

Determining the Proper Measure of Lost Wage Damages for Aliens Injured in the United States

When an undocumented worker seeks lost wages in the U.S. court system, what is the proper measure of damages?

By David C. Marshall

The influx of unauthorized workers into the American labor market is a matter of growing national concern. Recent surveys demonstrate that immigration is one of the biggest concerns of Americans today, having increased in recent months due to the migration from Mexico of tens of thousands of unaccompanied children into the United States. While the discussion generally focuses on the political and social considerations and effects of illegal immigration, there are important legal issues that attorneys should analyze when handling cases involving undocumented aliens.

Without question, the primary incentive for aliens to risk their lives to come to the United States illegally is because they are able to find better paying jobs and improved quality of life. Although

there are federal and state laws prohibiting the employment of unauthorized workers, the fact remains that aliens are coming to America, finding work and creating lives for themselves. This leads to the question of what protections are afforded to such aliens under U.S. 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 plaintiff's country of residence? This article outlines per-

tinent legal authorities that might provide guidance in answering such questions.

In *Hoffman Plastic Compounds, Inc. v. NLRB*,¹ 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 backpay by the NLRB after an administrative hearing. The U.S. Supreme Court held that the NLRB cannot award backpay to illegal aliens, as such relief is foreclosed by federal immigration law.² 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.”³ Thus, the Court held that such persons cannot recover backpay “for wages that could not lawfully have been earned, and for a job obtained in the first place by criminal fraud.”⁴ Any other result “would unduly trench upon explicit statutory prohibitions critical to federal immigration policy”⁵ and “encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigrations laws, and encourage future violations.”⁶

In the wake of *Hoffman*, litigants argued that unauthorized workers were unable to recover anything for lost wages or earnings. However, courts typically 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.⁷ The issue was thus refined to a more specific area of inquiry: determining the proper measure of damages for persons

unlawfully in this country based on earnings in the United States or the country of the plaintiff’s legal residence. Although *Hoffman* is not dispositive on this more narrow issue, several courts have used it to guide their decisions.

South Carolina courts have not directly decided whether an undocumented worker may recover future lost United States wages, as opposed to future wages from the alien’s country of origin. However, one district court in South Carolina has held that the IRCA does not preclude aliens from bringing federal and state labor law claims for withheld wages.⁸ The court noted that 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.”⁹ The court reasoned that allowing an employer to escape liability arising from violations of federal and state labor laws provides incentives to hire unauthorized aliens, thereby defeating the purpose of the IRCA

to reduce employment opportunities of such persons.¹⁰

Similarly, in the workers’ compensation context, the S.C. Supreme Court has ruled that because the IRCA does not expressly preclude an alien from being considered an employee for workers’ compensation benefits, the IRCA has no preemptive effect over state law and does not preclude an undocumented worker from receiving workers’ compensation benefits.¹¹ The court reasoned that allowing benefits to those people working in the United States illegally does not conflict with the IRCA’s policy against hiring them. “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.”¹²

In a personal injury case, another South Carolina district court held that the defendant was entitled to discover information about the plaintiff’s work history and immigration status because that information is relevant to his claim for past and future wage loss damages.¹³ The court noted that should the plaintiff “not be lawfully eligible for past and future work in the United States on account of his immigration status, the same is relevant to his damages claim and [the] Defendant’s defense of the claim.”¹⁴ Accordingly, the court held that the defendant’s right to discovery of such information outweighed any prejudice to the plaintiff resulting from the disclosure.¹⁵ From a discovery standpoint, other courts have reached similar conclusions.¹⁶

Although South Carolina courts have held that an alien is entitled to recover damages for lost wages or diminished earning capacity, and that a plaintiff’s immigration status is relevant to such analysis, the question remains whether an alien in South Carolina may recover future lost United States wages, as opposed to future wages from his or her country of origin.



Quality law firms demand dependable Professional Liability coverage.

We're the nation's largest provider of legal liability protection.

CNA understands the potential risks lawyers face every day. Since 1961, our **Lawyers Professional Liability Program** has helped firms manage risk with a full range of insurance products, programs and services, and vigorous legal defense when it's needed. As part of an insurance organization with \$55 billion in assets and an "A" rating from A.M. Best, we have the financial strength you can count on.

See how we can help protect your firm by contacting The General Agency at 1-800-922-5036.

The General Agency, the exclusive broker for CNA for firms up to 34 attorneys, has been handling the insurance needs of professionals in South Carolina for over 50 years. We know the intricacies of a claims-made policy and can help design coverage to best meet your firm's needs.



www.generalagencyinc.com
www.lawyersinsurance.com
 The program referenced herein is underwritten by one or more of the CNA companies. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2010 CNA. All rights reserved.



Accordingly, attorneys and trial courts should look to other jurisdictions for guidance in determining the proper measure of damages consistent with policy considerations, legal authority and evidentiary requirements. Not surprisingly, courts that have addressed whether *Hoffman* affects an alien's right to recover lost wages under state law, and what the proper method is for calculating such damages, have produced inconsistent results.

Many post-*Hoffman* jurisdictions hold that determining the measure of damages is a legal issue to be determined by the 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 has held that a plaintiff's illegal status precluded recovery for lost income based on projected earnings in the United States.¹⁷ Rather, an undocumented worker can only recover lost wages based on a damages model of wages he could have lawfully earned in his home country. Similarly, a district court in Florida, relying on *Hoffman*, has ruled that a plaintiff's undocumented alien status precluded any award of damages for alleged lost United States wages.¹⁸ 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.¹⁹ 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.'"²⁰

Likewise, district courts in Illinois have generally held that a plaintiff's immigration status is discoverable and relevant to determining the proper measure of damages.²¹ One court concluded "that plaintiff will not be entitled to recover the amount of any poten-

tial lost United States wages because such future wages could only have been earned in violation of the federal immigration laws."²² 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

Terminology

Immigrants can be in the United States improperly for two reasons. First, they can enter illegally without proper documentation, which is the traditional perception of illegal immigration. Second, they can enter legally on a temporary basis either with or without a visa, but overstay their allotted time. Studies indicate one-third to one-half of illegal aliens fall into the latter category.

There is a continuing discussion in the United States regarding the proper denomination for persons in the United States illegally. The most recent trend moves away from the phrase "illegal immigrant" because it is the actions that may be illegal, as opposed to the immigrants themselves. The move appears to be part of a broader shift away from labeling people, but instead labeling behavior.

recovery of damages for lost future earnings or earning capacity based on what he could legitimately earn in his country of lawful residence."²³

The Supreme Court of New Hampshire adopted a modified approach in determining the amount of recoverable damages by plaintiffs unlawfully in the United States.²⁴ 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."²⁵ 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."²⁶ Further, an alien that 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.²⁷ 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."²⁸

Implicit in these decisions is that the trial court must make an initial determination as to the residency status of the alleged alien, which will then dictate the type of damages presented to the jury, i.e., based on United States wages or foreign wages. Indeed, a California appellate court, long before *Hoffman*, specifically held that "any question 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,"²⁹ and that resolution of such question is "a prerequisite to any ruling upon the admissibility of evidence regarding future earnings."³⁰ Presumably, a similar pre-trial process can and should be followed in other jurisdictions that prohibit aliens from seeking recovery of future lost United States wages.

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.³¹ However, the court held that the type and amount of lost earnings

depends on the jury determining the likelihood of whether the plaintiff will remain in the United States for the duration of the relevant time period.³² If it is unlikely that the plaintiff will be deported, or if he 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 the plaintiff is likely to return to his home country, either by choice or deportation, a damages model based on wages from his country of legal residence may be more appropriate.³³ A district court in Pennsylvania has also taken this type of approach.³⁴

The Colorado Court of Appeals reached a similar conclusion, allowing a defendant to inquire into a plaintiff's immigration and employment status.³⁵ The court held that 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.³⁶ If there is no showing that the 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.³⁷ However, if the plaintiff is found to have been in Colorado illegally, and his employment contrary to law making him unlikely to remain in the United States during the period of lost future wages, then such evidence is admissible at trial so the jury can make a determination whether to award damages for lost future wages, and at what rate.³⁸

Likewise, the Fifth Circuit Court of Appeals has 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 he was about to be deported.³⁹ A dis-

trict 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 alleged lost United States wages.⁴⁰ A district court in Texas, applying Louisiana law, followed suit.⁴¹ These cases hold that an injured alien may introduce evidence of the alleged lost United States wages, and the defendant may then establish (1) that the use of such wages to calculate an award of future earnings is factually improper, and (2) that a proper measure of damages would be based on potential earnings in the legal country of residence.

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.⁴² Both courts excluded proffered expert testimony of future United States wages as inherently speculative and unreliable, given the numerous uncertainties of whether such earnings could be reasonably realized by undocumented workers facing the threat of deportation.

To the contrary, Texas law allows recovery of damages for lost earning capacity regardless of the 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 that was supported by expert testimony of future lost United States wages.⁴³ 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 it could consider pre-trial loss of earnings as an element of damages.⁴⁴ 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.⁴⁵

New York courts have produced inconsistent results over the years, but the general take-away is that a plaintiff's illegal status does not bar recovery of lost wages, even if based on potential United States earnings.⁴⁶ Given the broad range of appellate decisions, it appears the issue is left for the jury's determination in New York courts.

It is currently unclear how South Carolina appellate courts might rule on this issue, but there are certainly interesting legal considerations surrounding illegal immigration that will likely affect the amount of recoverable lost wage damages for aliens living and working in the United States and taking advantage of the U.S. legal system. Given the recent increase in illegal immigration, determining the proper measure of damages will remain an issue for attorneys across the country to litigate, and South Carolina lawyers should arm themselves with the knowledge and understanding of both sides of the issue in evaluating and preparing cases for trial.

David Marshall is an attorney with Turner Padgett in Columbia. He thanks Bettis Rainsford for his research related to this article and Thorne Barrett for his editorial assistance.

Endnotes

¹ 535 U.S. 137 (2002).

² *Id.* at 151.

³ *Id.* at 148.

⁴ *Id.* at 149.

⁵ *Id.* at 151.

⁶ *Id.*

⁷ 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. Ct. App. 2003) (finding *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").

⁸ *Flores v. Limehouse*, No. 2:04-1295-CWH, 2006 U.S. Dist. LEXIS 30433 (D.S.C. May 11, 2006).

⁹ *Id.* at *6 (citing *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting)).

- ¹⁰ *Id.*
- ¹¹ *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007).
- ¹² *Id.* at 28, 655 S.E.2d at 484.
- ¹³ *Fragoso v. Builders FirstSource Southeast Group LLC*, No. 4:10-503-TLW-SVH, 2011 U.S. Dist. LEXIS 19529 (D.S.C. Feb. 25, 2011).
- ¹⁴ *Id.* at *5.
- ¹⁵ *Id.*
- ¹⁶ See, e.g., *Davila v. Grimes*, No. 2:09-CV-407, 2010 U.S. Dist. LEXIS 51321 (S.D. Ohio Apr. 29, 2010) (recognizing that a plaintiff's status in this country may impact his claim for lost future wages, and finding discovery on the subject relevant).
- ¹⁷ *Hernandez-Cortez v. Hernandez*, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS 19780 (D. Kan. Nov. 4, 2003).
- ¹⁸ *Veliz v. Rental Service Corp. USA, Inc.*, 313 F. Supp.2d 1317 (M.D. Fla. 2003).
- ¹⁹ *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.").
- ²⁰ *Id.* (quoting *Majlinger v. Cassino Contracting Corp.*, 766 N.Y.S.2d 332 (N.Y. Sup. Ct. 2003)).
- ²¹ See, e.g., *Zuniga v. Morris Material Handling, Inc.*, No. 10-C-696, 2011 U.S. Dist. LEXIS 14352 (N.D. Ill. Feb. 14, 2011). But see *First Am. Bank v. Western Dupage Landscaping, Inc.*, No. 00C4026, 2005 U.S. Dist. LEXIS 7882 (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).
- ²² *Martinez v. Freeman*, No. 06-C-50199, 2008 U.S. Dist. LEXIS 112290 (N.D. Ill. Feb. 22, 2008).
- ²³ *Wielgus v. Ryobi Technologies, Inc.*, 875 F. Supp.2d 854, 862 (N.D. Ill. 2012).
- ²⁴ See *Rosa v. Partners in Progress, Inc.*, 868 A.2 994 (N.H. 2005).
- ²⁵ *Id.* at 1000.
- ²⁶ *Id.* at 1002.
- ²⁷ *Id.*
- ²⁸ *Id.* at 1000.
- ²⁹ *Rodriguez v. Kline*, 232 Cal. Rptr. 157, 158 (Cal. Ct. App. 1986).
- ³⁰ *Id.*
- ³¹ *Ayala v. Lee*, 81 A.3d 584 (Md. 2013). See also *Melendres v. Soales*, 306 N.W.2d 399 (Mich. Ct. App. 1981) (holding the jury had a right to know of plaintiff's illegal status when calculating damages for lost earnings).
- ³² *Ayala* at 597-98.
- ³³ *Id.*
- ³⁴ *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (E.D. Pa. 1975).
- ³⁵ *Silva v. Wilcox*, 223 P.3d 127 (Col. Ct. App. 2009).
- ³⁶ *Id.* at 131-32.
- ³⁷ *Id.* at 133, 138.
- ³⁸ *Id.*
- ³⁹ *Hernandez v. M/V Rajaan*, 848 F.2d 498 (5th Cir. 1988).
- ⁴⁰ *Avalos v. Atlas World Group, Inc.*, No. 2:03-CV-174, 2005 WL 6736327 (S.D. Miss. Apr. 4, 2005).
- ⁴¹ *Vargas v. Kiewit Louisiana Co.*, No. H-09-2521, 2012 U.S. Dist. LEXIS 99616 (S.D. Tex. July 18, 2012) (applying Louisiana law).
- ⁴² *Romero v. Reiman Corp.*, No. 11-CV-216-F, 2011 U.S. Dist. LEXIS 157839 (D. Wyo. Dec. 21, 2011); *Cruz v. Bridgestone/Firestone North American Tire, LLC*, No. 06-538-BB/DJS, 2008 U.S. Dist. LEXIS 107379 (D.N.M. Aug. 29, 2008).
- ⁴³ See *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tex. Ct. App. 2003). See also *Wal-mart Stores, Inc. v. Cordova*, 856 S.W.2d 768 (Tex. Ct. App. 1993).
- ⁴⁴ *Peterson v. Neme*, 281 S.E.2d 869 (Va. 1981).
- ⁴⁵ *Barros v. E.W. Bliss Co.*, No. 91-12633-Z, 1993 U.S. Dist. LEXIS 4015 (D. Mass. Mar. 25, 1993).
- ⁴⁶ See, e.g., *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp.2d 504, 507 (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, 68-69 (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 undocumented aliens' claims for lost earnings are not precluded or preempted by federal law).

CLAWSON AND STAUBES LLC

CHARLESTON, SC • COLUMBIA, SC
GREENVILLE, SC • CHARLOTTE, NC

WWW.CLAWSONANDSTAUBES.COM

800-774-8242



From Top Left: Sam Clawson, Matt Story, Peggy Urbanic, David Cleveland
Ronnie Craig, Chris Staubes, Paul Hammack, Jay McDonald

ATTORNEYS AT LAW

Business Disputes • Construction Litigation
Medical Malpractice • Personal Injury
Insurance Litigation • Workers Compensation

STATEWIDE MEDIATORS

Samuel R. Clawson

- Certified SC Circuit Court Mediator
- Named as *The Best Lawyers in America*™ since 2010

Matthew J. Story

- Certified SC Circuit Court Mediator

Peggy Urbanic

- Certified SC Circuit Court Mediator

David C. Cleveland

- Certified SC Circuit Court Mediator

Ronnie Craig

- Certified SC and NC Mediator

Chris B. Staubes

- Certified SC Circuit Court Mediator
- Named as *The Best Lawyers in America*™ since 2010

Paul E. Hammack

- Certified SC Circuit Court Mediator

John "Jay" L. McDonald, Jr.

- Certified SC Circuit Court Mediator