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USING FAIR LABOR STANDARDS ACT LITIGATION TO SUPPORT IMMIGRANT WORKER ORGANIZING

Turning Direct Legal Services into Impact Litigation

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The prevalence of wage theft is growing at the same time that government budgets for enforcing employment laws are shrinking.[1] Increasing numbers of legal services agencies around the country have joined the effort to police the line between exploitation and low-wage work by representing workers in unpaid wage claims under the Fair Labor Standards Act.[2] Because employers of immigrant workers are particularly prone to commit wage theft, many programs specifically target immigrant clients and frame wage-theft work as part of a campaign for just immigration reform.[3] The need is crushing, so how can we maximize the impact of our wage-and-hour litigation with limited resources?

The simplest answer to this question is to join efforts. Just as more civil legal services organizations have begun to incorporate employment issues into poverty law practice, more worker centers, faith-based groups, and other community organizations are incorporating a workers' rights agenda into community-organizing campaigns.[4] Many of these organizations are rooted in immigrant communities; some bring immigrant and nonimmigrant workers together.[5] Some are focused on one ethnic group or a particular industry; oth-

[1]See Annette Bernhardt et al., University of Illinois at Chicago Center for Urban Economic Development et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), http://bit.ly/uXpw2d; Rebecca Dixon & Mike Evangelist, National Employment Law Project, The President's FY 2012 Budget: Federal Priorities in Unemployment Insurance, Workforce Development, and Worker Rights 7 (March 9, 2011), http://bit.ly/u6sNHJ (federal attempt to restore enforcement budget to 2001 levels).

[2]See Sharon Dietrich et al., *An Employment Law Agenda: A Road Map for Legal Services Advocates*, 33 Clearinghouse Review 541 (Jan.–Feb. 2000); Rick McHugh, *Recognizing Wage and Hour Issues on Behalf of Low-Income Workers*, 35 *id.* 289, 290 (Sept.–Oct. 2001).

[3]See Rebecca Smith et al., *Protecting the Labor and Employment Rights of Immigrant Workers*, 38 Clearinghouse Review 329, 330 (Sept.–Oct. 2004).

[4]For simplicity, throughout this article I interchange the use of "worker centers" and "community organizations" to refer to all these groups; however, not all of the organizations identify as worker centers. Many different kinds of worker centers employ a wide range of philosophies, missions, and strategies (see, e.g., National Mobilization Against Sweatshops, About NMASS (2009), http://bit.ly/rsUTUp; Workplace Project (n.d.), http://www.workplaceprojectny.org; see also Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 New York Law School Law Review 417, 419–21, 426–29 (2005–2006)).

[5]E.g., National Mobilization Against Sweatshops, *supra* note 4 ("membership organization of working people finding our common ground in the struggle to establish control over our health, time, work, communities and lives"); Workplace Project, *supra* note 4 (focused on "Latino immigrant workers"). See Fine, *supra* note 4, at 430–31; Ruth Milkman, *Immigrant Workers and the Future of American Labor*, 26 American Bar Association Journal of Labor and Employment Law 295 (Winter 2011), http://bit.ly/vZCiGz.

ers are multitrade, forging alliances across various sectors of a community.[6] Some work in close connection with unions; others developed because organizers had experienced the limitations of a trade union organizing model and sought a broader strategy.[7] Regardless of their goal or model, these organizations are on the front lines in the nationwide campaign against wage theft. Many also form the vanguard of the immigrant rights movement.

The combination of law and organizing has generated a wealth of literature debating the effectiveness of a range of models and many examples of successful collaborations for workplace justice.[8] With the goal of convincing legal services organizations to prioritize litigation on behalf of immigrant workers who are organizing, here I highlight some key litigation issues for immigrant workers with wage claims and outline some practical benefits of litigating in connection with an organizing campaign.[9]

Most of my tips could apply to various law and organizing models but are primarily influenced by our experience at the Legal Aid Society, which has a long history of poverty law litigation in collaboration with community organizing.[10] In developing our practice in employment law, we have been lucky to learn from organizers with decades of experience using litigation as a tool in a campaign, in particular, organizers with the Chinese Staff and Workers' Association and the National Mobilization Against Sweatshops.[11] We have also had the benefit of consulting and cocounseling with experienced practitioners at other organizations.

Our wage litigation often begins at the request of organizers and workers in a community-organizing campaign geared not just at vindicating the rights of workers in the case but also at changing overall working and living conditions in the community.[12] Our role as lawyers is fairly limited

[6]E.g., Damayan Migrant Workers Association, Welcome to Damayan's Website (2008), http://bit.ly/v4hSKa (on "Filipino im/migrant workers"); New Orleans Workers' Center for Racial Justice (n.d.), http://www.nowcrj.org/ ("dedicated to organizing workers across race and industry to build the power and participation of workers and communities").

[7]See, e.g., Saru Jayaraman, *In the Wake of September 11: New York Restaurant Workers Explore New Strategies*, Labor Notes, Aug. 1, 2003, at 6, http://bit.ly/tMGX2v (outlining strategy of Restaurant Opportunities Center, worker center intended to create "labor-friendly climate" with goal of unionization or "organized restaurant workers"); PeiYao Chen, The "Isolation" of New York City Chinatown: A Geo-historical Approach to a Chinese Community in the U.S. (2003) (Ph.D. dissertation, City University of New York) (excerpted in Chinese Staff and Workers' Association, A Community-Based Workers' Center Model: An Alternative to Traditional Trade Unionism to Build a New Labor Movement (n.d.), http://bit.ly/s2mx3D) (mapping out developments in Chinese Staff and Workers' Association's organizing since its founding in 1979); Chinese Staff and Workers' Association, *The New Labor Movement* (2009), http://bit.ly/xHvfQH (limitations of traditional union organizing and hallmarks of "new labor movement" on community-based worker-center model); National Day Laborer Organizing Network, History of NDLON (n.d.), http://bit.ly/tXuuTk (collaboration with Change to Win and American Federation of Labor and Congress of Industrial Organizations).

[8]See, e.g., Jennifer Lynn Gordon, Suburban Sweatshops: The Fight for Immigrant Rights (2005); Sebastian Amar & Guy Johnson, *Here Comes the Neighborhood: Attorneys, Organizers, and Immigrants Advancing a Collaborative Vision of Justice*, 13 New York City Law Review 173 (2009); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 Clinical Law Review 355 (2008); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 California Law Review 1879 (2007); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 University of California, Los Angeles, Law Review 443 (2001); Saru Jayaraman, *Letting the Canary Lead: Power and Participation Among Latina/o Immigrant Workers*, 27 New York University Review of Law and Social Change 103 (2001–2002); E. Tammy Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 New York City Law Review 213 (2009); Nadia Marin-Molina & Jamie Vargas, *The Role of Legal Services in Workers' Organizing*, 13 New York City Law Review 195 (2009); Cynthia Mark & Evonne Yang, *The Power-One Campaign: Immigrant Worker Empowerment Through Law and Organizing*, 36 Clearinghouse Review 264 (July–Aug. 2002); Victor Narro, *Finding the Synergy Between Law and Organizing: Experiences from the Streets of Los Angeles*, 35 Fordham Urban Law Journal 339 (2008); Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 New York University Review of Law and Social Change 615 (2000–2001); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 Cardozo Law Review 2685 (2008); Naomi Zauderer, *Supporting Low-Income Workers: An Organizer's Perspective*, 34 Clearinghouse Review 666 (Jan.–Feb. 2001).

[9]See Zauderer, *supra* note 8, at 672–73.

[10]E.g., starting in the 1990s, The Legal Aid Society worked with various community groups, such as the Welfare Rights Initiative, Community Voices Heard, Families United for Racial and Economic Equality, and Association of Community Organizations for Reform Now to combat New York City's expanding workfare program.

[11]Other community organizations with which we have had the privilege of working thus far are Centro Hispano Cuzcatlan, Domestic Workers United, El Centro del Inmigrante, Make the Road New York, and Adhikaar. Some of these collaborations have involved other models of combining law and organizing: legislative advocacy, legal clinics, know-your-rights workshops, and member support in the form of representation of members in legal claims unconnected to organizing.

[12]Interview with JoAnn Lum, Organizer, National Mobilization Against Sweatshops, and Wing Lam, Organizer, Chinese Staff and Workers' Association, in New York, New York (Nov. 20, 2011).

to litigation, although when possible we may support the organizing campaign in other ways. The litigation is a small component of the campaign, and our clients—the worker-members—engage in direct action and media advocacy and employ other community-organizing techniques at strategic points in the larger campaign. We have observed the best results in such cases: our clients get better recovery in litigation *and* lead campaigns for change beyond the instant case, multiplying the investment of our work.

Litigation as an Organizing Tool: Benefits for Legal Services Organizations

Many organizing campaigns across the country have employed litigation as a campaign tool.[13] A collaboration between the Chinese Staff and Workers' Association and the National Mobilization Against Sweatshops, called the Justice Will Be Served Campaign, has successfully raised standards for restaurant workers in New York. For example, delivery workers from a restaurant called Saigon Grill began organizing around their low wages and were promptly fired.[14] The workers' daily pickets brought significant media attention, while their litigation efforts brought a $4.6 million judgment.[15] Delivery workers at other restaurants around the city joined the effort. The collaboration now counts many successful campaigns and litigation actions against similar restaurants.[16]

Regardless of the collaborative model used, litigating unpaid wage claims under the Fair Labor Standards Act on behalf of immigrant workers who are also engaged in community-organizing campaigns maximizes the potential of employment law as a vehicle for worker mobilization.[17] Wage litigation can "galvanize, insulate, and generate collective action" in low-wage workforces, particularly with organizers involved.[18] The litigation gives leverage in the form of accountability in court and potential financial impact, while organizers counteract lawyers' tendencies to limit the possible to the constraints of the law.[19] Worker-plaintiffs who are involved in a worker center turn a singular effort into a community campaign. A collective and public effort has a ripple effect—educating other workers about their rights, inspiring action in the community at large, and showing employers the consequences of continuing violations.

Prioritizing litigation that supports organizing efforts gets more "bang" for the legal services budget "buck." Worker-plaintiffs are more invested and active in the litigation than in the usual case, making dropouts less likely. Organizers often serve as interpreters—both linguistic and cultural, saving time and money.[20] Many organizations reach out to lawyers when a potential case is ripe for litigation. When the case gets to the lawyer's desk, the workers are assembled, know their rights and the potential remedies, and have decided to take the critical step to sue.

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[13]E.g., Ashar, *Public Interest*, *supra* note 8 (Restaurant Opportunities Center); Jaramayan, *supra* note 8 (Workplace Project); Kim, *supra* note 8 (collaborations with several organizations, such as National Mobilization Against Sweatshops and Chinese Staff and Workers' Center); Sachs, *supra* note 8 (Make the Road by Walking).

[14]See Boycott Saigon Grill, Saigon Grill Protests Heat up Again Under New Owners (Dec. 6, 2010), http://bit.ly/vSdJJB; *id*. Why Were the Saigon Grill Workers Able to Win, and Win Big?! (Dec. 1, 2010), http://bit.ly/uNV4Z3.

[15]*Yu G. Ke v. Saigon Grill Incorporated*, 595 F. Supp. 2d 240 (S.D.N.Y. 2008). The workers and 318 Restaurant Workers' Union also brought a successful unfair labor practice action before the National Labor Relations Board (*Saigon Gourmet Restaurant Incorporated*, 353 NLRB Dec. No. 110 (N.L.R.B. March 9, 2009)). The New York State Attorney General's Office also charged the owners with crimes related to their wage-and-hour practices (see Steven Greenhouse, *Saigon Grill Owners Charged with Falsifying Records*, New York Times City Room (Dec. 3, 2008, 10:08 AM), http://nyti.ms/sTQiln).

[16]E.g., delivery workers from Ollie's Noodle Shop, Tomo Sushi and Sake Bar, Vine Sushi and Sake, and Caffe Swish brought wage-and-hour, retaliation, and unfair labor practice claims against their employers (see *Li v. 2875 Restaurant Incorporated*, No. 07 Civ. 2601 (S.D.N.Y. filed March 29, 2007); *Wang v. 2850 Broadway Restaurant Incorporated*, No. 08 Civ. 8936 (S.D.N.Y. filed Oct. 17, 2008).

[17]See Sachs, *supra* note 8.

[18]*Id*. at 2722.

[19]*Id*. at 2729.

[20]See Ashar, *Law Clinics*, *supra* note 8, at 405–9.

The combination of wage-and-hour litigation and organizing is critical in confronting the exploitation rampant in immigrant-dominated industries. Traditional labor institutions have not overcome the workplace and community divisions caused by an immigration verification system that pits workers against one another and creates a race to the bottom for wages.[21] Furthermore, our traditional source of legal protection for worker organizing, the National Labor Relations Act, limits remedies for undocumented immigrant workers and is notoriously slow to deal with employer retaliation.[22] The Fair Labor Standards Act, with a direct route to federal court and immediate injunctive relief against retaliation, is a more ready tool for a worker- and community-driven campaign.

Litigation Issues

A review of a few basic litigation issues in Fair Labor Standards Act cases demonstrates how organizing can help frame a successful case.

Coverage. The Fair Labor Standards Act covers individual employees who are engaged in, producing goods for, or handling products that have moved in interstate commerce and who work for enterprises with more than $500,000 annual gross sales.[23] Because the Act considers "enterprises," employers with more than one location or interrelated businesses would likely be covered even if one location or business would not meet these requirements on its own.[24] Note that domestic workers are covered as individual employees engaged in interstate commerce.[25]

Coverage may be an issue in bringing claims on behalf of day laborers or other employees of small establishments. Even if workers used goods that had moved in interstate commerce, litigation around this issue could be protracted. Organizing can help overcome this challenge. For example, the Workplace Project has successfully confronted employers who are repeat offenders by bringing together day laborers who experienced violations by the same employer but did not work at the same time. In 2005 sixteen Workplace Project members brought suit against a roofing contractor whose modus operandi was to pay only partially until a job was done and then refused to pay altogether.[26] Their relatively small claims would have been difficult to litigate individually, but together the workers demonstrated an abusive pattern.

Proper Parties. The Fair Labor Standards Act has a broad reach. An "employer" is one who acts "directly or indirectly in the interest of an employer in relation to an employee."[27] To "employ" is "to suffer or permit to work."[28] The "economic realities" test is used to evaluate liability and allows for consideration of a broad range of factors.[29] The Act's deliberately expansive definitions stretch liability from the line supervisor to the chief executive officer and parent corporation.[30]

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[21]Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 University of Chicago Legal Forum 193, 214 (2007) (1986 Immigration Reform and Control Act, which prohibits hiring undocumented immigrants).

[22]See *Hoffman Plastic Compounds Incorporated v. National Labor Relations Board*, 535 U.S. 137, 152 (2002); Milkman, *supra* note 5, at 303–6; Sachs, *supra* note 8, at 2694–2700. Many worker centers still seek enforcement of the National Labor Relations Act through the National Labor Relations Board, despite its limitations.

[23]Fair Labor Standards Act, 29 U.S.C. § 203(s) (2006). See McHugh, *supra* note 2, at 292.

[24]29 U.S.C. § 203(r).

[25]*Id.* § 202(a).

[26] Complaint, *Chinchilla v. Besser*, No. 05 Civ. 01048 (E.D.N.Y. Feb. 24, 2005).

[27]29 U.S.C. § 203(d) (2006).

[28]*Id.* § 203(g).

[29]E.g., *Zheng v. Liberty Apparel Company*, 355 F.3d 61, 71–72 (2d Cir. 2003).

[30]29 C.F.R. § 791.2(b) (2011). E.g., *Ansoumana v. Gristede's Operating Corporation*, 255 F. Supp. 2d 184, 192–93 (S.D.N.Y. 2003) (owner-officers were employers); *Hodgson v. Servomation-Ajax Company*, 323 F. Supp. 1047, 1049 (N.D. Miss. 1971) (parent company liable as joint employer).

Issues of joint liability are common in litigation on behalf of immigrant workers, for example, day laborers and cleaning workers for fly-by-night subcontractors. The challenge is to mine the facts for the involvement of the deeper pockets in the chain. A classic example is the historic fight of the Chinese Staff and Workers' Association members who worked for Liberty Apparel. In a precedent-setting decision after years of organizing and litigation, the Second Circuit outlined a revised economic realities test based on functional, rather than formal, control in the analysis of whether an upper-level contractor was liable for sweatshop violations.[31]

In a very different industry, the National Mobilization Against Sweatshops brought together workers who had cleaned residences and office buildings in Lower Manhattan after the September 11 terrorist attacks. The workers were employed directly by small subcontractors hired by large restoration companies. Like the Workplace Project day laborers, each person's claim would have been difficult to litigate. The National Mobilization Against Sweatshops united workers for different subcontractors but the same general contractor and then used joint liability concepts against the restoration companies which had reaped large profits in the cleanup.[32]

Case Structure. The Fair Labor Standards Act gives two options for structuring an action. Each worker may be separately named as a plaintiff, closing the universe at the outset of the case, or a small group of workers may sue on behalf of all those similarly situated. This latter mechanism, called a "collective action," requires a determination of conditional certification of the collective and notice to the putative collective members setting an opt-in period in which workers must sign a consent-to-sue form to join the case.[33] This period usually occurs early in the case before discovery.

For litigation in support of wage-theft community-organizing campaigns, some worker centers advocate the former structure, arguing that unless each worker is named and has responsibility in the litigation, the worker will free-ride, avoiding other components of the campaign such as pickets or press conferences but benefiting in the ultimate recovery. Other organizations seek the collective action structure and use it as a way to affect—and thus organize—a larger group of workers than the initial clients. The course of the collective action depends on judicial discretion, which takes some control from both the lawyers and the organizers. This can be a particular problem if a case is before a judge who is concerned about direct action or media attention.

Litigators working with organizing campaigns must discuss these options extensively with clients. If the organizers prefer a particular structure, the lawyer will need to weigh the pros and cons with the clients and ensure their independent decision. Once fully informed of the risks and benefits, clients may make a litigation decision that would seem an unorthodox choice in a case without an organizing campaign involved or choose instead to ask the organizers to alter the direction of the campaign if the two efforts conflict. Confronting and resolving a potential conflict between litigation and organizing early in the case gives lawyers an opportunity to communicate that the organizing campaign is important and that the lawyers can balance clients' multiple interests within the confines of litigation.[34]

Employers' "Technical" Obligations. Aside from basic minimum-wage and overtime requirements, the Fair Labor Standards Act is chock-full of "technicalities." Employers must keep accurate and contemporaneous records of wages and hours.[35] They must post basic information about workers' rights under the law.[36]

[31] *Zheng*, 355 F.3d at 72, aff'd, 617 F.3d 182, 184–85 (2d Cir. 2010).

[32] *Gil v. Maxons Restorations Incorporated*, No. 07/603048 (N.Y. Sup. Ct. N.Y. Cnty. Filed Sept. 12, 2007). Because the Fair Labor Standards Act statute of limitations had run, the case was brought under New York law.

[33] 29 U.S.C. § 216(b) (2006).

[34] Ashar, *Law Clinics*, *supra* note 8, at 408.

[35] 29 U.S.C. § 211(c) (2006); 29 C.F.R. §§ 516.1–.34 (2011).

[36] 29 C.F.R. § 516.3 (2011).

They must inform employees if they consider them exempt or if they take a special credit against their wages.[37] There are even regulations outlining how to comply with some of these requirements for live-in domestic workers.[38] These seemingly minor requirements are essential components of a system designed to prevent exploitation.

Employers who do not follow these rules walk into court with a *per se* violation of the employment laws. These so-called technical violations—for which there is usually no private right of action—can be used to workers' advantage in litigation. Where employers fail in their affirmative obligations to inform employees of their wage-and-hour practices, workers have an opportunity to explain how they came to know the extent of the violations committed against them and to report them. This strategy creates an opportunity to give organizing a central place in the narrative of a case. Some workers may begin organizing against poor working conditions only after seeing other workers take action and get results.

Litigation offers numerous opportunities to tell this story—with powerful and concrete effect on the workers' claims. Because many immigrant workers are paid off the books, employers frequently have no, or patently false, records. If the employer fails to keep proper records and the employee establishes a prima facie case through credible testimony that approximates damages "as a matter of just and reasonable inference," the burden shifts to the employer to prove the employee's actual hours worked or the employee's lack of credibility.[39]

The Act's "technicalities" can come into play in seeking tolling of the statute of limitations; the statute allows two years of recovery of unpaid wages, with a third year available in the case of a willful violation.[40] The equitable tolling doctrine could allow recovery of damages over the course of a worker's full period of employment where the employer prevented the worker from knowing that the worker had a cause of action.[41] The employer's failure to post the required U.S. Department of Labor posters advising workers of their rights is one consideration for tolling.[42] Some decisions on the issue specifically note the importance of these requirements for an immigrant workforce.[43]

Settlement. Employers have a powerful incentive to settle Fair Labor Standards Act cases because even a small violation is doubled under the Act's liquidated damages provision and will quickly incur many times the violation's amount in attorney fees if the violation is litigated.[44] This incentive to settle grows stronger when combined with organizing that may embarrass the employer.

A significant consideration in settlement—especially when an organizing ef-

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[37]E.g., *id.* § 531.39 (requiring notice to tipped employees before use of tip credit).

[38]*Id.* § 552.110.

[39]*Anderson v. Mt. Clemons Pottery Company*, 328 U.S. 680, 687–88 (1946).

[40]29 U.S.C. § 255(a) (2006).

[41]See *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("This equitable doctrine is read into every federal statute of limitation.").

[42]E.g., *Lanzetta v. Florio's Enterprises Incorporated*, 763 F. Supp. 2d 615, 622–23 (S.D.N.Y. 2011) ("[T]he failure to provide an employee the notice required by the [Fair Labor Standards Act] may be a sufficient basis for tolling, as plaintiff argued, but only if that failure contributed to the employee's unawareness of his rights.") (internal quotation marks and citation omitted); *Ramirez v. Rifkin*, 568 F. Supp. 2d 262, 269–70 (E.D.N.Y. 2008) (declining to dismiss claims outside statute of limitations on summary judgment and indicating material issue of fact for equitable tolling determination where employer of domestic worker had not posted notices, had not given a paycheck stub, and had not withheld taxes); *Kamens v. Summit Stainless Incorporated*, 586 F. Supp. 324, 328 (E.D. Pa. 1984) ("An employer's failure to post a statutorily required notice … tolls the running of any period of limitations.").

[43]E.g., *Ramirez v. CSJ and Company*, No. 06 Civ. 13677, 2007 WL 1040363, at *3 (S.D.N.Y. April 3, 2007) ("The ability of most [immigrant workers] to learn of their legal rights under the complex web of labor and social legislation that governs the modern workplace is not great. Thus, employers that [fail] to post the required notices take advantage of the defenseless in a very real way, whether out of venality or otherwise. In any case, they frustrate [the] legislative objective of protecting those most in need of protection.").

[44]29 U.S.C. §§ 216(b), 260 (2006).

fort is at play—is confidentiality. Claims may be waived only with approval from the court or the Labor Department.[45] Scrupulous employers' counsel will insist on court review and approval of a settlement agreement to ensure that future liability is entirely foreclosed. A growing number of courts require settlements to be on the record even if both parties request a confidential settlement or court approval of a sealed agreement.[46] Making settlements public could coincide well with community-organizing goals, as workers might be using media and direct action and wish to publicize a victory.

Settlement negotiations in conjunction with an organizing campaign often raise concerns about third-party influence—an ethical question frequently discussed in the law and organizing literature.[47] Some lawyers may be uncomfortable with the reality that an organizer or community organization might affect a client's decisions in litigation. But plaintiffs often have complex motives rooted in their relationship with some third party; civil rights and environmental justice litigation are prime examples. Other clients may rely on the counsel of family members, religious leaders, or union shop stewards. A worker-center or community-organizing campaign is no different from these well-recognized influences.

Immigration Issues in Wage Litigation

When immigration issues emerge in response to worker organizing or a lawsuit, the involvement of a worker center or community organization can mitigate workers' fear and ensure success in litigation. Employment law remedies were consistently applied without regard to immigration status until the U.S. Supreme Court's 2002 *Hoffman* decision, which barred an undocumented immigrant, after being terminated in retaliation for union activity, from recovering back pay under the National Labor Relations Act.[48] Employers now raise status-related defenses at every opportunity under all employment law statutes. Other sources have analyzed the state of the law post-*Hoffman*, so here, while giving some practical tips for dealing with immigration issues in litigation, I will discuss only a few key developments.[49]

Immigration Status and Discovery. Courts around the country have consistently held that *Hoffman* does not apply to recovery of unpaid wages for work performed.[50] One court distinguishes the Fair Labor Standards Act in that its remedies are not discretionary as are those under the National Labor Relations Act.[51] Most courts will preclude discovery of immigration status and related matters both because status is irrelevant to the claims and because questions about status have an *in terrorem* effect.[52] Litigators should insist on such protection from the outset of litigation regardless of the immigration status of the plaintiffs. Even for documented immigrant workers, discovery related to receiving a green card or naturalization could deter participation in a lawsuit.[53] Litigators should draft pleadings to avoid raising immigration issues and should discuss the issues with oppos-

[45]*Id.* § 216(c); *D.A. Schulte Incorporated v. Gangi*, 328 U.S. 108 (1946).

[46]E.g., *Joo v. Kitchen Table Incorporated*, 763 F. Supp. 2d 643, 647–48 (S.D.N.Y. 2011); *Dees v. Hydradry Incorporated*, 706 F. Supp. 2d 1227, 1246–47 (M.D. Fla. 2010).

[47]See, e.g., Ashar, *Law Clinics*, *supra* note 8, at 405–6; Cummings & Eagly, *supra* note 8, at 510–13.

[48]*Hoffman Plastic Compounds*, 535 U.S. at 152.

[49]See Smith et al., *supra* note 3 (excellent background on state of law post-*Hoffman*). See, e.g., National Employment Law Project, Rights and Remedies for Undocumented Workers in Organizing (Aug. 2011), http://bit.ly/uEcA6w (comprehensive update on state of law post-*Hoffman*).

[50]E.g., *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002); *Zeng Liu v. Donna Karan International Incorporated*, 207 F. Supp. 2d 191(S.D.N.Y. 2002); *Flores v. Albertsons Incorporated*, No. CV 0100515, 2002 WL 1163623, at *5 (C.D. Cal. April 9, 2002).

[51]*Jin-Ming Lin v. Chinatown Restaurant Corporation*, 771 F. Supp. 2d 185, 190 (D. Mass. 2011).

[52]*Flores*, 233 F. Supp. 2d at 464; *Zeng Liu*, 207 F. Supp. 2d 191; *Flores*, 2002 WL 1163623, at *5.

[53]See Smith et al., *supra* note 3, at 336.

ing counsel as soon as defendants indicate that they intend to attempt a status-related defense.[54] Such defense strategies could be a vague "unclean hands" defense or an explicit discovery request for social security numbers.[55] This issue may be resolved by informing opposing counsel that plaintiffs will not allow discovery on immigration status and that defendants must move to compel if they intend to pursue that line.[56] Depending on the facts, a protective order or even a preliminary injunction may be necessary if defendants have made threats or taken retaliatory actions related to immigration status, such as contacting authorities.[57] Some advocates advise invoking the Fifth Amendment instead.[58]

Two other discovery techniques often serve as an underhanded route for employers to intimidate workers: discovery of tax returns and discovery of a worker's current employment situation. Discovery of either category of information can be restricted independent of its connection to immigration status, but broad protection against discovery of any issues connected to immigration status must be sought.[59]

Retaliation Remedies. Wage cases on behalf of immigrant workers who are organizing will inevitably involve retaliation claims. Retaliation is increasingly common as employers have found it effective in preventing workers from making claims.[60] At the same time, over the past decade the Supreme Court has repeatedly reinforced the breadth of retaliation protections in the employment law scheme.[61]

The relevance of immigration status to the traditional retaliation remedies of

[54]See *id*.

[55]The "unclean hands" defense does not generally apply to claims for money damages (e.g., *LCI International Telecom Corporation v. American Teletronics Long Distance Incorporated*, 978 F. Supp. 799, 802 (N.D. Ill. 1997)). The bad acts complained of must relate directly to the allegations in the suit for the defense to apply (*International Business Machines Corporation v. Martson*, 37 F. Supp. 2d 613, 619 (S.D.N.Y. 1999)).

[56]The Federal Rules of Civil Procedure allow for basic objections to discovery of immigration status: that the information sought is (1) irrelevant and not "reasonably calculated to lead to the discovery of admissible evidence"; (2) not discoverable because the burden of the discovery outweighs the benefits; and (3) designed merely to cause annoyance, embarrassment, or oppression (Federal Rules of Civil Procedure 26(b)(1), 26(b)(2)(C)(iii), 26(c)(1); see also Christopher Ho, Legal Aid Society-Employment Law Center of San Francisco, Immigration Protections When Challenging Workplace Abuse (Nov. 16, 2011) (presentation during National Employment Law Project webinar)).

[57]E.g., *Montano-Perez v. Durrett Cheese Sales Incorporated*, 666 F. Supp. 2d 894, 901 (M.D. Tenn. 2009) (denying motion to dismiss Fair Labor Standards Act retaliation claim that defendant had retaliated by reporting plaintiffs to Immigration and Customs Enforcement); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 139 (W.D.N.Y. 2003) (restraining defendant from contacting any law enforcement agency about former employees); *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1059–60 (N.D. Cal. 2002) (denying motion to dismiss Fair Labor Standards Act retaliation claim where employer procured employee's detention by immigration authorities in retaliation for wage complaint).

[58]See Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 Cornell International Law Journal 27 (2008) (litigation around protective order can delay case and implies lack of status). But see Ho, *supra* note 56 (pointing out similar limitations with invoking Fifth Amendment).

[59]On the tax return issue, see, e.g., *Bellosa v. Universal Tile Restoration Incorporated*, No. 08-60054-CIV, 2008 WL 2620735 (S.D. Fla. June 30, 2008) (precluding production of tax returns but granting production of other financial information); *Chen v. Republic Restaurant Corporation*, No. 07 Civ. 3307, 2008 WL 793686 (S.D.N.Y. March 26, 2008) (precluding discovery of plaintiffs' tax returns); *Galaviz-Zamora v. Brady Farms Incorporated*, 230 F.R.D. 499 (W.D. Mich. 2005) (precluding discovery of tax returns and documents related to immigration status). On discovery related to current employment, see, e.g., *Warnke v. CVS Corporation*, 265 F.R.D. 64 (E.D.N.Y. 2010) (quashing subpoena to current employer in discrimination case); *Centeno-Bernuy v. Becker Farms*, 219 F.R.D. 59, 61–62 (W.D.N.Y. 2003) (granting protective order against discovery of current employers in Fair Labor Standards Act case).

[60]See Kate Bronfenbrenner, Economic Policy Institute, No Holds Barred: The Intensification of Employer Opposition to Organizing (May 20, 2009), http://bit.ly/uWihyn (showing 51 percent election win rate in workplaces where employers do not threaten to report workers to Immigration and Customs Enforcement in response to organizing and 34 percent election win rate in workplaces where employers do make such threats); U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 Through FY 2010, http://1.usa.gov/vpTYZO (showing rise in retaliation claims).

[61]See *Kasten v. Saint-Gobain Performance Plastics Corporation*, 131 S. Ct. 1325, 1335 (2011) (Fair Labor Standards Act's protected activity requirement met by oral complaints); *Thompson v. North American Stainless Limited Partnership*, 131 S. Ct. 863 (2011) (Title VII allows a remedy for retaliation against fiancé of employee who had engaged in protected activity); *Crawford v. Metropolitan Government of Nashville and Davidson County*, 555 U.S. 271 (2009) (Title VII's "opposition" clause does not require active opposition but encompasses involuntary participation); *CBOCS West Incorporated v. Humphries*, 553 U.S. 442 (2008) (42 U.S.C. § 1981 allows retaliation claim although the statute does not refer to retaliation); *Burlington Northern and Santa Fe Railway Company v White*, 548 U.S. 53 (2006) (Title VII's antiretaliation provision is not limited to employment-related actions).

reinstatement and back pay remains unsettled.[62] Reinstatement is foreclosed to undocumented immigrants because federal courts are unlikely to order an employer to violate the requirements of the Immigration Reform and Control Act. Some clients may decide not to raise a claim for back pay to avoid the issue entirely and instead focus on punitive and emotional distress damages. The question of strategy can get particularly complicated in the case of a mixed group, where some workers with status may want to demand reinstatement, while others without status will not have that remedy available. The key is to have a careful and open conversation with the group about the implications of status on each type of remedy, the potential arguments, and the risks and benefits in a way that preserves confidentiality as to each worker's status but helps the group reach a decision. An attorney can request that the court bifurcate the liability and damages phases of the case to preserve the possibility of back pay later while avoiding an *in terrorem* effect in initial discovery.[63]

Navigating this tricky area is more complex when a case includes claims that explicitly raise the specter of immigration: a retaliation, trafficking, or forced-labor claim based on threats of deportation, for example. Again, pleadings should be drafted carefully to avoid admissions about immigration status even while raising such threats as illegally retaliatory or coercive or both. Employers may argue that raising these claims puts immigration status at issue, but some courts have granted discovery protections, precluded discovery of immigration status altogether, or, for trafficking claims, precluded discovery of immigration status after the termination of the employment relationship; case law is sparse, however.[64]

Note some relevant developments in current federal policy on the intersection of immigration law enforcement and labor, civil rights, and employment law. On March 23, 2011, the Department of Homeland Security and the Labor Department issued a Memorandum of Understanding stating that U.S. Immigration and Customs Enforcement will "refrain from engaging in civil worksite enforcement activities at a worksite that is the subject of an existing [Labor Department] investigation of a labor dispute during the pendency of the [Labor Department] investigation and any related proceeding.… [Immigration and Customs Enforcement] further agrees to be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes."[65] On June 7, 2011, the National Labor Relations Board issued updated procedures on dealing with immigration issues in the course of the investigation of National Labor Relations Act violations.[66] And on June 17, 2011, Immigration and Customs Enforcement issued two memos. One discusses prosecutorial discretion overall.[67] The other outlines the Department of Homeland Security's policy with regard to immigrants involved in organizing efforts or civil rights litigation: "Absent special circumstances, it is …

[62]Compare *Rivera v. NIBCO Incorporated*, 364 F.3d 1057 (9th Cir. 2004) (immigration status not relevant to Title VII case), with *Rodriguez v. ACL Farms Incorporated*, No. CV-10-3010, 2010 WL 4683743, at *4 (E.D. Wash. Nov. 12, 2010) (immigration status relevant to back pay remedy, but liability and damages phases of discovery to be conducted separately).

[63]E.g., *Rodriguez*, 2010 WL 4683743, at *4.

[64]Compare *David v. Signal International Limited Liability Company*, 257 F.R.D. 114 (E.D. La. 2009) (granting protective order against any inquiry into plaintiffs' immigration status, addresses, and employment posttermination in case under federal antitrafficking statute), with *Catalan v. Vermillion Ranch Limited Partnership*, No. 06-cv-01043, 2007 WL 951781, at *2 (D. Colo. March 28, 2007) (allowing discovery of immigration status in trafficking, Racketeer Influenced and Corrupt Organization Act, and wage-and-hour case).

[65]Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), http://1.usa.gov/sJBaca.

[66]See National Employment Law Project, Advancing Enforcement of the National Labor Relations Act: National Labor Relations Board (NLRB) Issues Guidelines for Seeking Deferral of Immigration Action and U Visas for Immigrant Workers [and] Immigration and Customs Enforcement (ICE) Issues Guidelines on Exercising Favorable Discretion for Individuals Engaged in Protected Activity (Aug. 2011), http://bit.ly/v2KulC.

[67]Memorandum from John Morton, Director, U.S. Department of Homeland Security, to Field Office Directors, Special Agents in Charge, and Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), http://bit.ly/sTqgKP.

against [Immigration and Customer Enforcement] policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties."[68] Note that cooperating victims of trafficking, forced labor, or extreme retaliation, such as witness tampering and obstruction of justice, may be eligible for immigration remedies.[69] The Obama administration recently began to implement a policy of terminating the deportation proceedings of immigrants with no criminal history.[70] These developments should help immigrants separate employment law violations from immigration-related repercussions instigated by retaliating employers or routine law enforcement activities.

■ ■ ■

Community-organizing support in a case involving undocumented workers can be hugely beneficial. Because of organizing efforts and advocacy in the federal courts, we have not seen what was predicted after *Hoffman*: the complete withdrawal of undocumented immigrants from the courthouse.[71] Some organizations have used community education around *Hoffman*'s purported limitations on immigrants' rights as an organizing tool.[72] Others have sought to bring attention to the workforce divisions created by employers' immigration-related reporting requirements.[73] When plaintiff-worker-members are involved in a collective action, the less power will immigration status have as a potential tool of the employer in either the workforce or litigation.

With a worker center behind it, a wage case is more likely to involve a group of workers with a strong committed core of leaders. An employer might easily pick off one or two employees by making immigration-related intimidations or threats. However, when an entire group of undocumented workers from the same workplace is poised to litigate without fear, an employer will see that the employer's illegal business model is at risk of exposure if the employer makes status an issue. Worker centers' use of media and community pressure is also key here; in some ways the more open immigrant workers are, the safer they may be, depending in large part on the local environment.

Litigation support for worker centers organizing immigrant workers makes our jobs easier and our cases more successful. We can do more than simply hold the line by helping one individual worker after another; instead we can use litigation to further movements to stop wage theft and build worker and community power.

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[68]Memorandum from John Morton, Director, U.S. Department of Homeland Security, to Field Office Directors, Special Agents in Charge, and Chief Counsel, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), http://bit.ly/s5LOlm (listing, among others, "plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and individuals engaging in a protected activity related to civil or other rights (for example, union organizing …)").

[69]Victims of an enumerated list of crimes may be eligible for a U visa if they report the crime and otherwise cooperate with the law enforcement investigation and are given a certification by the law enforcement agency (8 C.F.R. § 214.14 (2011)). The U.S. Department of Labor recently released a protocol for certification of victims of certain crimes (involuntary servitude, peonage, trafficking, obstruction of justice, or witness tampering) (Department of Labor U Visa Process and Protocols: Question-Answer (April 28, 2011), http://1.usa.gov/sLxHTG). Victims of trafficking, involuntary servitude, forced labor, and slavery may also be eligible for a T visa, even without certification from law enforcement (8 C.F.R. § 214.11 (2011)).

[70]See Julia Preston, *U.S. Issues New Deportation Policy's First Reprieves*, New York Times, Aug. 22, 2011, at A15. On November 17, 2011, the Department of Homeland Security issued more detailed guidance (see Press Release, Immigration Policy Center, DHS Issues Awaited Guidance on Prioritizing Deportations, Law Enforcement Letter Praises (Nov. 17, 2011), http://bit.ly/vgg9NA).

[71]Cunningham-Parmeter, *supra* note 58, at 80.

[72]The Coalition of Immigrant Worker Advocates in Los Angeles organized know-your-rights workshops in immigrant communities after the *Hoffman* decision; the workshops also served to expand and energize their organizing campaigns (Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 New York Law School Law Review 465, 502 (2005–2006)).

[73]Several worker centers, such as the National Mobilization Against Sweatshops and Chinese Staff and Workers Center, have created the Break the Chains Alliance, which advocates repealing the immigration verification requirements and employer sanctions in the Immigration Reform and Control Act (see Break the Chains (n.d.), http://www.breakthechainsnow.org/).

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