



Calculating the Proper Measure

By David C. Marshall
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When an undocumented worker seeks future lost wage damages in the American legal system, should the damages be based on U.S. wages or foreign wages?

Damages and the Undocumented Worker

The influx of unauthorized workers into the American labor market continues to be a matter of growing national interest. Recent surveys demonstrate that immigration is one of the biggest concerns of Americans today in light

of the recent wave of unaccompanied children migrating across the Mexican border into the United States. When handling cases involving undocumented workers living in the United States, attorneys should consider the potential effect of their immigration status on the amount of recoverable damages.

The primary incentive for undocumented immigrants to come to the United States illegally is the promise of better paying jobs and improved quality of life. Although there are federal and state laws prohibiting the employment of unauthorized workers, they still come to the United States, find work, and create lives for themselves. After the 2014 presidential election, President Barack Obama signed an executive order introducing initiatives affecting the status of many undocumented immigrants in the United States. According

to United States Citizenship and Immigration Services (USCIS), these initiatives broaden the criteria by which immigrants can lawfully reside and work in the United States and extend the time periods of current deferred action plans. The USCIS estimates that roughly 4.9 million individuals may be eligible to take advantage of these initiatives. However, shortly after the executive order was passed, the U.S. House of Representatives moved legislation forward to limit funding for some of the initiatives, and a federal judge in Texas temporarily blocked the presidential initiatives with an injunction on February 16, 2015, responding to a lawsuit filed by Texas, joined by 26 other states at that time.

Regardless of the outcome of the continued political discourse and litigation regarding immigration, a class of undocumented workers will remain illegally in



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the U.S. labor market. This raises questions about what protections are afforded to these workers under United States law, for instance, when they have an employment claim against their employer, sustain a job-related injury, or have a simple personal injury claim against a third party. The courts are generally open to such claims, but what is the proper measure of damages for any alleged lost wages or earning capacity? Should such analysis be premised upon wages that might have been earned unlawfully in the United States, or upon lost wages that could have been earned lawfully in the worker's country of residence? This article outlines pertinent legal authorities that may provide guidance to answering such questions.

Citizenship Status Matters

It is critical for defense attorneys to analyze each plaintiff's citizenship status fully to evaluate claims for future lost wages properly. Depending on the jurisdiction, undocumented workers may be limited in recovery because the difference in U.S. wages and foreign wages may significantly reduce the damages model admitted into evidence. Some courts may even exclude an undocumented worker's claim for future lost U.S. wages as a matter of law. Other jurisdictions deem the issue as one of fact to be decided by the ultimate fact finder. A limited number of jurisdictions allow recovery of U.S. wages regardless of citizenship status. Thus, consideration must be given to each plaintiff's citizenship status to determine the proper measure of recoverable damages.

Damages Recoverable for Federal or State Labor Law Violations

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the National Labor Relations Board (NLRB) determined that an employer violated the National Labor Relations Act (NLRA) by selecting four employees for layoffs because they supported a union's organizing activities. One of the four employees was in the United States illegally, and all were awarded back pay by the NLRB after an administrative hearing. The United States Supreme Court held that the NLRB cannot award back pay to illegal aliens because such relief is foreclosed

by federal immigration law. *Id.* at 149, 151. Under the Immigration Reform and Control Act of 1986 (IRCA), "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies." *Id.* at 148. Thus, the Court held that such persons cannot recover back pay "for wages that could not lawfully have been earned, and for a job obtained in the first place by criminal fraud." *Id.* at 149. Any other result "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy" and "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigrations laws, and encourage future violations." *Id.* at 151-52.

In the wake of *Hoffman*, litigants argued that unauthorized workers were unable to recover anything for lost wages or earnings. However, courts typically have rejected such arguments, noting that *Hoffman* does not hold that the IRCA precludes courts from awarding damages to aliens otherwise allowable under federal or state law. *See, e.g., Riveria v. NIBCO, Inc.*, 364 F.3d 1057, 1074 (9th Cir. 2004) ("We seriously doubt that Hoffman's prohibition of NLRB-authorized backpay awards under the NLRA serves to prohibit a district court from awarding backpay to a Title VII plaintiff."); *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003) (finding that *Hoffman* "only applies to an undocumented alien worker's remedy for an employer's violation of the NLRA and does not apply to common-law personal injury damages"). For instance, the IRCA does not preclude aliens from bringing federal or state labor law claims for withheld wages, and *Hoffman* only prohibits back pay. Indeed, the general purpose of the IRCA is to diminish the attractive force of employment, which, "like a magnet pulls illegal immigrants towards the United States." *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting). Allowing an employer to escape liability arising from violations of federal and state labor laws would provide incentives to hire unauthorized aliens, thereby defeating the purpose of the IRCA to reduce employment opportunities of such persons. Thus, undocumented workers are able to seek recovery for violations of federal or state labor laws,

although they are prohibited from recovering back pay.

Availability of Workers' Compensation to Undocumented Workers

In the workers' compensation arena, many courts have ruled that undocumented workers are entitled to benefits because the IRCA has no preemptive effect over state law and

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does not preclude undocumented workers from receiving workers' compensation benefits. *See, e.g., Staff Mgmt. v. Jimenez*, 839 N.W.2d 640 (Iowa 2013), *as corrected* (Nov. 18, 2013) (holding the IRCA does not preempt workers' compensation benefits); *Dowling v. Slotnik*, 712 A.2d 396 (Conn. 1998) (holding that the IRCA does not preempt, either expressly or implicitly, the authority of states to award workers' compensation benefits to undocumented aliens); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. Super. Ct. App. Div. 1996) (allowing workers' compensation benefits to illegal alien despite the IRCA); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 329 (Minn. 2003) (holding that the IRCA was not intended to preclude the authority of states to award workers' compensation benefits to unauthorized aliens). These courts generally reason that there is no conflict between allowing such benefits and the IRCA's policy against hiring undocumented workers: "To the contrary, disallowing benefits would mean unscrupulous employers could hire undocumented workers without the burden of insuring them, a consequence that would encourage rather than discourage the hiring of illegal workers." *Curiel v. Environmental Management Services (MS)*, 655 S.E.2d 482 (S.C. 2007).

Recoverable Damages in Tort Litigation

With torts, courts have generally held that defendants are entitled to discover information about their opponents' work history and immigration status because such information is relevant to claims for past and future wage loss damages. In cases involving immigrants who entered or remained the United

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States illegally, the inquiry becomes more specific: what is the proper measure of damages for persons unlawfully in this country—earnings based on United States wages, or wages from the immigrant's country of legal residence? Although *Hoffman* is not dispositive on this narrower question, several courts have used it to guide their decisions. Not surprisingly, however, courts that have addressed whether *Hoffman* affects an alien's right to recover lost wages under state law when he or she works illegally in the United States, and what the proper method is for calculating such damages, have produced inconsistent results.

Legal Issue Jurisdictions

Many jurisdictions issuing decisions after *Hoffman* hold that determining the measure of damages is a legal issue to be determined by a court and that unauthorized workers may not recover future lost wages that might have been earned in the United

States. For instance, a district court in Kansas held that a plaintiff's illegal status precluded recovery for lost income based on projected earnings in the United States. *Hernandez-Cortez v. Hernandez*, 2003 U.S. Dist. Lexis 19780, 2003 WL 22519678 (D. Kan. 2003). Rather, an undocumented worker can only recover lost wages based on a damages model of wages that he or she could have lawfully earned in his home country.

Similarly, a district court in Florida, relying on *Hoffman*, ruled that a plaintiff's undocumented alien status precluded any award of damages for alleged lost United States wages. *Veliz v. Rental Service Corp. USA, Inc.*, 313 F. Supp. 2d 1317 (M.D. Fla. 2003). In reaching its conclusion, the court rejected the plaintiff's argument that lost wages should be available to the plaintiff because Florida extends workers' compensation benefits to undocumented aliens. *Id.* at 1337 ("Thus, while awarding workers' compensation benefits is not inconsistent with the decision rendered in *Hoffman*, awarding lost wages is. Backpay and lost wages are nearly identical; both constitute an award for work never to be performed."). The court held that "an award predicated on wages that could not lawfully have been earned, and on a job obtained by utilizing fraudulent documents, runs 'contrary to both the letter and spirit of the IRCA, whose salutary purpose it would simultaneously undermine.'" *Id.* (quoting *Majlinger v. Cassino Contracting Corp.*, 766 N.Y.S.2d 332 (N.Y. Sup. Ct. 2003)).

Likewise, district courts in Illinois generally hold that a plaintiff's immigration status is discoverable and relevant to determining the proper measure of damages. *See, e.g., Zuniga v. Morris Material Handling, Inc.*, 2011 U.S. Dist. Lexis 14352, 2011 WL 663136 (N.D. Ill. Feb. 14, 2011). *But see First Am. Bank v. Western Dupage Landscaping, Inc.*, 2005 U.S. Dist. Lexis 7882, 2005 WL 991892 (N.D. Ill. Apr. 11, 2005) (refusing to determine the measure of damages because the defendant failed to plead the affirmative defense of illegality as it related to lost future earnings of an illegal alien decedent). One court concluded "that plaintiff will not be entitled to recover the amount of any potential lost United States wages because such future wages could only have been earned in vio-

lation of the federal immigration laws." *Martinez v. Freeman*, 2008 U.S. Dist. Lexis 112290 (N.D. Ill. Feb. 22, 2008). Another court predicted that the Illinois Supreme Court would apply the rationale of *Hoffman* and conclude that a plaintiff's status "as an undocumented alien precludes the recovery of damages based on the loss of future United States earnings... but does not preclude the recovery of damages for lost future earnings or earning capacity based on what he could legitimately earn in his county of lawful residence." *Wielgus v. Ryobi Technologies, Inc.*, 875 F. Supp. 2d 854, 862 (N.D. Ill. 2012).

The Supreme Court of New Hampshire adopted a modified approach in determining the amount of recoverable damages by plaintiffs unlawfully in the United States. *See Rosa v. Partners in Progress, Inc.*, 868 A.2d 994 (N.H. 2005). The court held that "generally an illegal alien may not recover lost United States earnings, because such earnings may be realized only if that illegal alien engages in unlawful employment." *Id.* at 1000. However, the court created an exception to this general rule: "A person responsible for an illegal alien's employment may be held liable for lost United States wages if that illegal alien can show that the person knew or should have known of his status, yet hired or continued to employ him nonetheless." *Id.* at 1002. Further, an alien who submits fraudulent documents to obtain employment, in violation of the IRCA, will not be barred from recovery unless the employer reasonably relied on such documents. *Id.* The court noted that any other result "would provide an incentive for employers to target illegal aliens for employment in the most dangerous jobs or to provide illegal aliens with substandard working conditions." *Id.* at 1000.

Implicit in these decisions is that a trial court must make an initial determination on the residency status of a plaintiff, which will then dictate the type of damages model presented to a jury, based on United States wages or foreign wages. Indeed, a California appellate court, long before *Hoffman*, specifically held that "any questions regarding a plaintiff's citizenship or lawful place of residence is one of law, to be decided exclusively by the trial court outside the presence of the jury" and that res-

olution of this question is “a prerequisite to any ruling upon the admissibility of evidence regarding future earnings.” *Rodriguez v. Kline*, 232 Cal. Rptr. 157, 158 (1986). Presumably, a similar pre-trial process can and should be followed in other jurisdictions that prohibit aliens illegally in the United States from seeking recovery of future lost United States wages.

Question of Fact Jurisdictions

Other jurisdictions differ from this approach and hold that the question of whether a plaintiff is entitled to lost United States earnings or earnings from his or her home country is a question of fact. For instance, the Maryland Court of Appeals acknowledged that immigration status is relevant to a claim for lost wages for the simple reason that the legal ability to work affects the likelihood of future earnings in the United States. *Ayala v. Lee*, 81 A.3d 584 (Md. Ct. Spec. App. 2013). See also *Melendres v. Soales*, 306 N.W.2d 399 (Mich. Ct. App. 1981) (holding that the jury had a right to know of a plaintiff’s illegal status when calculating damages for lost earnings). However, the court held that the type and the amount of lost earnings depends on the jury determining the likelihood of whether or not the plaintiff would remain in the United States for the duration of the relevant time period. *Ayala* at 597–98. If it is unlikely that a plaintiff would be deported, or if he or she shows a long history of working in the United States, then a damages model of United States wages may be appropriate. If, on the other hand, there is evidence that a plaintiff is likely to return to his or her home country, either by choice or deportation, a damages model based on wages from his or her country of legal residence may be more appropriate. *Id.* A district court in Pennsylvania has also taken this type of approach. *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (E.D. Pa. 1975).

The Colorado Court of Appeals reached a similar conclusion, allowing a defendant to inquire into a plaintiff’s immigration and employment status. *Silva v. Wilcox*, 223 P.3d 127 (Col. Ct. App. 2009). The court held,

where a claimant is seeking to recover lost future wages as damages, the inquiry into his right as an immigrant to earn such wages is relevant; however,

there must be a showing that the immigrant has violated the IRCA and that he is unlikely to remain in the country during the period for which wages are sought before he can be precluded from recovering such wages.

Id. at 131–32. If there is no showing that a plaintiff’s status was in violation of immigration laws or regulations, then the plaintiff is entitled to seek recovery for lost future earnings in the United States. *Id.* at 133, 138. However, if a plaintiff is found to have been in Colorado illegally and his or her employment has been contrary to law, making him or her unlikely to remain in the United States during the period of lost future wages, then such evidence is admissible at trial so that a jury can make a determination whether or not to award damages for lost future wages, and if so, at what rate. *Id.* Likewise, the Fifth Circuit Court of Appeals held that an undocumented worker could present evidence of future lost wages in the United States based on his history of United States earnings and the absence of evidence indicating that he was about to be deported. *Hernandez v. M/V Rajaan*, 848 F.2d 498 (5th Cir. 1988) (on appeal from Texas district court). A district court in Mississippi followed the Fifth Circuit’s approach and held that a decedent’s status as an illegal alien does not preclude evidence of his or her alleged lost United States wages. *Avalos v. Atlas World Group, Inc.*, 2005 WL 6736327 (S.D. Miss. Apr. 4, 2005). A district court in Texas, applying Louisiana law, followed suit. *Vargas v. Kiewit Louisiana Co.*, 2012 U.S. Dist. Lexis 99616, 2012 WL 2952171 (S.D. Tex. July 18, 2012) (applying Louisiana law). These cases hold that an injured alien may introduce evidence of the alleged lost United States wages despite his or her legal status, and the defendant may then establish that (1) the use of such wages to calculate an award of future earnings is factually improper, and (2) a proper measure of damages would be based on potential earnings in the legal country of residence.

Evidentiary Issue Jurisdictions

Recognizing the split of authority among jurisdictions, other courts address the issue from an evidentiary standpoint. For instance, district courts in Wyoming and New Mexico have conducted *Daubert* analyses of proposed expert testimony

regarding alleged lost future earnings of unauthorized aliens. *Romero v. Reiman Corp.*, 2011 U.S. Dist. Lexis 157839, 2011 WL 11037890 (D. Wyo. Dec. 21, 2011); *Cruz v. Bridgestone/Firestone North American Tire, LLC*, 2008 U.S. Dist. Lexis 107379, 2008 WL 5598439 (D.N.M. Aug. 29, 2008). Both courts excluded proffered expert testimony of future United States wages as

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inherently speculative and unreliable, given the numerous uncertainties of whether or not such earnings could be reasonably realized by undocumented workers facing the threat of deportation.

Outlier Jurisdictions

Texas law allows recovery of damages for lost earning capacity regardless of a claimant’s citizenship or immigration status, placing Texas in the minority of jurisdictions that have addressed the issue. The Texas Court of Appeals has specifically upheld a damages award for an injured alien with an illegal status that was supported by expert testimony of future lost United States wages. See *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tex. App. 2003). See also *Walmart Stores, Inc. v. Cordova*, 856 S.W.2d 768 (Tex. App. 1993). In a pre-*Hoffman* decision, the Supreme Court of Virginia reached a similar conclusion, holding that a trial court did not err in excluding evidence of an alien’s immigration violations and instructing the jury that it could consider pre-trial loss of earn-

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ings as an element of damages. *Peterson v. Neme*, 281 S.E.2d 869 (Va. 1981). Likewise, a district court in Massachusetts held that an alien's status did not bar recovery for reduced earning capacity or lost wages in a personal injury action. *Barros v. E.W. Bliss Co.*, 1993 U.S. Dist. Lexis 4015 (D. Mass. Mar. 25, 1993).

New York courts have produced inconsistent results over the years, but the general takeaway is that a plaintiff's illegal status does not bar recovery of lost wages, even if based on potential United States earnings. See, e.g., *Madeira v. Affordable Hous. Found., Inc.*, 315 F.Supp.2d 504 (S.D.N.Y. 2004) ("under New York law, plaintiff's alien status is relevant to determining whether lost earnings are appropriate and, if so, how much should be awarded"); *Majlinger v. Cassino Contr. Corp.*, 802 N.Y.S.2d 56 (N.Y. Sup. Ct. 2005) ("the jury may take the plaintiff's status into account, along with the myriad other factors relevant to a calculation of lost earnings, in determining, as a practical matter, whether the plaintiff would have continued working in the United States throughout the relevant period, or whether his or her status would have resulted in, e.g., deportation or voluntary departure from the United States"); *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246 (N.Y. 2006) (holding that undocumented aliens' claims for lost earnings are not precluded or preempted by federal law). Given the broad range of appellate decisions, it appears that the issue is left for a jury to determine in New York courts.

Conclusion

No singular method exists for calculating the proper measure of future lost wage damages for undocumented workers in the United States. The issue of illegal immigration continues to be a hot-button topic in the political and social landscape of our country. Accordingly, determining the proper measure of damages for undocumented workers will remain an issue for attorneys across the country to litigate, and defense attorneys should arm themselves with the knowledge and understanding to evaluate and prepare their cases fully for trial.

Practitioners must identify whether their jurisdiction has addressed the issue or adopted a uniform approach to analyze the proper measure of future lost wage damages for undocumented workers. Recognizing this issue and implementing a strategy early in the defense of a case will allow the most effective presentation of evidence and arguments to exclude unlawful, speculative, or improper claims of lost wage damages. **FD**