 892 (quoting De Canas v. Bica, 424 U.S. 351, 359 (1976)).

22. 467 U.S. 883 (1984).

23. Blum, *supra* note 16, at 1343.

24. Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1368 (2009).

25. *Sure-Tan*, 467 U.S. at 886.

26. *Id.*

27. Originally, the INS was in charge of employer oversight. Kelsey E. Papst, Comment, *Protecting the Voiceless: Ensuring ICE's Compliance with Standards That Protect Immigration Detainees*, 40 MCGEORGE L. REV. 261, 269 (2009). However, on March 1, 2003, Immigration

statuses.[28] When INS officials visited the workplace, they discovered five undocumented employees.[29] The workers later acknowledged their illegal presence in the country and opted for voluntary departure as a substitute for deportation.[30] The National Labor Relations Board (NLRB), the agency responsible for enforcing the NLRA,[31] charged the employer with violating the NLRA by requesting the INS to investigate the employees for engaging in union organization activities.[32]

The Court held that the undocumented workers were properly considered "employees" under the NLRA and were thus entitled to its protections.[33] However, even though the employees were entitled to those protections, the employees could only win reinstatement—a remedy under the NLRA—if they legally reentered the United States, and they could only collect back pay if they were deemed "available" for work.[34] Because the employees were "not lawfully entitled to be present and employed in the United States," they were deemed "unavailable" for work, tolling the accrual of back pay.[35]

C. IRCA and Subsequent Case Law: Opening the Door for Unscrupulous Employers

In 1986, Congress passed IRCA as an INA amendment.[36] By enacting IRCA—which included a provision making it illegal for employers to hire undocumented workers—Congress sought to control illegal immigration.[37] Congress concluded that jobs were the magnet pulling undocumented workers into the country and decided that penalizing employers would deter the hiring of undocumented

and Customs Enforcement (ICE)—which is part of the Department of Homeland Security—took over employer oversight. *Id.*

28. *Sure-Tan*, 467 U.S. at 887.

29. *Id.*

30. *Id.*

31. *Our History*, NAT'L LABOR RELATIONS BD., http://www.nlrb.gov/who-we-are/our-history (last visited Mar. 12, 2011).

32. *Sure-Tan*, 467 U.S. at 887–88.

33. *Id.* at 892.

34. *Id.* at 902–03, 888–89.

35. *Id.* at 903.

36. H.R. REP. NO. 99-682, pt. 2, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5757.

37. H.R. REP. NO. 99-682, pt. 1, at 45 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649.

workers and, as a result, curb illegal immigration.[38] IRCA focuses on employer enforcement and employer sanctions. Subsequent court decisions interpreting the law, however, broadened IRCA's impact on employment matters.

1. IRCA's Effect on Employers

With regard to employers, IRCA caused two major shifts in immigration law. First, IRCA shifted the responsibility and the power of enforcement to employers.[39] Second, IRCA imposed sanctions on employers who knowingly hire, or continue to employ, undocumented workers.[40] Prior to implementing employer sanctions, Congress created the Select Commission to conduct various studies evaluating then-existing laws and procedures regarding undocumented workers.[41] Based on the Select Commission's recommendations,[42] Congress decided that employer sanctions were the "most humane, credible and effective way to respond to the large-scale influx" of undocumented workers.[43]

38. *Id.* at 46; *see also* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1324–25 (6th ed. 2008) ("The reasoning behind employer sanctions is straightforward: (1) the imposition of penalties on employers of undocumented aliens will deter the hiring of such aliens; and (2) because securing employment is the primary reason for illegal entry and residence, this will reduce incentives for illegal entry.").

39. *See* 8 U.S.C. § 1324a(a) (2006). The idea of employer enforcement was not original to IRCA. For a more in-depth discussion regarding the origins of employer enforcement and employer sanctions see Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195–200 (2007).

40. *See* 8 U.S.C. § 1324a(a). IRCA contains, however, a "small employer exemption from sanctions," which states that the employers that employ three or fewer employees are exempted from employer sanctions and IRCA's recordkeeping requirements. H.R. REP. NO. 99-682, pt. 1, at 214–15, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5751.

41. Vernon M. Briggs, Jr., *Report of the Select Commission on Immigration and Refugee Policy: A Critique*, TEX. BUS. REV., Jan.–Feb. 1982, at 11. "The Select Commission held public hearings around the country, commissioned numerous papers from social scientists, historians, and other scholars, reviewed mountains of data, and after extensive study issued its final report (complete with seven volumes of appendices) in 1981." Wishnie, *supra* note 39, at 200.

42. THE SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 301–30 (1981), *available at* http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED211612.

43. H.R. REP. NO. 99-682, pt. 1, at 46, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

a. Employer enforcement

Under IRCA, employers act as screeners in the immigration process.[44] Employers must verify all applicants' documents before hiring them.[45] Congress created the I-9 form to aid employers in this endeavor; employers are required to complete this form within three business days after the employment began.[46] The I-9 form requires employers to examine applicants' documents to establish not only identity but also employment authorization.[47] Applicants may submit certain combinations of twenty-six different documents to establish employment eligibility.[48] While employers must complete and retain I-9 forms to prove compliance in the case of ICE inspection,[49] employers need not photocopy the documents establishing employment eligibility.[50] Employers must keep completed I-9 forms for three years after the date of hire or for one year after the date of termination, whichever is longer.[51]

Employers must sign I-9 forms, under penalty of perjury, attesting that the documents "appear to be genuine and to relate to the employee . . . and that to the best of [the employer's] knowledge the employee is authorized to work in the United States."[52] Employers who comply in good faith with the I-9 form requirements

44. Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1112 (2009) ("[IRCA] imposed screening responsibilities on employers, requiring them to verify the immigration status of their workers and to keep records on whom they hired.").

45. *See* 8 U.S.C. § 1324a(b). For I-9 form purposes, "employer" means "all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors." DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGRATION SERVS., OMB NO. 1615-0047, FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION 1 (2009).

46. DEP'T OF HOMELAND SECURITY, *supra* note 45, at 1.

47. Lozano v. City of Hazleton, 620 F.3d 170, 198 (3d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3370 (U.S. Dec. 8, 2010) (No. 10-772).

48. *See* DEP'T OF HOMELAND SECURITY, *supra* note 45, at 5. "Employers cannot specify which document(s) listed on the last page of Form I-9 employees present to establish identity and employment authorization." *Id.* at 1.

49. *See id.* at 2 (providing that I-9 forms "will be kept by the employer and made available for inspections by authorized officials of the Department of Homeland Security, Department of Labor, and Office of Special Counsel for Immigration-Related Unfair Employment Practices").

50. *Id.* at 1 ("Employers may, but are not required to, photocopy the document(s) presented. If photocopies are made, they must be made for all new hires.").

51. *Id.* at 2.

52. *Id.* at 4.

establish an affirmative defense that they did not knowingly employ an undocumented worker.[53]

If an applicant does not present the required documentation, the employer cannot hire the worker.[54] Similarly, if an employer discovers that it unknowingly hired an undocumented worker, or if the worker becomes unauthorized while employed, the employer is required to terminate the worker on discovery of the worker's undocumented status.[55] The I-9 form document-verification process only applies to employees and not to independent contractors.[56]

b. Employer sanctions

Congress believed that employer sanctions had the potential to "close the back door"[57] on future illegal immigration and called employer sanctions the "keystone" of IRCA.[58] As a means of securing employer compliance, employers who knowingly hire undocumented workers or who accept documents that do not "reasonably appear" to be genuine are subject to civil and potentially criminal penalties.[59] Currently, employers who knowingly hire undocumented workers are subject to civil fines between $375 and $3,200 for each undocumented worker for the first offense, between $3,200 and $6,500 for the second offense, and between $4,300 and $16,000 for the third and subsequent offenses.[60] An employer who engages in a "pattern or practice" of violations is subject to maximum criminal penalties of $3,000 for each undocumented

53. *See* 8 U.S.C. § 1324a(a)(3) (2006).

54. *Id.* § 1324a(a)(1).

55. Hoffman v. Nat'l Labor Relations Bd., 535 U.S. 137, 148 (2002) (citing 8 U.S.C. § 1324a(a)(2)).

56. 8 C.F.R. § 274a.1(f) (2006) ("The term employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . . .").

57. H.R. REP. NO. 99-682, pt. 1, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

58. BETSY COOPER & KEVIN O'NEIL, MIGRATION POLICY INST., LESSONS FROM THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, at 2 (2005), *available at* www.migrationpolicy.org/pubs/PolicyBrief_No3_Aug05.pdf; *see also* Michael Fix, *Employer Sanctions: An Unfinished Agenda*, *in* THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM 1, 2 (Michael Fix ed., 1991) ("Sanctions, however, were thought to be the cornerstone of the law.").

59. *See* 8 U.S.C. § 1324a(a)–(b); H.R. REP. NO. 99-682, pt. 1, at 62, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5661.

60. 8 C.F.R. § 274a.10(b)(1)(ii)(A)–(C). Employers are also ordered to cease and desist from such behavior in addition to receiving civil fines. *Id.* § 274a.10(b)(1)(i).

worker and imprisonment of up to six months.[61] Employers can also receive fines for paperwork violations, which occur when the employer does not complete or maintain I-9 forms.[62] These fines range from $110 to $1,100 per violation and do not increase with subsequent violations.[63]

Because Congress sought to balance controlling unauthorized immigration with discouraging discrimination against persons thought to be undocumented, civil penalties under IRCA are modest.[64] To deter discrimination, Congress created substantial anti-discrimination provisions in IRCA.[65] Congress also created a Special Counsel in the Justice Department to handle IRCA discrimination charges.[66] Under IRCA, an employer, therefore, may be liable for both knowingly hiring undocumented workers and for refusing to hire workers based on the mistaken perception that they are undocumented.

2. Post-IRCA Case Law

With the passage of IRCA, the scope of the Court's holding in *Sure-Tan* was unclear. While *Sure-Tan* showed that all "employees" were not to be treated equally under the NLRA,[67] it was unclear whether the Court's holding extended to undocumented workers continuously residing in the United States.[68] While subsequent decisions could have decided that granting labor-law protections to undocumented workers encourages illegal immigration, courts have generally refused to interpret *Sure-Tan*'s holding so broadly.

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61. *Id.* § 274a.10(a).

62. 8 U.S.C. § 1324a(e)(5).

63. 8 C.F.R. § 274a.10(b)(2).

> In determining the amount of the penalty, consideration shall be given to: (i) [t]he size of the business of the employer being charged; (ii) [t]he good faith of the employer; (iii) [t]he seriousness of the violation; (iv) [w]hether or not the individual was an unauthorized alien; and (v) [t]he history of previous violations of the employer.

Id.

64. *See* 8 U.S.C. § 1324a(e)(4)(A) (providing that civil penalties may range from $250 to $10,000 depending on the circumstances); *see also* H.R. REP. NO. 99-682, pt. 1, at 49, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653 (acknowledging "the widespread fear that sanctions could result in employment discrimination against Hispanics and other minority groups").

65. *See* 8 U.S.C. § 1324b (detailing what type of conduct qualifies as unfair and prohibited immigration-related employment practices).

66. H.R. REP. NO. 99-682, pt. 1, at 49, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653.

67. Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883, 904–06 (1984).

68. Cunningham-Parmeter, *supra* note 24, at 1368–69.

In *Patel v. Quality Inn South*,[69] the plaintiff, an undocumented worker, claimed that his employer violated FLSA's wage and overtime provisions.[70] Congress enacted FLSA in 1938 to "eliminate substandard working conditions."[71] FLSA entitles employees to minimum wage and overtime pay—one and one half times their regular hourly rate—in the event that they work more than forty hours in a week.[72] Any employer who violates FLSA is liable for unpaid wages, an equal amount of liquidated damages, and attorney's fees.[73] The employer in *Patel* argued that as a result of IRCA, undocumented workers were no longer protected by FLSA and, even if they were, *Sure-Tan* precluded them from recovering damages.[74] Using a rationale similar to the rationale in *Sure-Tan*, the Eleventh Circuit concluded that undocumented workers were "employees" under FLSA and were therefore entitled to the protections of FLSA.[75] Regarding damages, the court distinguished *Patel* from *Sure-Tan* by stating that, in this case, the plaintiff sought damages for work that he had already performed, whereas the plaintiff in *Sure-Tan* sought back pay for work not yet performed.[76] The court reasoned that it did not make sense to consider the undocumented worker "'unavailable' for work during a period of time when he was actually working."[77] Therefore, the plaintiff could collect damages under FLSA.[78] In sum, the court held that undocumented workers—regardless of their immigration statuses—are entitled to all remedies under FLSA.[79]

Following *Patel*, most courts held that undocumented workers were entitled to employment-law and labor-law protections,

69. 846 F.2d 700 (11th Cir. 1988).

70. *Id.* at 701; *see also* 29 U.S.C. §§ 201–219 (1982) (codifying the FLSA).

71. *Patel*, 846 F.2d at 702.

72. *Id.*

73. *Id.*; *see* 29 U.S.C. § 216(b).

74. *Patel*, 846 F.2d at 703.

75. *See id.* at 702–03 ("Congress enacted both the FLSA and the NLRA as part of the social legislation of the 1930's . . . . More importantly the two acts similarly define the term 'employee,' and courts frequently look to the decisions under the NLRA when defining the FLSA's coverage."). *Id.* at 703.

76. *Id.* at 705.

77. *Id.* at 705–06.

78. *Id.* at 706.

79. *Id.*

excluding reinstatement, with regard to work that they had performed.[80] The exclusion of reinstatement created a potential incentive for unscrupulous employers to take advantage of undocumented workers. The Supreme Court provided further incentive for the exploitation of undocumented labor by extinguishing employers' monetary liability for wrongful termination of undocumented workers in violation of the NLRA in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*.[81]

Hoffman Plastic Compounds, Inc. ("Hoffman") terminated Jose Castro ("Castro"), one of its employees, for participating in a union-organizing campaign.[82] By terminating Castro, Hoffman directly violated the NLRA.[83] As part of the initial remedy that it awarded to Castro, the trial court ordered Hoffman to provide him back pay.[84] Later, during a compliance hearing, Castro admitted that he had never been authorized to work in the United States and that he tendered fraudulent documents to gain employment from Hoffman.[85] The Court declared that where a remedy "trenches upon a federal statute or policy . . . the . . . remedy may be required to yield."[86] Awarding Castro back pay pursuant to the NLRA would contradict IRCA, the Court reasoned, thereby trenching upon a federal statute, because Castro could only claim the award by illegally remaining in the United States.[87] The Court further postulated that requiring such an award would only encourage undocumented immigrants to illegally remain in the country.[88] In short, the Court held that under the NLRA, employers are not liable for back pay to undocumented workers whom they wrongfully terminate.[89]

80. Wishnie, *supra* note 39, at 211.

81. 535 U.S. 137 (2002); *see also* Wishnie, *supra* note 39, at 212 (discussing how the *Hoffman* decision drastically changed the legal landscape that existed at the time).

82. *Hoffman*, 535 U.S. at 140.

83. *Id.*; *see* 29 U.S.C. § 158(a)(3) (2006) (prohibiting "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

84. *Hoffman*, 535 U.S. at 140–41.

85. *Id.* at 141.

86. *Id.* at 147.

87. *See id.* at 148–49 (discussing how it would undermine IRCA to award back pay to Castro since "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies").

88. *See id.* at 150.

89. *Id.* at 151.

While many worried that *Hoffman* would be extended to exclude awards of back pay under other labor laws,[90] subsequent administrative statements[91] and cases[92] have generally limited the holding in *Hoffman*. In *Zavala v. Wal-Mart Stores, Inc.*,[93] for example, the plaintiffs sought relief under FLSA claiming that Wal-Mart failed to pay them minimum wage or overtime.[94] Wal-Mart argued that the plaintiffs were seeking back pay, a remedy unavailable to them under *Hoffman*.[95] Using reasoning similar to that in *Patel*, the U.S. District Court for the District of New Jersey pointed out that the plaintiffs sought relief for work that they had already performed, unlike the plaintiff in *Hoffman*, who was seeking back pay for work he would have, but had not, performed.[96] In sum, post-IRCA case law has extinguished undocumented workers' remedies under the NLRA. While courts have generally refused to extend the Supreme Court's holding in *Hoffman* to directly limit other labor laws, *Hoffman* has indirectly diluted undocumented workers' labor protections beyond those provided by the NLRA.[97]

D. IRCA Enforcement (or Lack Thereof)

Congress's original focus in IRCA was on employer compliance.[98] Congress believed that if it were to penalize employers

90. Richard A. Johnson, Note, *Twenty Years of the IRCA: The Urgent Need for an Updated Legislative Response to the Current Undocumented Immigrant Situation in the United States*, 21 GEO. IMMIGR. L.J. 239, 260 (2007).

91. *See Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of* Hoffman Plastics *Decision on Laws Enforced by the Wage and Hour Division*, U.S. DEP'T OF LABOR (revised July 2008), http://www.dol.gov/whd/regs/compliance/whdfs48.htm (explaining that the Department of Labor will continue to enforce FLSA regardless of whether the employee is undocumented).

92. *See, e.g.*, Rivera v. Nibco, Inc., 364 F.3d 1057, 1074–75 (9th Cir. 2004) (holding that notwithstanding *Hoffman*, immigration status is not relevant in determining whether an employer engaged in national-origin discrimination under Title VII); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (explaining that although *Hoffman* requires plaintiff's claim of back pay to be dismissed in a Title VII action, *Hoffman* does not exclude the availability of other remedies under Title VII); Singh v. Jutla, 214 F. Supp. 2d 1056, 1061–62 (N.D. Cal. 2002) (holding that in a FLSA action, *Hoffman* only precludes the specific remedy of back pay).

93. 393 F. Supp. 2d 295 (D.N.J. 2005).

94. *Id.* at 301.

95. *Id.* at 321.

96. *Id.* at 322.

97. *See infra* Part III.

98. *See* Lee, *supra* note 44, at 1126 (noting that the design and history of IRCA "suggests that Congress intended to deter unauthorized immigration by targeting employers").

for knowingly hiring undocumented workers, employers would refrain from hiring them.[99] It follows that if employers were not hiring undocumented workers, those workers would have no reason to come to the country.[100] In the initial years after IRCA passed, the General Accounting Office[101] determined that the INS was "satisfactorily" implementing employer sanctions.[102] Until recently, raids were ICE's most commonly used enforcement tool.[103] However, since then ICE has now turned its focus to employer audits.[104]

1. Raids as an Enforcement Tool

Predominantly used during President George W. Bush's administration, high-profile raids on big businesses were ICE's main enforcement strategy for some time.[105] ICE considered raids to be an efficient means of enforcement because agents could detain hundreds of undocumented workers during one raid, reducing costly and time-consuming investigations.[106] Because the media documented these high-profile raids well, ICE believed the raids would deter both employers and employees from violating IRCA.[107] Some raids were very extensive. For example, while ICE made 3,677 arrests in 2006, more than one-third of those arrests came from one raid, "Operation Wagon Train," a raid against meatpacking facilities that Swift & Company owned.[108]

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99. *See* ALEINIKOFF ET AL., *supra* note 38, at 1324–25.

100. *Id.*

101. Since 2004, the General Accounting Office has been known as the Government Accountability Office (GAO). David M. Walker, *GAO Answers the Question: What's in a Name*, ROLL CALL (July 19, 2004), http://www.rollcall.com/issues/50_8/-6262-1.html. The GAO's work involves "program evaluations, policy analyses, and legal opinions and decisions on a broad range of government programs and activities both at home and abroad." *Id.*

102. Brownell, *supra* note 17.

103. *See* Miriam Jordan, *'Silent Raids' Squeeze Illegal Workers*, WALL ST. J, Mar. 29, 2011, at A6.

104. *Id.*

105. Benjamin Crouse, Comment, *Worksite Raids and Immigration Norms: A "Sticky" Problem*, 92 MARQ. L. REV. 591, 598 (2009).

106. *Id.*

107. *Id.*

108. ALEINKOFF ET AL., *supra* note 38, at 1324. Other high-profile raids include a 2008 raid on an Agriprocessors plant located in Postville, Iowa. Spencer S. Hsu, *Immigration Raid Jars a Small Town*, WASH. POST, May 18, 2008, at A1. During the raid 389 undocumented workers were detained. *Id.* At the time, it was the Bush administration's largest raid at a single site. *Id.*

2. Employer Audits

Although enforcement was up between 2006 and 2008 as compared to previous years, that was a result of workplace raids that were focused on arresting undocumented employees.[109] Since then arrests have been down due to the Obama administration's focus on employer audits.[110] While the Obama administration has stated that on-site arrests of undocumented workers will still continue, it will focus enforcement efforts on employer compliance.[111] ICE is focusing on employer compliance by its use of, among other things, employer audits.[112]

Employer audits consist of ICE auditing employers' I-9 forms to ensure compliance.[113] An audit starts when ICE sends an employer a Notice of Inspection, which requests that the employer supply ICE with certain documentation, including I-9 forms.[114] ICE usually allows the employer three days to present the documents, unless the investigation is part of a criminal investigation, in which case ICE

109. *See Fact Sheet: Worksite Enforcement*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Apr. 30, 2009), http://www.ice.gov/news/library/factsheets/worksite.htm [hereinafter *U.S. Immigration Fact Sheet*] (displaying graph of arrests between 2002 and 2008). In 2005, arrests totaled 176 criminal arrests, 1,116 administrative arrests; in 2006, arrests totaled 716 criminal arrests, 3,667 administrative arrests; in 2007, arrests totaled 863 criminal arrests, 4,077 administrative arrests; and in 2008, arrests totaled 1,103 criminal arrests, 5,184 administrative arrests. *Id.*

110. *See* Penny Starr, *ICE Official: Work-Site Arrests of Illegal Aliens 'Down From Previous Years*,' CNSNEWS.COM (Feb. 3, 2010), http://www.cnsnews.com/node/60925 (discussing how under the Obama administration, there have been very few ICE operations that have led to the arrests of undocumented workers due to the administration's move away from work-site raids); *see also U.S. Immigration Fact Sheet*, *supra* note 109 ("ICE will focus its resources in the worksite enforcement program on the criminal prosecution of employers who knowingly hire illegal workers in order to target the root cause of illegal immigration.").

111. Starr, *supra* note 110.

112. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE ANNUAL REPORT FISCAL YEAR 2008 16 (2008), *available at* https://www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf (explaining that during 2008 ICE started implementing "debarment" proceedings against employers who either knowingly hired or continued to employ an alien who became unauthorized). Debarment prohibits companies from receiving or competing for federal contracts. *Id.* During fiscal year 2008, "ICE launched debarment proceedings against seven companies." *Id.*

113. *See* Miriam Jordan, *Chipotle Workers Draw Scrutiny*, WALL ST. J., Feb. 8, 2011, at B1 (discussing how Minnesota Chipotle restaurants dismissed hundreds of employees after the company received notices of "suspect documents" from ICE).

114. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: FORM I-9 INSPECTION OVERVIEW 1 (Dec. 2009), *available at* http://www.ice.gov/doclib/news/library/factsheets/pdf/i9-inspection.pdf (explaining that ICE can also compel the production of "supporting documentation, which may include a copy of the payroll, list of current employees, Articles of Incorporation, and business licenses").

can demand the documents immediately.[115] If ICE finds any procedural violations, the employer has ten business days to make corrections.[116] If the employer does not correct the problems, it *may* receive a fine.[117] However, if ICE can determine that the employer knowingly hired or continued to employ undocumented workers, the employer "will be required to cease the unlawful activity, may be fined, and in certain situations may be prosecuted criminally."[118] When determining the amount of the penalty, ICE will consider five factors: (1) the size of the business, (2) whether there was a good-faith effort to comply, (3) the seriousness of the violation, (4) whether the violation involved undocumented workers, and (5) the history of previous violations.[119] Employer audits are becoming more frequent: during the 2010 fiscal year ICE conducted 2,740 employer audits, nearly twice as many as it conducted in 2009.[120]

III. IRCA'S DILUTING EFFECT ON LABOR LAWS: AN INVITATION FOR UNSCRUPULOUS EMPLOYERS TO EXPLOIT UNDOCUMENTED WORKERS

Employers are exposed to great liability in the course of their businesses. Admittedly, many liabilities are the same for all employers regardless of whether they choose to hire undocumented workers.[121] Notwithstanding those similarities, the Supreme Court's holding in *Hoffman*—that employers' liability under the NLRA depends on whether the employee is undocumented—counteracts IRCA by creating an incentive for unscrupulous employers to seek out and hire undocumented workers because the employers are exposed to less liability by doing so.[122] *Hoffman*, in an attempt to

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Jordan, *supra* note 113, at B1.

121. Under Title VII of the Civil Rights Act, all employers are prohibited from harassing employees based on race, color, sex, religion, or national origin. 42 U.S.C. § 2000e–2(a) (2006). In *Patel*, the Eleventh Circuit held that employers are liable to "employees," which includes undocumented workers, under FLSA to pay them minimum wage and overtime pay if the employee works more than forty hours a week. Patel v. Quality Inn S., 846 F.2d 700, 702 (11th Cir. 1988).

122. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 151 (2002).

punish undocumented workers, gives employers who knowingly hire such workers a competitive advantage over law-abiding employers by immunizing the unscrupulous employers from liability for back pay under the NLRA, in addition to indirectly weakening the effect of other labor laws. By creating this incentive for unscrupulous employers, IRCA and *Hoffman* exacerbate rather than deter illegal migration.

The court in *Patel* stated that "[i]f the FLSA did not cover undocumented [workers], employers would have an *incentive* to hire them."[123] FLSA counteracted this would-be incentive by prohibiting unscrupulous employers from paying employees less than minimum wage.[124] In *Hoffman*, however, the Court did not apply this same reasoning to employers' violations of undocumented workers' rights under the NLRA.

A. Hoffman *Incentivizes Unscrupulous Employers to Violate the NLRA, IRCA, and Other Labor Laws*

Employers who violate the NLRA are subject to "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay."[125] *Hoffman*'s holding that employers of undocumented workers are not liable for back pay under the NLRA has a sizable effect on employers' overall liability.[126]

Assume that both Employer A's and Employer B's employees want to unionize. Employer A—the law-abiding employer—will accept its employees' unionization efforts. Employer B—the unscrupulous employer—will terminate any employee involved in unionization efforts. Because Employer B hired undocumented workers, it will not be liable for back pay under the NLRA, according to *Hoffman*.[127] Although Employer B will be required to "cease and desist its violations of the NLRA and . . . conspicuously post notices to employees setting forth their rights under the

123. *Patel*, 846 F.2d at 704.
124. *Id.*
125. 29 U.S.C. § 160(c) (2006).
126. *Hoffman*, 535 U.S. at 151.
127. *Id.* at 151–52.

NLRA,"[128] these obligations carry no monetary liability.[129] In fact, these obligations have no deterrent effect whatsoever on Employer B because none of the rights that Employer B must conspicuously post apply to Employer B's undocumented workers anyway. This is precisely what Justice Breyer meant in his dissent when he stated, "employers could conclude that they can violate the labor laws . . . with impunity."[130]

Employer B, though, still faces potential sanctions for violating IRCA. But, if this is Employer B's first IRCA violation, it will only face fines between $375 and $3,200 for each undocumented employee. In comparison, liability for back pay under the NLRA is much greater. Thus, by hiring undocumented workers, Employer B can substitute its negligible exposure to IRCA penalties for the more substantial liability that it would face under the NLRA for its anti-union activities.

The problem becomes even clearer when one considers that the same employers who violate labor laws such as FLSA and the NLRA rely heavily on undocumented workers. A 2008 study of low-wage workers concluded that employment-law and labor-law violations were "severe and widespread" among low-wage labor markets.[131] Employers in those low-wage industries were also very likely to hire undocumented workers. Of the workers interviewed for the low-wage study, 70 percent were foreign-born, and more than 55 percent of those workers openly admitted that they were undocumented.[132]

Wal-Mart (whose slogan until recently was "Always Low Prices")[133] is an example of an employer with a history of seeking out undocumented workers and committing severe labor-law violations to increase profits. An internal audit of Wal-Mart stores revealed that many stores regularly violated not only child-labor laws but also

128. *Id.* at 152. For an example of what a notice contains, see *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 101 (1992).

129. *Hoffman*, 535 U.S. at 139.

130. *Id.* at 154 (Breyer, J., dissenting).

131. ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2 (2009), *available at* http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

132. *Id.* at 15.

133. Ylan Q. Mui & Michael S. Rosenwald, *Wal-Mart's New Tack: Show 'Em the Payoff*, WASH. POST, Sept. 13, 2007, at D1.

wage laws because employees worked through breaks without pay.[134] In addition to those labor-law violations, more than 250 undocumented workers were detained by ICE after being caught during a night raid on sixty Wal-Mart stores in 2003.[135] Although independent contractors employed the workers (eliminating Wal-Mart's obligation to verify employees' work eligibility under IRCA), subsequent evidence showed that Wal-Mart executives and store managers acquiesced to IRCA violations.[136]

Wal-Mart is also notoriously anti-union and goes to great pains to keep employees from unionizing.[137] Wal-Mart has repeatedly violated the NLRA by interrogating workers, confiscating union literature, and firing union supporters.[138] In addition, Wal-Mart uses video surveillance to monitor employees and regularly hires union busters.[139]

While unscrupulous employers like Wal-Mart are exposed to potential liability for violating other labor laws, Justice Breyer's dissent in *Hoffman* addressed an anomaly that can occur as a result of the majority's decision.[140] Under IRCA, it is only unlawful for an employer to hire an undocumented worker *knowing* the worker is undocumented.[141] Thus, the majority's decision encourages employers to hire with a "wink and a nod" potentially undocumented workers because doing so will lower the costs of labor-law violations.[142] For example, if Employer B claims it "unknowingly" hired undocumented workers, it would not only diminish its labor-

134. Steven Greenhouse, *In-House Audit Says Wal-Mart Violated Labor Laws*, N.Y. TIMES, Jan. 13, 2004, at A16.

135. Steven Greenhouse, *Wal-Mart Raids by U.S. Aimed at Illegal Aliens*, N.Y. TIMES, Oct. 24, 2003, at A1.

136. *Id.*

137. *See* Karen Olsson, *Up Against Wal-Mart*, MOTHER JONES, Mar.–Apr. 2003, *available at* http://motherjones.com/politics/2003/03/against-wal-mart.

138. *Id.*

139. *Id.*

140. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 155–56 (2002) (Breyer, J., dissenting).

141. 8 U.S.C. § 1324a(a)(1)(A) (2006).

142. *Hoffman*, 535 U.S. at 155–56 (Breyer, J., dissenting).

law liability but also evade IRCA liability because it does not meet the requisite standard.[143]

Under IRCA, proving employer knowledge is very difficult.[144] This is true because employers have an affirmative defense if they comply with IRCA's standards in "good faith."[145] Thus, unless an employer acknowledges acting in bad faith, ICE must prove employer knowledge with circumstantial evidence. But other labor laws do not require an employer to acknowledge bad faith. Under FLSA, employers are liable for the amount of the unpaid wages in addition to an equal amount of liquidated damages regardless of their intention to violate the law.[146] Similarly, employer liability under the NLRA is triggered by an employer's affirmative action to hinder unionization.[147]

Taking all of this into consideration, in a best-case scenario for Employer B, it will not be subject to any monetary penalties under IRCA or the NLRA for wrongful termination of its undocumented workers. In a worst-case scenario, Employer B will be liable for between $375 and $3,200 for each undocumented employee under IRCA.

In contrast, Employer A's labor costs will significantly increase as a result of the employees' unionization. Specifically, in the construction industry unionized workers earn up to 51.9 percent more base pay than nonunionized workers earn.[148] Assuming that Employer A paid all ten of its employees federal minimum wage

143. 8 U.S.C. § 1324a(a)(1)(A) ("It is unlawful for a person or other entity to hire . . . for employment in the United States an alien *knowing* the alien is an unauthorized alien." (emphasis added)).

144. Susan Carroll, *Few Firms Fined Over Hiring*, HOUS. CHRON., Sept. 1, 2010, at A1 (explaining the difficulty in distinguishing between an employer that has been unintentionally duped into accepting fraudulent documents and an employer that is accepting them knowing that they are fraudulent).

145. 8 U.S.C. § 1324a(a)(3). The same is true even if the employer committed procedural or technical errors in attempting to comply. *Id.* § 1324a(b)(6)(A).

146. 29 U.S.C. § 216(b) (2006). However, only employers who willfully violate FLSA can be criminally punished. *Id.* § 216(a).

147. *See id.* § 158(a)(1)–(5) (defining employer actions that constitute unfair labor practices).

148. *Union Member Summary*, *supra* note 6, tbl.4. This result is not exclusive to the construction industry. In industries that heavily rely on migrant labor, unionized employees earn far more than nonunion employees. For example, unionized employees earn 43 percent more in the building, maintenance, and groundskeeping industry; 40 percent more in the transportation industry; 33 percent more in the production and manufacturing industry; and 17 percent more in the food preparation industry. *Id.*

before they unionized, which is unlikely, its labor costs for a forty-hour workweek would increase from $2,900 to $4,612, a weekly increase of $1,712. This figure accounts for only base pay and does not include overtime pay or increased payroll tax liability.

Now assume that Employer A, in a moment of frustration, terminated its employees. In addition to the NLRB requiring it to cease and desist and to post a notice to its employees, Employer A will now be required to pay its employees back pay and, in some cases, reinstate them.[149] Assuming that the court orders back pay rather than reinstatement, Employer A will have to hire more employees. Thus, in addition to paying his new employees, Employer A will have to provide back pay to the workers it wrongfully terminated. Under the NLRA, back pay is calculated on a quarterly basis.[150] Notwithstanding the current economic state of the construction industry, assume that the NLRB requires Employer A to reimburse back pay for just one quarter. This adds up to $37,671.

Exploring the bottom-line results of this scenario, Employer A will either indefinitely have to pay at least $1,712 weekly in increased labor costs or $37,671 in NLRA penalties. In a worst-case scenario for Employer B, it will only have to pay IRCA fines between $375 and $3,200 for each employee. Even if ICE finds Employer B to have the requisite knowledge—which, as previously mentioned, is very difficult to prove—and Employer B receives the maximum penalty under IRCA for each employee, which is unlikely,[151] its total liability would still be $5,671 less than Employer A's liability would be under the NLRA. If ICE fines Employer B the minimum amount for each employee, Employer B's liability would be $33,921 less than Employer A's. Finally, if ICE does not fine

149. *See, e.g.*, Elam v. Nat'l Labor Relations Bd., 395 F.2d 611, 613 (D.C. Cir. 1968) (per curiam) (ordering employer to provide reinstatement and back pay to wrongfully terminated striking employees).

150. *In re* F.W. Woolworth Co., 90 N.L.R.B. 289, 293 (1950) ("Loss of pay shall be determined by deducting from a sum equal to that which [the employee] would normally have earned for each such quarter or portion thereof, her net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter."). In addition, the National Labor Relations Board decided that back pay is subject to daily compounded interest. Jackson Hosp. Corp., 356 N.L.R.B. No. 8 (Oct. 22, 2010).

151. During an audit of an Illinois company, ICE discovered that nearly 80 percent of the company's employees had questionable documents. Similarly, an audit of a Texas company revealed that more than half of the company's 107 employees had suspicious paperwork. ICE did not fine either of these two companies. Carroll, *supra* note 144, at A1.

Employer B, it receives a complete windfall. Thus, no matter the outcome, Employer B is essentially rewarded for openly violating IRCA and the NLRA. Employer B is therefore incentivized to seek out and hire undocumented workers.

In sum, no matter what Employer A decides to do—accept unionization or terminate its employees—it is placed at a competitive disadvantage as compared to Employer B. Moreover, Employer B can direct its savings to securing market share at Employer A's further expense.

B. Hoffman *Is a Direct Result of IRCA*

In essence, the Supreme Court in *Hoffman* faced a decision: whether to punish Jose Castro's illegal tendering of fraudulent documents, which undermined IRCA's verification system, or to punish Hoffman's wrongful termination of Castro, which directly violated the NLRA.[152] Ultimately the Court decided to punish Castro's actions. The Court's *Hoffman* decision was a direct result of IRCA. However, to link *Hoffman* to IRCA, it is helpful to explore the Court's reasoning in *Sure-Tan*, which also involved the NLRA.

As mentioned above, the Court in *Sure-Tan* declared that undocumented workers are "employees" under the NLRA.[153] As such, undocumented workers are entitled to full NLRA protections.[154] In *Sure-Tan*, Justice O'Connor stated that there was no inherent conflict between INA and the NLRA because INA did not make it illegal for employers to hire undocumented workers or for unauthorized immigrants to gain employment after they entered the country illegally.[155] However, in enacting INA, Congress was concerned with the illegal entry of unauthorized immigrants.[156] By conditioning the plaintiff's reinstatement offer on legal reentry and tolling the accrual of back pay during any time the plaintiff was not entitled to be present and employed in the United States, the Court took into account INA's objective of deterring unauthorized

152. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 140–41, 148 (2002) (describing both parties' statutory violations).

153. Sure-Tan, Inc. v. Nat'l Labor Relations Bd., 467 U.S. 883, 892 (1984).

154. *Id.*

155. *Id.* at 892–93.

156. *Id.* at 903.

immigration and thereby avoided a potential conflict between INA and the NLRA.[157]

In contrast, the Court in *Hoffman* held that awarding back pay to an undocumented worker inherently conflicted with IRCA.[158] With IRCA's passage, Congress made it illegal for employers to hire undocumented workers and for undocumented workers to accept employment in the United States.[159] By providing fraudulent documents to Hoffman to gain employment, Castro engaged in criminal behavior that directly violated IRCA.[160]

The Court in *Hoffman* sidestepped construing *Sure-Tan*, which has two potential interpretations. First, a plain-language interpretation of *Sure-Tan* dictates that employees who were never lawfully entitled to be present or employed in the United States are not entitled to back pay.[161] Second, a contextual interpretation of *Sure-Tan* states that this limitation only applies to unauthorized immigrants who leave the country and cannot claim back pay without lawful reentry.[162]

Factually, *Sure-Tan* and *Hoffman* were fairly similar. The deciding factor in *Sure-Tan* was that the undocumented employee returned to Mexico. Therefore, to avoid a conflict with INA, the back pay and reinstatement remedies had to be limited to require lawful reentry into the United States. After *Sure-Tan* it was unclear what would have happened if the plaintiff had stayed in the United States, which is precisely what Jose Castro did in *Hoffman*. The Court in *Hoffman* chose not to resolve the question regarding *Sure-Tan*'s interpretation and also refused to award Castro with back pay.[163]

Why did the *Hoffman* Court leave open the issue of *Sure-Tan*'s interpretation?[164] The reason is because the legal landscape

157. *Id.*

158. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 149 (2002).

159. 8 U.S.C. § 1324a(a)(1)(A) (2006); *Hoffman*, 535 U.S. at 148 (explaining that to gain employment, an undocumented worker must provide fraudulent documents, which undermines IRCA).

160. *Hoffman*, 535 U.S. at 141, 143. The Court held that "awarding [back pay] to illegal aliens runs counter to policies underlying IRCA." *Id.* at 149.

161. *Id.* at 146.

162. *Id.*

163. *Id.* at 151.

164. *Id.* at 147.

"significantly changed" when Congress passed IRCA.[165] Unlike INA, IRCA made it illegal for employers to hire undocumented workers and for unauthorized immigrants to accept employment in the United States.[166] In addition, IRCA implemented an employment verification system, which is "critical to the IRCA regime."[167] By tendering fraudulent documents, Castro "subvert[ed] the cornerstone of IRCA's enforcement mechanism . . . ."[168] The Court also stated that awarding back pay "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA."[169] Therefore, the *Hoffman* Court could not have reached the same holding if Congress had not enacted IRCA.

C. IRCA's Diluting Effect on Undocumented Workers' Labor Rights

While undocumented workers' remedies under the NLRA are limited, protections under other labor laws, such as FLSA and Title VII, remain intact, at least in theory.[170] Notwithstanding *Hoffman*, the U.S. Department of Labor and the Equal Employment Opportunity Commission, the agencies in charge of enforcing FLSA and Title VII, respectively, have stated that these labor laws apply to undocumented workers, regardless of their immigration statuses.[171] While equal labor-law protection is true in theory, it is not true in practice. As a result of IRCA, many undocumented workers are hesitant to assert their rights under FLSA or Title VII because they

165. *Id.*

166. Id. at 147–48.

167. *Id.*

168. *Id.* at 148.

169. *Id.* at 151.

170. Patel v. Quality Inn S., 846 F.2d 700, 706 (11th Cir. 1988) (holding that undocumented workers can recover under FLSA); Equal Emp't Opportunity Comm'n v. Switching Sys. Div. of Rockwell Int'l Corp., 783 F. Supp. 369, 374 (N.D. Ill. 1992) ("Plaintiff plainly is correct that Title VII's protections extend to aliens who may be in this country either legally or illegally.").

171. U.S. DEP'T OF LABOR, *supra* note 91 ("The Department's Wage and Hour Division will continue to enforce the FLSA . . . without regard to whether an employee is documented or undocumented. Enforcement of these laws is distinguishable from ordering back pay under the NLRA."); *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (June 27, 2002), http://www.eeoc.gov/policy/docs/undoc-rescind.html ("The Supreme Court's decision in *Hoffman* in no way calls into question the settled principle that undocumented workers are covered by the 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.").

fear employer retaliation, which often comes in threats of termination, or worse, deportation.[172] By prohibiting employers from hiring undocumented workers, IRCA acts to prevent undocumented workers from asserting their labor rights.[173]

With regard to FLSA enforcement, the Department of Labor entered into an agreement with the former INS to not report workers' undocumented statuses that are discovered during investigations of employee-alleged violations.[174] Thus, while in theory undocumented workers' fears of deportation for reporting workplace violations are unfounded, they are nevertheless hesitant to report their employers' violations. As evidenced by *Hoffman*, IRCA claims are prioritized over labor-law claims. This in turn chills undocumented workers from asserting their labor-law rights.

In particular, workplace raids have caused undocumented workers to avoid claiming workplace violations. In many instances, ICE has worked with employers to arrest and deport undocumented workers.[175] Thus, from an undocumented worker's point of view, the government is more concerned that he or she is deported than treated fairly by his or her employer. The end result is that undocumented workers shy away from reporting labor-law violations.

As previously mentioned, many employers that violate labor laws also hire undocumented workers. Thus, in practice, an unscrupulous employer's purported compliance with IRCA places it in a position to gain knowledge of its worker's immigration status and to use that status to exploit the employee. Because the employee is unlikely to assert his or her rights under the labor laws, the unscrupulous employer gains another advantage over the law-abiding

172. *See* Christopher Ho & Jennifer C. Chang, *Drawing the Line After* Hoffman Plastic Compounds, Inc. v. NLRB: *Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 492 (2005) ("[U]ndocumented workers are reluctant to enforce their rights . . . given the risks not only of retaliatory discharge but also of retaliatory reporting to the Department of Homeland Security and concomitant criminal prosecution.").

173. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 264–65 (2009).

174. *Memorandum of Understanding: Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor*, U.S. DEP'T OF LABOR WAGE & HOUR DIV. (Nov. 23, 1998), http://www.dol.gov/whd/whatsnew/mou/nov98mou.htm.

175. Lee, *supra* note 44, at 1108.

employer in the form of lower wages through wage violations. In sum, IRCA acts to dilute undocumented workers' labor-law rights while allowing unscrupulous employers to gain another advantage over law-abiding employers.

D. IRCA and Hoffman *Actually Increase Unauthorized Immigration*

As described above, IRCA and *Hoffman* have diluted undocumented workers' labor-law rights. Because employers are therefore exposed to little potential liability, IRCA and *Hoffman* have created an economic incentive for unscrupulous employers to hire undocumented workers. On passing IRCA, Congress concluded that undocumented workers primarily migrate to the United States for jobs.[176] Therefore, by not decreasing the pull that jobs have on undocumented immigrants, IRCA and *Hoffman* in effect increase the population of undocumented immigrants.[177] If, in practice, employers were liable under the NLRA and other labor laws regardless of an employee's documented status, that would eliminate both the current competitive disadvantage for law-abiding employers and the reason for which undocumented immigrants come to the country, namely jobs.

The court in *Patel* doubted that undocumented workers "come to this country to gain the protection of our labor laws."[178] However, even though granting labor-law protections does not increase the unauthorized immigrant population, Justice Breyer dissented in *Hoffman* because denying a back pay remedy could increase the strength of the "magnetic force" that draws undocumented immigrants into the country.[179] Justice Breyer reasoned that by not levying a monetary penalty against an unscrupulous employer, the *Hoffman* court decreased the cost of the violation and thereby increased the employer's desire to hire undocumented workers.[180]

176. H.R. REP. NO. 99-682, pt. 1, at 46, 53 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5649–50.

177. *See* Kim, *supra* note 173, at 264–65.

178. Patel v. Quality Inn S., 846 F.2d 700, 704 (11th Cir. 1988).

179. Hoffman Plastics Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 155–56 (2002) (Breyer, J., dissenting).

180. *Id.* at 155–56.

This effect becomes evident when examining the undocumented-immigrant population. When IRCA passed, the United States had an estimated population of 3.2 million undocumented immigrants.[181] The number of undocumented immigrants initially dropped after IRCA passed, but that has been primarily attributed to the fact that Congress granted permanent residency status to 2.7 million undocumented immigrants under IRCA's amnesty provision.[182] During the first decade after IRCA passed, the unauthorized-immigrant population increased at an average rate of 500,000 people annually.[183] During the 2000s, the average rate increased to between 700,000 and 800,000 people annually.[184] As of March 2010, the number of undocumented immigrants in the United States was 11.2 million, down from a high of 12 million in 2007.[185] Thus, by failing to discourage employers from hiring undocumented workers, ICRA increases unauthorized immigration.

In contrast, if Congress were to repeal IRCA and ensure that—in practice—undocumented workers enjoy the same protections that documented workers enjoy under the NLRA, the incentive to hire undocumented workers would decrease. To be sure, employers that rely on immigrant labor have a very real desire to stop their employees from unionizing. Immigrants are becoming increasingly more active in unions.[186] Specifically, Latino workers are the fastest-growing union contingency, representing 12.2 percent of union members, up from 5.8 percent in 1983.[187] Thus, if employers could

181. RUTH ELLEN WASEM, CONG. RESEARCH SERV., UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986, at 2–3 (2009), *available at* http://www.fas.org/sgp/crs/misc/RL33874.pdf.

182. Wishnie, *supra* note 39, at 205–06; *see also* COOPER & O'NEIL, *supra* note 58, at 3 ("[N]early 2.7 million people received permanent residency in the United States as a result of IRCA."). IRCA contained a provision that created a legalization program for individuals who had resided in the U.S. continuously since January 1, 1982. Fix, *supra* note 58, at 10.

183. WASEM, *supra* note 181, at 4.

184. *Id.*

185. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010 1 (Feb. 1, 2011), *available at* http://pewhispanic.org/files/reports/133.pdf.

186. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, THE CHANGING FACE OF LABOR, 1983–2008, at 15 (2009), *available at* http://www.cepr.net/documents/publications/changing-face-of-labor-2009-11.pdf.

187. *See id.* (comparing the growth of Latino union workers to the growth of Asian Pacific American and African-American union workers).

not prevent undocumented workers from joining unions, the employers would have less incentive to hire those workers. The net effect would be a decrease in the magnetic pull that jobs have on undocumented workers, which would, in all likelihood, reduce unauthorized immigration.

The same would also be true in the context of FLSA. There is no doubt that unscrupulous employers seek out undocumented workers in part to be able to pay depressed wages. If Congress were to repeal IRCA and assure equal rights to undocumented workers under FLSA—in practice and not just in theory—then unscrupulous employers would have no reason to hire them. The effect would again be a decrease in unauthorized migration.

IV. UNDER-ENFORCEMENT OF IRCA FAILS TO DISCOURAGE UNSCRUPULOUS EMPLOYERS FROM HIRING UNDOCUMENTED WORKERS

Under IRCA, all employers are subject to the same administrative requirements.[188] While employers originally opposed such requirements, they now generally agree that the requirements are less burdensome than they anticipated.[189] As explained above, all employers must use I-9 forms to verify employees' employment eligibility.[190] Also, all employers must accept a document if it "reasonably appears on its face to be genuine."[191]

As dictated by IRCA, the government oversees employers and ensures that they comply with IRCA's requirements.[192] Congress believed that because "[t]he penalties are uniformly applied to all employers,"[193] employer enforcement would not create an inherent disadvantage for any employer.[194] While the initial goal was uniform

188. *See* DEP'T OF HOMELAND SECURITY, *supra* note 45, at 1 ("[T]he term 'employer' means all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors.").

189. Wishnie, *supra* note 39, at 208.

190. *See* discussion *supra* Part II.C.1.a.

191. 8 U.S.C. § 1324a(b)(1)(A)(ii) (2006).

192. Brownell, *supra* note 17, at 2.

193. H.R. REP. NO. 99-682, pt. 1, at 56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660.

194. *See id.* ("The Committee felt such as [sic] approach would be the least disruptive to the American businessman . . . .").

enforcement,[195] the Government Accountability Office (GAO) later concluded that both INS and ICE made the worksite-enforcement program a relatively low priority.[196] While all employers are subject to the same substantive requirements, ICE's historical under-enforcement of IRCA emboldens unscrupulous employers to exploit undocumented workers because there is little risk that ICE will fine employers that violate IRCA.

A. Creation of Competitive Disadvantage for Law-Abiding Employers

ICE admits that law-abiding employers are placed at an unfair disadvantage because unscrupulous employers pay undocumented workers low wages.[197] This unfair-competition effect was foreseeable and evident even in the early years after Congress passed IRCA.[198] Nevertheless, Congress has failed to properly remedy this issue, and, as a result, unscrupulous employers continue to exploit undocumented workers to lower labor costs and realize higher profits.

Undocumented immigrants who come to the country are disproportionately likely to be less educated than other groups are, which is one reason why undocumented immigrants are more likely to hold low-skilled, labor-intensive jobs rather than white-collar jobs.[199] While the undocumented-immigrant population represents 5.4 percent of the total workforce, undocumented workers are overrepresented in several labor-intensive occupations.[200] For example, undocumented workers make up 25 percent of all farm

195. *See id.* (stating that the penalties will be applied uniformly to all employers who hire, recruit, or refer undocumented aliens).

196. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 6 (Aug. 2005), *available at* http://www.gao.gov/products/GAO-05-813. While the INS's investigations division was initially responsible for the worksite-enforcement program, the INS has since been dissolved into the Department of Homeland Security, which now enforces employer sanctions through ICE. Brownell, *supra* note 17, at 2.

197. *U.S. Immigration Fact Sheet*, *supra* note 109.

198. *See* Michael Fix, *supra* note 58, at 316–19 ("[I]n markets where law-abiding and law-evading firms compete with one another, the latter may come to enjoy an increased cost advantage as these programs evolve.").

199. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 14 (Apr. 14, 2009), *available at* http://pewhispanic.org/files/reports/107.pdf.

200. *Id.* at 15 fig.19.

workers; 19 percent of building, groundskeeping, and maintenance workers; 17 percent of construction workers; 12 percent of food preparation and serving workers; 10 percent of production workers; and 7 percent of transportation and material moving workers.[201]

It is not surprising, then, that in these labor-intensive industries labor typically accounts for the largest portion of employers' expenses.[202] For example, in the food industry, labor accounts for roughly 38.5 percent of an employer's expenses.[203] Moreover, the profit margins in these low-skilled industries are typically smaller than the profit margins in other industries.[204] For example, the average profit margin in heavy construction is 3.3 percent, while it is 7.5 percent in restaurants.[205] On the other hand, the average profit margin in high-skilled industries can be much higher; for example, it is 22.7 percent in the software industry and 16.5 percent in the pharmaceutical manufacturing industry.[206] Because of typically lower profit margins, low-skilled industries are more sensitive to fluctuations in labor costs, which gives unscrupulous employers an incentive to cut corners and violate the law. Because of this "race to the bottom,"[207] unscrupulous employers have an incentive to either directly exploit undocumented workers by violating wage regulations or indirectly exploit undocumented workers through independent contractors.

1. Wage Violations

Many undocumented workers come to this country seeking a better life for their families through higher-paying jobs.[208] Because jobs in their home countries usually pay much less than jobs in the

201. *Id.*

202. *See, e.g.*, James Cooper, *Why an Improving Job Market May Not Be Good for Profits*, THE FISCAL TIMES (Apr. 5, 2011, 7:45 AM), http://www.businessinsider.com/more-jobs-but-inflation-and-lower-profits-to-follow-2011-4.

203. *Marketing Costs*, FOOD MARKETING INST., 1 (Aug. 2008), http://www.fmi.org/docs/facts_figs/MarketingCosts.pdf.

204. *See* Mark J. Perry, *Profit Margin: Health Insurance Industry Ranks #86*, CARPE DIEM (Aug. 12, 2009, 1:35 PM), http://mjperry.blogspot.com/2009/08/health-insurance-industry-ranks-86-by.html.

205. *Id.*

206. *Id.*

207. Wishnie, *supra* note 39, at 214.

208. H.R. REP. NO. 99-682, pt. 1, at 45–46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

United States pay, immigrants will take less pay than is legally required because such pay is much more than they would make in their home countries.[209] Most commonly, unscrupulous employers exploit undocumented workers by paying less than the legally required minimum wage and violating overtime-pay requirements.[210] By reducing what could constitute their single largest expense, unscrupulous employers not only increase their profits but also remain competitive in the marketplace.

In a study of low-wage employees, female, foreign-born undocumented workers were almost three times as likely to be the victims of minimum-wage violations as compared to women born in the United States.[211] Nearly half of these unauthorized female workers suffered minimum-wage violations just one week before the study.[212] Similarly, foreign-born unauthorized men were nearly twice as likely to suffer minimum-wage violations as compared to men born in the United States.[213] Moreover, the amount by which employers underpaid these workers significant. Sixty percent of the workers in the study were underpaid by more than one dollar an hour.[214] Violation rates also varied with race and ethnicity.[215] Nearly one-third of Latino workers experienced minimum wage violations, compared to only 8 percent of white workers.[216]

FLSA mandates overtime pay, which requires employers to pay employees "time and a half," or one-and-one-half times the regular hourly rate for each hour that the employees work over forty hours each week.[217] Also, some states require daily overtime pay when

209. *See* Wishnie, *supra* note 39, at 201 ("[W]age disparities between the United States and many other nations attract undocumented immigrants to the U.S. labor market.").

210. *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 35 & fig.4.6 (2009), *available at* http://www.labor.ucla.edu/publications/reports/brokenlaws.pdf (discussing minimum wage and overtime violations by industry and by method of payment).

211. *See id.* at 43 fig.5.1.

212. *Id.* at 43.

213. *See id.* at 43 fig.5.1.

214. *Id.* at 21 fig.3.1 (indicating that in 2008, 39.9 percent of workers were underpaid by $1.00 an hour or less; 25.6 percent were underpaid by $1.01 to $2.00 an hour; 16.3 percent were underpaid by $2.01 to $3.00 an hour; 8.7 percent were underpaid by $3.01 to $4.00 an hour; and 9.6 percent were underpaid by more than $4.00 an hour).

215. *Id.* at 42.

216. *Id.*

217. *Id.* at 21.

employees work more than a specified number of hours each day.[218] In the same study of low-wage workers, nearly 85 percent of undocumented workers reported at least one overtime violation.[219] This study supports the proposition that unscrupulous employers seek out undocumented workers in order to depress the employees' wages and to remain immune from monetary sanctions.

Assume that Employer B pays one of its employees $6.25 an hour, just $1.00 less an hour than the federal minimum wage.[220] Also assume that Employer B requires the employee to work fifty hours a week and does not pay the employee FLSA-mandated overtime.[221] At this rate, Employer B saves just over $71 a week. As previously mentioned, the civil fine for first-time violators of IRCA is between $375 and $3,200 for each undocumented worker. Therefore, Employer B has to keep the employee for just over five weeks to realize the savings if it is fined $375, and just over 10 months if it is fined $3,200. Keep in mind that this example does not take into account additional savings that Employer B would realize if it were to pay the employee in cash, thereby avoiding FICA taxes.[222]

2. IRCA Incentivizes Unscrupulous Employers Not to Investigate Whether an Independent Contractor Hires Undocumented Workers

Some unscrupulous employers will not openly violate IRCA and hire undocumented workers. However, some of them will hire independent contractors that hire undocumented workers.[223] Employers are not required to screen independent contractors in the

218. *Id.*; *see also Minimum Wage Laws in the States—January 1, 2011*, U.S. DEP'T OF LABOR (Jan. 1, 2011), http://www.dol.gov/whd/minwage/america.htm#California (California requires one-and-one-half times regular hourly pay for any time worked in excess of eight hours per day and two times the regular hourly pay if an employee works more than twelve hours per day).

219. BERNHARDT ET AL., *supra* note 210, at 44 tbl.5.2, 45.

220. At the time of this Article's publication, the federal minimum wage was $7.25 per hour. *Minimum Wage*, U.S. DEPT. OF LABOR, http://www.dol.gov/dol/topic/wages/minimumwage.htm (last visited Apr. 9, 2011). Studies indicate that the majority of minimum wage violations involve underpaying workers by more than $1.00 per hour. BERNHARDT ET AL., *supra* note 210, at 21.

221. These violations would result in a net loss of $40.00 in hourly pay and $31.25 in overtime pay to the worker.

222. This tax requires employers to contribute 6.2 percent of employees' Social Security tax and 1.45 percent of employees' Medicare tax to the federal government. I.R.C. § 3111(a), (b)(6) (2006). Employer B could also realize savings by maintaining substandard working conditions, violating meal-break rules, or committing other wage violations.

223. *See, e.g.*, Greenhouse, *supra* note 135, at A1.

same way that the employers must screen regular employees,[224] but an employer is prohibited from hiring an independent contractor if the employer knows that the independent contractor employs undocumented workers.[225]

After IRCA passed, instead of hiring undocumented workers directly, large agricultural employers hired farm-labor contractors.[226] This allowed the large employers to exploit workers while not bearing any of the burdens of IRCA compliance.[227] Believing that they have found a loophole, many employers have greatly expanded their practice of hiring independent contractors to exploit employees since IRCA passed.[228] From 2001 to 2005, the total employment by independent contractors increased from just 1 percent to 7.4 percent.[229]

By only punishing employers who knowingly hire undocumented workers through independent contractors, IRCA incentivizes unscrupulous employers *not* to investigate whether an independent contractor hires undocumented workers. If an employer takes affirmative action to verify the documentation status of an independent contractor's employees, the employer is held to the reasonableness standard, the same standard that applies when an employer directly hires the employee.[230] Thus, by requesting to verify an independent contractor's employees, the employer opens the door to more potential liability. Therefore, by not requesting verification the employer absolves itself from this liability and is able to exploit the undocumented employees through the independent contractor.

This rule regarding independent contractors has also created a large gray area for employers. Specifically, because IRCA only prohibits employers from hiring independent contractors if the

224. 8 C.F.R. § 274a.1(f) (2010) (excluding independent contractors from the definition of "employee").

225. 8 U.S.C. § 1324a(a)(4) (2006) (stating that an employer who knowingly hires an independent contractor who employs undocumented workers "shall be considered to have hired the alien for employment in the United States").

226. Wishnie, *supra* note 39, at 213–14.

227. *Id.*

228. *Id.* at 214.

229. John A. Pearce II, *The Dangerous Intersection of Independent Contractor Law and the Immigration Reform and Control Act: The Impact of the Wal-Mart Settlement*, 10 LEWIS & CLARK L. REV. 597, 598 (2006).

230. *Id.* at 606.

employers have knowledge that the contractors hire undocumented workers, what should employers do if they suspect that contractors hire undocumented workers but do not have knowledge of the fact? Is a law-abiding employer who ignores his or her suspicion now unscrupulous? Or, is an employer who investigates further deemed "anti-immigrant" because he questions the documentation status of the contractor's employees? The potential for employer liability for hiring an independent contractor who the employer knows uses undocumented labor does little to close the loophole. It also creates more confusion for employers who want to follow the law but do not want to unnecessarily disturb their business relationships.

B. IRCA Enforcement Is Incorrectly Focused on Employees and Job Sectors Where Undocumented Labor Is Not Prevalent

Although INS and, currently, ICE have declared that enforcement is focused on employers, the brunt of the law often impacts undocumented employees.[231] The INS, in many past cases, actually ended up teaming with employers to find undocumented workers.[232] After deporting the workers, the agency only rarely punished the employers.[233] For example, in 2008, ICE made more than 6,200 criminal and administrative arrests related to worksite enforcement; only 135 of those arrested were employers.[234] The fact that ICE will work with employers to find and deport undocumented workers sends a message to unscrupulous employers that the door is open to exploit undocumented workers and turn them over to ICE when the arrangement stops benefiting such employers.

Not only has enforcement been incorrectly focused on employees instead of on employers but enforcement has also become focused on industries with national-security interests instead of on industries that heavily rely on immigrant labor.[235] After the terrorist attacks of September 11, 2001, the former INS focused its main

231. *See* Lee, *supra* note 44, at 1126 ("IRCA's implementation history, however, demonstrates that from the very beginning the then-INS demonstrated a willingness to work with employers, rather than fully committing to a policy of targeting and punishing them.").

232. *Id.* at 1108.

233. *Id.* at 1127.

234. *U.S. Immigration Fact Sheet*, *supra* note 109.

235. Brownell, *supra* note 17.

enforcement efforts on infrastructure sites such as airports, nuclear power plants, and military bases.[236] However, the five industries that are most reliant on immigrant labor are agriculture; building, groundskeeping, and maintenance; construction; food preparation and serving; and production.[237] Because these industries are usually not the focus of national-security issues, Congress moved resources for enforcement to industries and locations where national security was at issue.[238] Thus, IRCA now turns a blind eye to the very job magnet that Congress enacted it to eradicate.

C. Recent Changes in Enforcement Have Little Effect on Unscrupulous Employers

While the INS, and later ICE, primarily relied on raids, recent enforcement efforts are directed at employer audits.[239] Although audits are becoming more commonplace, ICE admits that these investigations can take several years to prosecute.[240] When choosing whom to audit, ICE does not randomly select employers; it bases "[a]ll investigations and arrests . . . on specific intelligence obtained from a variety of sources."[241] While the current administration plans to increase the number of audits, the 2010 fiscal year budget for ICE only had $6 million allocated specifically for worksite enforcement.[242] That amounted to less than one-tenth of 1 percent of ICE's budget for the fiscal year.[243] ICE's 2010 budget fact sheet stated that "[f]unding for worksite enforcement will allow ICE to provide a strong deterrent to employers who knowingly hire illegal workers; reduce economic incentive for illegal immigration; and restore the integrity of employment laws."[244] It is hard to believe that ICE could have accomplished these lofty goals with an average of $120,000 per state for the entire 2010 fiscal year.

236. *Id.*

237. PASSEL & COHN, *supra* note 199, at 15.

238. Brownell, *supra* note 17.

239. *See supra* Part II.D.2.

240. *U.S. Immigration Fact Sheet*, *supra* note 109.

241. *Id.*

242. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: ICE FISCAL YEAR 2010 ENACTED BUDGET 4 (Nov. 5, 2009), *available at* www.ice.gov/doclib/news/library/factsheets/doc/2010budgetfactsheet.doc.

243. *Id.* at 1 ("ICE has an annual budget of more than $5.7 billion.").

244. *Id.* at 4.

Moreover, audits, or "silent raids" as they are commonly referred to, have largely been fruitless.[245] For example, ICE audited 400 companies, 110 of which had questionable paperwork, but ICE fined only fourteen companies for a total of $150,000.[246] An audit of one California company found that 262 of its employees—93 percent of its labor force—had suspect documents.[247] ICE did not levy any fines and did not criminally prosecute the employer.[248] Thus, unscrupulous employers continue to disregard IRCA because audits fail to give those employers a reason not to.

V. GRANTING UNDOCUMENTED WORKERS EQUAL LABOR-LAW PROTECTIONS WILL REMOVE THE INCENTIVE TO HIRE THEM

Because unscrupulous employers exploit undocumented workers to gain a competitive advantage over law-abiding employers, it would be rational to conclude that to eliminate this advantage ICE merely needs to properly enforce IRCA. While strict enforcement would arguably do away with the competitive advantage, and also deter illegal immigration, this is not a workable solution. Since IRCA passed, uniform enforcement has never been close to becoming a reality. Moreover, strict enforcement could bring about Congress's original fear when it passed IRCA: that employers would discriminate against persons thought to be undocumented.[249] Strict enforcement could also prevent cautious employers from hiring at all for fear of exposing themselves to unwanted liability. Policies that stymie job growth are ill-advised while the job market still struggles to recover from the recent recession.

Because IRCA places enforcement power in the hands of employers who are ultimately concerned about their bottom-line profit margins, an inherent conflict of interest has opened the door

245. Susan Carroll, *Few Firms Fined over Hiring: New Program Finds Employers That Hire Illegal Workers, but Isn't Penalizing Them*, HOUS. CHRON., Sept. 1, 2010, at A1.

246. *Report: Feds Lax on Illegal Immigrants' Employers*, NAT'L PUB. RADIO (Sept. 1, 2010), http://www.npr.org/templates/story/story.php?storyId=129584581.

247. *Id.*

248. *Id.*

249. 8 U.S.C. § 1324a(e)(4)(A) (2006); *see also* H.R. REP. NO. 99-682, pt. 1, at 49 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5653 (explaining that there was a "widespread fear that sanctions could result in employment discrimination against Hispanics and other minority groups").

for employers to take advantage of undocumented workers. To solve this problem, Congress must take enforcement out of employers' hands. In addition, Congress must ensure that, in practice, all labor laws give undocumented workers the same rights that documented workers have.

A. Repealing Employer Enforcement and Restoring Equal Rights to Undocumented Workers Will Deter Unscrupulous Employers

Congress passed IRCA to control unauthorized immigration to the United States.[250] This goal has undeniably failed. Even the original authors of IRCA stated, "we . . . believe that the shortcomings of the act are not due to design failure but rather to the failure of both Democratic and Republican administrations since 1986 to execute the law properly."[251] Although the number of undocumented immigrants decreased slightly in 2010, experts attribute this drop to the bad economy and not to any meaningful enforcement of IRCA.[252] Even though the focus of IRCA was to eliminate the jobs magnet, the lack of enforcement and conflicts between IRCA and other labor laws have encouraged employers to hire undocumented workers. While this has increased illegal immigration, it has also resulted in the creation of a competitive disadvantage for law-abiding employers. Congress must repeal IRCA and restore equal-employment rights to undocumented workers.

While granting undocumented workers more labor protections may seem counterintuitive, it will remove any incentive to hire undocumented workers.[253] Granting undocumented workers the same employment rights that documented workers have will take away the economic advantages that unscrupulous employers realize when they hire undocumented workers. If unscrupulous employers are exposed to the same liability that law-abiding employers are exposed to, the

250. H.R. REP. NO. 99-682, pt.1, at 45.

251. Romano L. Mazzoli & Alan K. Simpson, *Enacting Immigration Reform, Again*, WASH. POST (Sept. 15, 2006 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2006/09/14/AR2006091401179.html.

252. Muzaffar Chishti & Claire Bergeron, *Increasing Evidence That Recession Has Caused Number of Unauthorized Immigrants in U.S. to Drop*, MIGRATION POL'Y INST. (Mar. 15, 2010), http://www.migrationinformation.org/USFocus/display.cfm?ID=774.

253. Wishnie, *supra* note 39, at 217.

unscrupulous employers will have no reason to purposefully seek out and hire undocumented workers.

The Special Agricultural Worker (SAW) program established a similar system.[254] Before it passed IRCA, Congress feared that agricultural employers would especially suffer because of their reliance on undocumented workers to harvest their crops.[255] If Congress sanctioned them for using undocumented workers, agricultural employers would have labor shortfalls and their crops would perish.[256] Congress predicted that labor shortfalls would result in, among other things, "loss of production of some crops, loss of sales to other countries, . . . higher prices for American consumers and loss of American jobs . . . ."[257]

Congress concluded that the best way to meet agricultural employers' needs as well as the undocumented workers' needs was to "ensure[] that their employment is fully governed by all relevant law without exception."[258] Michael V. Durando, President of the Farm Labor Alliance, testified that such a system is "extremely effective" in meeting employer and employee needs.[259] He said, "The fact that the system is so effective should not be surprising because what it does, in simplest terms, is employ the basic principles of a free market system—supply and demand."[260] By repealing IRCA, Congress could help eliminate the artificial desire for undocumented labor that IRCA created and thereby eliminate the competitive disadvantage for law-abiding employers.

B. Strengthening Government Enforcement of Other Labor Laws

While repealing IRCA will start the process of restoring a level playing field to all employers, it alone will not be sufficient. This is true because unscrupulous employers would most likely continue violating labor laws. Thus, in addition to repealing IRCA, Congress should direct the funds that it currently allocates to IRCA

254. H.R. REP. NO. 99-682, pt. 1, at 83–88.
255. *Id.* at 83.
256. *Id.*
257. *Id.*
258. *Id.* at 84.
259. *Id.*
260. *Id.*

enforcement to increased enforcement of FLSA, NLRB, and Title VII. Moreover, the funds should be directed to the labor-intensive industries where undocumented workers are prevalent.

The immigration enforcement budget is divided into three general categories: (1) border control; (2) detention and removal, and intelligence; and (3) interior investigations, which includes investigations on employers.[261] Interior investigation spending increased 320 percent from 1985 to 2002, making up 11 percent of total enforcement spending during that period.[262] As of 2002, the interior enforcement budget totaled $458 million.[263] This is a significant amount of money, which, if directed at labor-intensive industries, would help the government ensure proper enforcement of all labor laws and restore employers to a level playing field.

C. Consequences of This Proposal

Repealing IRCA and ensuring that undocumented workers have access to all labor-law protections will no doubt cause many negative consequences. However, the sum of the consequences is outweighed by the benefits not only to employers but also to undocumented workers.

1. Effects on Jobs

Because employers will have to pay more for labor costs, this proposal could negatively impact low-skilled workers. To remain competitive in a global economy, employers may be forced to transfer jobs overseas. Because many manufacturing jobs are fungible, those jobs would likely go to countries where low-cost labor is available. For example, an American farmer who grew lettuce and broccoli in California transferred his operations to Mexico, where he pays his employees $11 a day instead of $9 an hour.[264] Many farmers will likely follow suit to take advantage of the abundant workforce that is willing to work for low pay.[265]

261. INDEP. TASK FORCE ON IMMIGRATION & AM.'S FUTURE, MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT SPENDING SINCE IRCA 1 (2005), *available at* http://www.migrationpolicy.org/ITFIAF/FactSheet_Spending.pdf.

262. *Id.* at 2.

263. *Id.*

264. Julia Preston, *Short on Labor, Farmers in U.S. Shift to Mexico*, N.Y. TIMES, Sept. 5, 2007, at A1, A22.

265. *Id.* at A22.

The effect on service jobs would be different. Approximately 30 percent of unauthorized immigrants work in service jobs,[266] and the availability of these immigrant workers "keeps a damper on wage growth."[267] Thus, for services such as construction, food preparation, and other industries that heavily rely on undocumented workers,[268] repealing employer sanctions will likely mean that the price of goods will increase.

But these jobs concerns are not legitimate because this proposal does not change the ultimate result that exploiting undocumented workers is illegal; this proposal merely changes the channel through which that goal is accomplished. Now, instead of enforcing immigration laws through employers and IRCA, this proposal will enforce immigration laws through existing labor laws. There is no reason to think that because labor laws will be enforced through a different scheme there will be a wide-sweeping, dramatic impact on jobs.

2. Effects on Illegal Immigration

Although it may seem that granting equal rights to undocumented workers would draw more of them to the United States, the opposite is likely true. Granting equal rights to undocumented workers effectively removes any incentive that unscrupulous employers have to hire them. Eliminating these incentives will eliminate many jobs for unauthorized immigrants. If all employers are exposed to the same labor-law liabilities, employers will not have any incentive to hire undocumented workers over documented workers.

3. Effect on Discrimination of Immigrant Workers

Because this Article suggests that there be stricter enforcement of labor laws, there is the potential that employers would discriminate against undocumented workers or workers thought to be undocumented. If employers are liable under all labor laws regardless of their workers' documentation statuses, there is a potential that this proposal would tip the balance against immigrant

266. Dean Calbreath, *Experts Split on Economic Toll of Illegal Immigrants*, SAN DIEGO UNION-TRIB., May 2, 2010, at A17.

267. *Id.*

268. *Id.*

workers. However, these concerns are unfounded. This proposal seeks to place undocumented workers and documented workers on the same level. As this Article argues, a major reason why unscrupulous employers seek out undocumented workers is because the employers are exposed to less liability by doing so. Therefore, if an employer is not exposed to less liability by hiring undocumented workers, there is no reason for an employer to directly seek out and hire them.

4. Continued or Increased Demand of Undocumented Labor

While this proposal has an indirect effect on unauthorized immigration in general, this proposal is admittedly not a silver bullet that solves the problem of unauthorized immigration. Even if this proposal were enacted, many employers would nevertheless prefer to employ undocumented workers even though they would be exposed to the same liabilities. However, this proposal is merely an attempt to eliminate the disadvantage that law-abiding employers face in enforcing IRCA. Controlling unauthorized immigration is a comprehensive issue and all facets of government enforcement must address it. This proposal would decrease the demand for undocumented labor from the inside-out, but, admittedly, Congress would need to take further action to solve the overall problem of unauthorized immigration.

VI. CONCLUSION

The Supreme Court stated in *Sure-Tan*, and later restated in *Hoffman*, "[I]n light of the practical workings of the immigration laws, any perceived deficiency in the NLRA's existing remedial arsenal must be addressed by congressional action, not the courts."[269] Congress must act to remove the competitive disadvantage that law-abiding employers suffer from as a result of not only IRCA and its lack of enforcement but also the case law that has followed and the subsequent dilution of undocumented workers' labor-law rights.

By taking the enforcement power out of the hands of employers and restoring equal-employment rights to undocumented workers,

269. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 152 (2002) (internal quotation marks omitted).

Congress will effectively remove the incentive to hire undocumented workers. By removing any incentives, unscrupulous employers will not be able to exploit undocumented workers, and, therefore, law-abiding employers will not be at an inherent competitive disadvantage because they choose to obey the law.