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## Restoring a Willingness to Act: Identifying and Remediating the Harm to Authorized Employees Ignored Under *Hoffman Plastics*

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# RESTORING A WILLINGNESS TO ACT: IDENTIFYING AND REMEDYING THE HARM TO AUTHORIZED EMPLOYEES IGNORED UNDER *HOFFMAN PLASTICS*

Rita Trivedi\*

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## INTRODUCTION

Despite a perhaps instinctual feeling to the contrary, the goals of labor and immigration statutes and policies are not inherently in conflict.<sup>1</sup> Congress sought to create industrial peace and encourage the free flow of commerce with the National Labor Relations Act (NLRA) by (1) safeguarding the exercise of fundamental rights and free choice for employees;<sup>2</sup> (2) restoring the status quo ex ante to the violation; and (3) deterring violations of the law through remedies such as backpay,<sup>3</sup> reinstatement,<sup>4</sup> cease-and-desist orders,<sup>5</sup> or orders to collectively bargain.<sup>6</sup> The Immigration Reform and Control Act (IRCA) regulates who may enter the United States, sets limits on their ability to work, and deters employers from violating the law with financial and other penalties.<sup>7</sup> Nothing in one is intended to limit the other.<sup>8</sup> But the Supreme Court put the effectiveness of the two statutes into conflict with its decision in *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board* (NLRB or “Board”), holding that the primary NLRA remedies of backpay and reinstatement are generally unavailable in cases of violations against unauthorized discriminatees who were never lawfully

1. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–93 (1984) (“Counterintuitive though it may be, we do not find any conflict between application of the [National Labor Relations Act] to undocumented aliens and the mandate of the Immigration and Nationality Act.”).

2. National Labor Relations Act, 29 U.S.C. §§ 151–69 (2012).

3. *E.g.*, 29 U.S.C. § 160(c) (2012); see *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 380 (2011) (Chairman Liebman and Member Pearce, concurring), *aff’d in part, remanded in part sub nom.* *Palma v. NLRB*, 723 F.3d 176, 187 (2d Cir. 2013).

4. *E.g.*, § 160(c).

5. *E.g.*, *United States Postal Serv.*, 345 N.L.R.B. 409 (2005); *Hickmott Foods, Inc.*, 242 N.L.R.B. 1357, 1357 (1979).

6. *E.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968).

7. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. ); *e.g.*, 8 U.S.C. §§ 1151, 1181, 1221, 1321 (2012).

8. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5662.

intended to be employed at all.<sup>9</sup> Instead of incentivizing compliance, current interpretations may incentivize an employer to make a business calculation and decide that a violation might be the cost of doing business in light of the potential competitive advantage the company would gain.<sup>10</sup> The *Hoffman* decision therefore pits the need to deter an unauthorized worker from securing employment against the need to protect the right of employees to engage in protected concerted action with respect to the terms and conditions of their employment—and then requires the NLRA remedies to yield.<sup>11</sup> Moreover, the Court's narrow view of the harm caused by an unfair labor practice and subordination of labor law to immigration law has resulted in unanticipated consequences for all employees.<sup>12</sup>

Much of the existing analyses of the contradictions and tensions between the NLRA and the IRCA, as well the *Hoffman* ruling, have focused on unauthorized workers. This Article takes no position on whether attempts to secure additional rights or remedies for unauthorized workers are desirable, either as a social or political matter. Instead, it focuses on a harm that has gone relatively unarticulated: the negative effect of incentives for non-compliance on *authorized* employees who work alongside unauthorized workers and the erosion of the mental confidence of those authorized employees in their free exercise of their fundamental labor rights. These additional adverse and unintended consequences fall on authorized

9. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-153 (2002).

10. See, e.g., Robert I. Corrales, *Did Hoffman Plastic Compounds, Inc. Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103, 141 (2003); Charles J. Morris, *A Blueprint For Reform of the National Labor Relations Act*, 8 ADMIN. L.J. AM. U. 517, 528 (1994) (noting “unfair labor practices that were not deterred, either because of the Board’s failure to enforce vigorously the core provisions of the Act, or because the Act does not contain effective enforcement mechanisms” and observing that the Board has a “demonstrated inability” to protect employees “with timely and adequate remedies”); Clyde Summers, *Effective Remedies For Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 477-78 (1992); Paul Weiler, *Promises to Keep: Securing Workers’ Rights To Self-Organization Under The NLRA*, 96 HARV. L. REV. 1769, 1791 (1983).

11. *Corrales*, supra note 10 at 147.

12. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147-52 (2002) (requiring Board’s remedy to “yield” to immigration policy and limiting Board’s remedial authority by denying ability to award backpay, a standard Board remedy, to discriminatees whose employer violated the NLRA when discriminatees were unauthorized workers); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903-05 (1984) (holding that the NLRB’s normally broad discretion in awarding remedial relief is constrained by federal immigration policies, despite the fact that discriminatees suffered harm and employer violated the NLRA); Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 6 (2003) (“[T]he Court has set up an apparent conflict between the NLRA and some other federal legislative scheme, then resolved that conflict by effectively abrogating federal labor policy in favor of federal ‘other’ policy.”).

employees due to the collective focus of the NLRA, its goals, and its inherent operation. In particular, authorized employees may be more reluctant to exercise their protected rights and lose faith in the Board's willingness to safeguard their rights after seeing their employer violate the NLRA and stifle protected activity with few significant consequences.<sup>13</sup> Because the Board relies on unions or individuals to report employers' alleged unfair labor practices, this chilling effect on the authorized employees severely limits its ability to enforce the law.<sup>14</sup>

Part I of this Article provides a background for both the NLRA and the IRCA. It examines the goals and remedies of both statutes as well as the impact of the Supreme Court's *Hoffman* decision on available remedies.

Part II addresses the currently-skewed remedial incentives. It considers why employers are tempted to hire unauthorized workers and commit unfair labor practices that are then inadequately remedied, which creates a situation that adversely effects the rights of authorized employees.

Part III more closely analyzes this consequential harm. This Part identifies the erosions on the NLRA's collective nature and the impact on authorized employees' terms and conditions of employment as well as their ability to change them. It also examines the far-reaching erosion of mental confidence experienced by authorized employees when considering their statutorily protected rights. This chilling effect, when unaddressed, represents a failure of the NLRA to achieve its remedial goal to restore the status quo ex ante to the employer's unfair labor practice.

In Part IV, this Article considers the literature addressing remedies in cases involving unauthorized workers, including the many existing suggestions for refinements that might bring balance to the currently misaligned incentive structure. It observes, however, that these proposals reflect a current focus on unauthorized workers that not only poses practical and political dilemmas if implemented but, as a normative measure, continues to overlook the problem of

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13. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969) (noting that "[i]f an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done . . ."). The same might be said for extreme violations of the law in other non-election cases when one severe act is enough to send ripples though the workforce and chill protected activity.

14. The same holds true for alleged violations by unions; there must be a charge from an employer. See *Investigate Charges*, NLRB, <https://www.nlr.gov/what-we-do/investigate-charges> (last visited Nov. 30, 2017). Unlike some other agencies, the Board cannot independently decide to investigate an employer's compliance with the law. See *id.*

the harm done to authorized employees—and may even cause them further harm.

Given that any attempt to amend the NLRA or modify *Hoffman* to account for this developing problem is almost certainly doomed to fail in the foreseeable future, Part V concludes that it may be more expedient to work within the existing statutory text and case law to address the distinct harm to authorized worker as a part of the restoration of the status quo. It therefore suggests that in cases where an unfair labor practice has been found involving an unauthorized worker, the General Counsel and the Board should routinely consider expanded appropriate remedies. These remedies could potentially include longer notice posting times, notice mailing with explanatory material educating the remaining workers of their rights, publication of the notice for a period of weeks in a publication of general circulation, visitation to ensure compliance with the Board's order, and other measures designed to restore the confidence and willingness to act of employees, particularly the authorized workers who have been harmed by their employer's actions.

## I. FUNDAMENTALS OF THE NLRA, IRCA, AND KEY SUPREME COURT DECISIONS

The NLRA interacts with immigration law not only through its coverage but also through its remedies and policies. After outlining the foundations of the NLRA and the IRCA, this section discusses the key Supreme Court decision bearing on the deterrence—or incentivizing—of unlawful conduct involving unauthorized employees and the Board's responses. This body of law currently leads to remedies that cannot restore authorized workers to the status quo ex ante to an employer's unlawful conduct.

### A. *The NLRA: Goals and Remedies*

The NLRA governs the right of employees to engage in concerted activity in the workplace, whether unionized or not.<sup>15</sup> Although several classes of workers are excluded from coverage, unauthorized workers are not among them—the Supreme Court has affirmed that they are statutory “employees.”<sup>16</sup> The first section will

15. See 29 U.S.C. §§ 151, 152, 157–60, 163–67, 169 (2012).

16. § 152(3); *Amay's Bakery and Noodle Co.*, 227 N.L.R.B. 214, 214 (1976) (“The Board consistently has held that illegal aliens are employees within the meaning of the Act and are

discuss the goals that the NLRA seeks to accomplish. The second section will discuss the main categories of remedies and their objectives under the NLRA.

### 1. Goals of the NLRA

Congress enacted the NLRA in 1935 to remove barriers to the free flow of commerce by fostering industrial peace and to mitigate the inequality of power between employees and employers, which inherently tended to reduce wage rates and hinder the economy.<sup>17</sup> Against the backdrop of the Great Depression, when strikes and other work disruptions seemed too common, Congress determined that encouraging collective bargaining and protecting workers' rights to association, organization, and representation in employment negotiations would promote commerce and labor stability.<sup>18</sup> The focus of the Act lies in the "concerted" nature of the behavior: working for some form of "mutual aid and protection" in the workplace.<sup>19</sup> Justice Thurgood Marshall put it clearly: "[t]hese are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife by encouraging the practice and procedure of collective bargaining."<sup>20</sup>

With this in mind, the NLRA sets rules and limitations on the conduct of labor unions and employers while also protecting the

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entitled to the protection of the Act. Aliens without working papers have been permitted to vote and have been accorded protection in the exercise of Section 7 rights."). As the Supreme Court affirmed in *Sure-Tan*, "[t]he Board has consistently held that undocumented aliens are 'employees' within the meaning of § 2(3) of the Act. . . . Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'" *Sure-Tan, Inc.*, 467 U.S. at 891–92 (internal citations omitted) (footnote omitted). In considering the definition of the term "employee" under the NLRA and in light of the IRCA, the District of Columbia Circuit Court found that the legislative history and plain language of the IRCA was not intended to—and did not—change the definition under labor law. *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008) (holding that authorized and unauthorized employees could be in the same collective bargaining unit, and noting that Congress did not amend the NLRA after the Supreme Court's *Sure-Tan* decision upheld the inclusion of unauthorized workers in the definition of employee).

17. 29 U.S.C. § 151 (2012).

18. *Id.*

19. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–67 (1978) (NLRA's protection of employee activities based on Sec. 7 of the Act protecting concerted activity for mutual aid and protection); *NLRB v. White Oak Manor*, 452 F. App'x 374, 379–80 (4th Cir. 2011) (discussing the scope of concerted activity for mutual aid and protection as it relates to the kind of conduct protected under the NLRA).

20. *Emporium Capwell Co. v. W. Addition Comm. Org.*, 420 U.S. 50, 62 (1975).

fundamental rights of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . .”<sup>21</sup> Employers violate the NLRA if they interfere with employees who exercise their statutory rights;<sup>22</sup> assist or interfere with a labor union;<sup>23</sup> discriminate against an employee for union activity by (for example) firing, retaliating, or otherwise punishing him;<sup>24</sup> punish an employee for filing a charge under the NLRA;<sup>25</sup> or refuse to bargain with a union when required to do so.<sup>26</sup> Other parts of the law govern picketing, boycotts, and strikes.<sup>27</sup>

## 2. Remedies Under the NLRA

The Board is authorized to prevent any person from breaking the NLRA.<sup>28</sup> In addition to express remedies such as backpay and

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21. 29 U.S.C. § 157. It has been noted that employees’ rights under the NLRA are largely procedural:

The NLRA does not guarantee any substantive rights to workers; in the main, it contains only procedures governing organization and collective bargaining. If workers are able to organize, the Act provides them only with the opportunity to negotiate an agreement with their employers. Employers, in turn, are obliged to negotiate in good faith with their employees’ designated representative. Good faith bargaining does not require that an agreement be reached or even that a concession be made.

James A. Gross, *The Human Rights Movement at U.S. Workplaces: Challenges and Changes*, 65 INDUS. & LAB. REL. REV. 3, 12 (2012). Although this is to some extent true, when crafting the NLRA, Congress sought to “equalize the bargaining power of the employee with that of his employer by allowing employees to band together” and act in a concerted manner. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Workers may share information about the terms of their employment, plan how to approach an employer, and elect representatives to advocate for their positions, each of which can considerably improve their working conditions. A collective identity develops out of the procedures Gross identifies, an identity that can prompt a long-term relationship between employers and employees through the bargaining process (a primary goal of the NLRA) while also fostering a sense of common cause and goals among employees.

22. 29 U.S.C. § 158 (a)(1).

23. § 158 (a)(2).

24. § 158 (a)(3).

25. § 158 (a)(4).

26. § 158 (b)(4); (b)(7).

27. 29 U.S.C. § 158.

28. § 160(a).



reinstatement,<sup>29</sup> the NLRA gives extremely broad remedial powers to the Board in order to “*effectuate the policies of this Act.*”<sup>30</sup>

Remedies under the NLRA fall into three main categories. First, some remedies try to restore the status quo ex ante to the statutory violation.<sup>31</sup> These include backpay and reinstatement to financially return the employee to where he or she would have been before the employer’s unlawful firing or retaliation.<sup>32</sup> Restoring the status quo also includes restoring a union’s right to communicate with the employees.<sup>33</sup> Possibilities here include requiring the employer to give a union access to the facility to talk with employees onsite, to provide bulletin boards for union pamphlets and notices, or to provide a list of employees’ contact information so the union can communicate its message offsite (and away from the employer’s oversight).<sup>34</sup> These orders let employees hear more about a union and be “reassure[ed] that they can learn about the benefits of union representation, and can enlist the aid of union representatives, if they desire to do so, without fear of being subjected to severe unfair labor practices.”<sup>35</sup> Particularly during union organizing, remedies giving the union access to employees mitigate the damage caused by the employer’s violation of the law.<sup>36</sup> In cases of extreme violations during the critical period of an election that

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29. § 160(c).

30. *Id.* (emphasis added). Section 160(c) states: “If upon the preponderance of the testimony taken the [Labor] Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease-and-desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.” *Id.*

31. *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *NLRB v. Beverly Health & Rehab. Servs.*, 187 F.3d 769, 772 (8th Cir. 1999) (affirming Board order to restore the status quo between the parties before the unfair labor practices began and prevent the employer from benefiting from its wrongdoing); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1118 (7th Cir. 1992).

32. *See NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (discussing backpay); *Phelps Dodge Corp.*, 313 U.S. at 195 (discussing reinstatement);.

33. *See generally Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

34. *E.g., Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1241–42 (1966).

35. *Charlotte Amphitheater Corp.*, 331 N.L.R.B. 1274, 1276 (2000) (quoting *United States Serv. Indus., Inc.*, 319 N.L.R.B. 231, 232 (1995)).

36. *United States Serv. Indus., Inc.*, 319 N.L.R.B. at 232. Union access violations depend on many factors, including the accessibility of employees via channels outside of the workplace, how the employer has applied its non-solicitation/non-distribution rules against union communications, the employer’s property rights, whether access is during working time and/or in work areas, and the right of employees to hear the union’s message as part of organizing. Remedies are restorative, but also very fact-specific. *See, e.g., Lechmere, Inc.*, 502 U.S. 527 (1992); *Albertson’s Inc. v. NLRB*, 301 F.3d 441 (6th Cir. 2002).

threaten conditions for employees' free choice, the Board may order a re-run election.<sup>37</sup>

A second category of remedy is intended to send a message to employees that the employer understands that it violated the NLRA and will not do so again. In so doing, it educates employees about their statutory rights and reinforces to them that their employer cannot violate their rights with impunity.<sup>38</sup> Employers are usually ordered to post a notice issued by the Board in the workplace that lists each element of the company's violations (including those against individuals) and pledges that "we will not . . ." break the law in that way again.<sup>39</sup> This notice must also be sent by email or posted on the company's internal website if it usually posts information or communicates with employees that way.<sup>40</sup> In egregious circumstances, a high-ranking member of management may be required to stand before the employees and read the notice to employees (or be present while a Board official does so).<sup>41</sup> Such notice readings are designed to ensure that "employees will fully perceive that [the employer] and its managers are bound by the requirements" of the NLRA.<sup>42</sup> At times, the Board will order the notice to be mailed to all

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37. Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948); *see also* IRIS U.S.A., Inc., 336 N.L.R.B. 1013, 1013–14 (2001).

38. *See, e.g.*, HTH Corp., 361 N.L.R.B. 709, 714 (2014).

39. The introductory "we will not" phrasing is part of the Board's standard notice posting language, and as such it appears in virtually every case followed by a specific description of the nature of the violation found. *See, e.g.*, *United States Serv. Indus., Inc.*, 319 N.L.R.B. at 233.

40. *See generally* J & R Flooring, Inc., 356 N.L.R.B. 11 (2010). Notice posting is considered an "essential element of the Board's remedies for unfair labor practices since the earliest cases under the Act" insofar as it "help[s] to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board's role in protecting the free exercise of those rights. They inform employees of steps to be taken by the respondent to remedy its violations of the Act and provide assurances that future violations will not occur." *Id.* at 12.

41. *E.g.*, Print Fulfillment Serv. LLC, 361 N.L.R.B. 1243, 1247–49 (2014) (granting notice reading remedy and noting importance of showing even sophisticated employees that their employer understands its obligations under the Act, especially when highest levels of management developed plans to thwart employees' unionization efforts); Farm Fresh Co., 361 N.L.R.B. 848, 848–849 n.3 (2014); HTH Corp., 361 N.L.R.B. 709, 715–716 (2014).

42. Homer D. Bronson Co., 349 N.L.R.B. 512, 515 (2007) ("The public reading of the notice is an effective but moderate way to let in a warning wind of information and, more important, reassurance. . . . [T]he presence of a responsible management official when a government official informs employees of the terms of the remedial order is not demeaning, but only a minimal acknowledgment of the obligations that have been imposed by law. The employees in this case are entitled to at least that much assurance that their organizational rights will be respected in the future.") (internal citations omitted); *see also* Federated Logistics & Operations v. NLRB, 400 F.3d 920, 930 (D.C. Cir. 2005) (citing and upholding the Board's order for a notice-reading at Federated Logistics & Operations, 340 N.L.R.B. 255, 257, 15 (2003)); *J & R Flooring, Inc.*, 356 N.L.R.B. at 12.

employees and former employees impacted by the employer's misconduct when many would otherwise not hear of the violation or when it is preferable to allow employees to review the notice privately without the risk of employer surveillance.<sup>43</sup> Another remedy within this category is the "publication" remedy. This is used in situations "where the violations are flagrant and repeated" and publication of the notice along with any supporting documents in publications of general circulation and local interest will have "the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in 'a warming wind of information and, more important, reassurance.'"<sup>44</sup>

The third type of remedy covers additional orders for particularly egregious violations of the NLRA, or, in factual contexts, where the standard remedies are for some reason insufficient or inappropriate. For example, broad cease-and-desist orders are used "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights."<sup>45</sup> Employers that unlawfully failed to bargain with a union may be specifically ordered to do so.<sup>46</sup> On a case-by-case basis, the

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43. See, e.g., *Farm Fresh Co.*, 361 N.L.R.B. at 848–49, n.3; *Bud Antle, Inc.*, 359 N.L.R.B. 1257, 1257–58 (2013) (notice mailing appropriate because employees were mobile when harvesting crops; notice was also read to employees at each location at start of harvest), *abrogated by* *Bud Antle, Inc.*, 2014 WL 2929802 511 (June 27, 2014). However, there must be a specific justification for the notice mailing. See, e.g., *S.E. Clemons, Inc.*, 363 N.L.R.B. No. 94, 2016 WL 146996, at \*5 n.1 (Jan. 12, 2016); *On Target Security, Inc.*, 362 N.L.R.B. No. 31, 2015 WL 1228316, at \*3 (Mar. 17, 2015).

44. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); see also *HTH Corp.*, 361 N.L.R.B. 709, 715 (2014) (publication of notice in two local publications twice a week for eight weeks).

45. *Hickmott Foods*, 242 N.L.R.B. 1357, 1357 (1979); e.g., *NLRB v. Blake Constr. Co.*, 663 F.2d 272, 285 (D.C. Cir. 1981); *KenMor Elec. Co.*, 355 N.L.R.B. 1024, 1035 (2010) (upholding a broad cease-and-desist order when multiple employers were involved in a discriminatory hiring plan); *Beverly Health & Rehab. Serv., Inc.*, 346 N.L.R.B. 1319, 1355 (2006) (upholding a broad corporate cease-and-desist order when corporate officials played a prominent part in the unfair labor practices); *United States Postal Serv.*, 345 N.L.R.B. 409, 409–10 (2005); *Grinnell Fire Prot. Sys., Co.*, 335 N.L.R.B. 473, 473 (2001).

46. An order to bargain is known as a *Gissel* order, named for the Supreme Court decision that announced the remedy. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). *Gissel* orders are intended to address situations where the employer's conduct has been so outrageous and pervasive that other remedies are unlikely to undo the effects of the violation on employee free choice in a fair election. *Abramson, LLC*, 345 N.L.R.B. 171, 176 (2005). *Gissel* orders may also be used for a small subset of somewhat less egregious cases where the possibility of using other remedies to erase the effect of past practices exists, but is so slight that employees would be better protected by a bargaining order. *Id.* In some cases, the employer may also be ordered to pay backpay, often to bring the union back to the level of bargaining strength it would have had absent the labor violation. *Melody San Bruno Inc.*, 325 N.L.R.B. 846, 846 (1998); *Transmarine Navigation Corp.*, 170 N.L.R.B. 389, 390 (1968). Bargaining schedules and written progress reports may also be required. *Gimrock Constr., Inc.*, 356

Board may grant visitation rights to Board agents to monitor an employer's specific compliance with terms of an order "when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance."<sup>47</sup> For example, in *HTH Corp. ("Pacific Beach Hotel")*, the Board found it appropriate to order a narrowly tailored three-year visitation clause requiring the employer to allow an appointed Board agent to enter its facility at reasonable times and in a manner not unduly disruptive of its operations to determine compliance with the Board's three-year notice posting, distribution, and mailing requirements.<sup>48</sup>

Courts have traditionally excluded punitive damages from possible remedies under the NLRA,<sup>49</sup> even though the prohibition arguably prevents the Board from "effectuating the policies" of the NLRA in certain cases. Approximately three years after the passage of the Act, the Supreme Court's decision in *Consolidated Edison Co. v. NLRB* announced that the NLRA authorizes the Board to issue a cease-and-desist order and take other affirmative action, but that "the power to command affirmative action is remedial, not punitive."<sup>50</sup> The Court's 1944 *Republic Steel Corp. v. NLRB* decision reinforced the point. Though the Court held that the Board could award backpay (because that remedy was related directly to addressing the employees' grievances),<sup>51</sup> it clarified that the NLRA did not "confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board may be of the opinion that the policies of the Act may be effectuated by such an order."<sup>52</sup>

### B. The IRCA: Goals and Remedies

The IRCA,<sup>53</sup> while not directly a part of traditional labor law, nevertheless contains provisions that directly impact those laws and remedies, including the NLRA. One of the most direct points of intersection is the treatment of unauthorized workers and the hiring obligations of employers. The first section will discuss the goals

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N.L.R.B. 529, 529 (2011) (when employer failed over a period of years to comply with Board bargaining order).

47. *Cherokee Marine Terminal*, 287 N.L.R.B. 1080, 1083 (1988).

48. *HTH Corp.*, 361 NLRB 709, 717–18 (2014).

49. *See* 29 U.S.C. § 160(c) (2012).

50. 305 U.S. 197, 236 (1938).

51. 311 U.S. 7 (1940).

52. *Id.* at 11–12.

53. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. ).

of the IRCA. The second section will outline the basic remedies under the statute as they relate to common violations.

### 1. Goals of IRCA

Congress enacted the IRCA in 1986 as an amendment to the Immigration and Nationality Act. Recognizing work as an attractive magnet for aliens,<sup>54</sup> the IRCA makes it “unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment.”<sup>55</sup> Employers therefore must meet specific verification requirements to confirm that a new employee is authorized to work in the United States.<sup>56</sup> An employer is also prohibited from hiring or continuing to employ a worker who it knows is unauthorized.<sup>57</sup> On the workers’ side, it is a crime to use a false identification document or falsely claim authorization to work in the United States<sup>58</sup> or to use someone else’s identification document.<sup>59</sup>

In addition to preventing illegal immigration, one of the driving policies behind the IRCA was to change the financial incentives to hire unauthorized workers via successively greater fines on employers.<sup>60</sup> At the same time, unauthorized aliens themselves would be deterred from entering the country to seek employment since jobs would be harder to find, and work would be preserved for those legally permitted to perform it.<sup>61</sup> Congress also recognized the risk of IRCA’s unintended consequences, such as disincentive for employers to hire lawful workers who look or sound “foreign.”<sup>62</sup> It is

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54. H.R. REP. NO. 99-682, pt. 1, at 46 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5650 (“Employment is the magnet that attracts aliens here illegally . . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”).

55. 8 U.S.C. § 1324a(a)(1)(A) (2012).

56. 8 U.S.C. § 1324a(b) (2012).

57. 8 U.S.C. § 1324a(a)(1)–(2) (2012).

58. 8 U.S.C. § 1324c(a)(1)–(2) (2012).

59. 8 U.S.C. § 1324c(a)(3)–(4) (2012). As Professor Kati Griffith noted, however, “the IRCA specifically did not make it unlawful for an undocumented worker who did not use fraudulent documents to work or accept employment.” Kati L. Griffith, *A Supreme Stretch: The Supremacy Clause in the Wake of IRCA and Hoffman Plastic Compounds*, 41 CORNELL INT’L L.J. 127, 129 (2008).

60. See Robert F. Koets, Annotation, *Validity, Construction, and Application of § 274A of Immigration and Nationality Act (8 U.S.C.A. § 1324a), Involving Unlawful Employment of Aliens*, 130 A.L.R. Fed. 381, § 3 (1996) (citing cases).

61. See *United States v. Van*, 931 F.2d 384, 386 (6th Cir. 1991); Koets, *supra* note 60, § 7.

62. H.R. REP. NO. 99-1000 (Conf. Rep.), at 87–88 (1986), reprinted in 1986 U.S.C.C.A.N. 5840, 5842; see also *United States v. Todd Corp.*, 900 F.2d 164, 165 (9th Cir. 1990) (“Congress

therefore unlawful to discriminate against an authorized individual with respect to hiring or employment on the basis of national origin.<sup>63</sup> The IRCA itself is silent with respect to backpay awards under the NLRA.<sup>64</sup>

## 2. Remedies Under the IRCA

Unlike the NLRA, the IRCA imposes both civil and criminal penalties.<sup>65</sup> On the criminal side, an employer engaging in a pattern or practice of violations “shall be fined not more than \$3,000 for each unauthorized alien, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.”<sup>66</sup> Civil penalties run on a tier system based on the frequency of the offense, and the ranges are wide.<sup>67</sup> For example, an initial fine for an offense after March 27, 2008 runs from \$375 to \$3,200; a second from \$3,200 to \$6,500; and more than two from \$4,300 to \$16,000.<sup>68</sup> Cease-and-desist orders carry their own civil penalties, also on a progressive system.<sup>69</sup> Other “remedial action as is appropriate” may be ordered.<sup>70</sup> Employers must also maintain records for inspection proving their employees’ eligibility to work.<sup>71</sup> They are, however, entitled to a good-faith affirmative defense if they establish compliance with various statutory methods verifying eligibility for employment.<sup>72</sup>

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was particularly concerned about documented aliens and ‘foreign looking and sounding’ United States citizens.”) (citing H.R. REP. NO. 99-1000).

63. 8 U.S.C. § 1324b(a)(1) (2012). Title VII of the Civil Rights Act of 1964 echoes this provision more generally for all employees. *See* 42 U.S.C. § 2000e-2(a)(2) (2012).

64. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002) (accepting the Board’s point that the IRCA is silent with respect to backpay, but dismissing the argument when reaching the result); *see also* Griffith, *supra* note 59 at 129 (also noting that “[t]he IRCA’s express preemption provision dealt only with its preemptive effect on state laws sanctioning employers for hiring undocumented immigrant workers.”).

65. *See* 8 U.S.C. §§ 1324a(a), (e)(4), (f) (2012); 8 C.F.R. §§ 274a.10(a), (b)(1)(ii) (2017).

66. 8 C.F.R. § 274a.10(a).

67. 8 C.F.R. § 274a.10(b) (2017).

68. 8 C.F.R. § 274a.10(b)(1)(ii).

69. 8 U.S.C. § 1324a(e)(4).

70. 8 U.S.C. § 1324a(e)(4)(B)(ii).

71. 8 U.S.C. § 1324a(b)(3) (2012).

72. 8 U.S.C. § 1324a(a)(3), (b) (2012).

*C. The Supreme Court, the Board, and Unauthorized Workers*

Because the bulk of the literature and legal precedent regarding remedies in cases involving unauthorized workers focuses on remedies for those employees rather than their authorized coworkers, one is well-served to examine them as the sources of the current unsatisfying state of the law. In *Hoffman*, the Supreme Court held that no backpay could be awarded to a discriminatee under the NLRA because such an award exceeded the Board's remedial authority.<sup>73</sup> In so doing, it also subordinated the NLRA to immigration laws by finding that a backpay award would violate the IRCA's policies and maintaining that the Board could not involve itself in immigration laws by issuing that kind of remedy.<sup>74</sup> The majority emphasized that "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."<sup>75</sup> Allowing backpay, it concluded, would encourage future violations of immigration law by incentivizing unauthorized workers to seek employment and file claims under the NLRA to keep ill-gotten pay.<sup>76</sup> Nor could the required mitigation of losses be made without the worker further breaking the law by obtaining other employment.<sup>77</sup> The *Hoffman* majority saw the employee's unauthorized immigration and work as the key act that brought the labor and immigration statutes into a conflict they might not otherwise have.<sup>78</sup> As a result, the justices cited other remedies under the NLRA, such as notice readings and broad cease-and-desist orders, as sufficient to remedy violations.<sup>79</sup>

In contrast, Justice Breyer's dissent saw the issue as primarily a *labor* problem and fought against forcing labor to take a back seat to

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73. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002).

74. *Id.* at 148–49.

75. *Id.* at 148. The Court therefore seems to have rejected the earlier *Sure-Tan* logic that some form of backpay and/or reinstatement could be awarded upon lawful reentry.

76. *Id.* at 150–51. Professor Senn offers an interesting perspective on *Hoffman*, noting that the employee at issue had himself violated the IRCA by engaging in fraudulent conduct in obtaining his employment. Craig Robert Senn, *Proposing A Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law*, 77 FORDHAM L. REV. 113, 160 (2008). Senn argues that the *Hoffman* court was at least implicitly guided by this fact in its conclusion that awarding backpay would expressly thwart the purpose of the IRCA—a law that expressly imposes criminal fines on an unauthorized worker who tries to gain employment using fraudulent documents. *See id.* at 159–61.

77. *Hoffman*, 535 U.S. at 150–51.

78. Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, its Predecessors and its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 33 (2008).

79. *Hoffman*, 535 U.S. at 152.

immigration laws.<sup>80</sup> Arguing that the Board must remedy labor violations and that it has broad discretion to do so, he maintained that backpay serves a critical remedial purpose beyond compensating victims, including “deterrence, i.e., discouraging employers from violating the Nation’s labor laws.”<sup>81</sup> Without the possibility of strong remedial action, “employers could conclude that they can violate the labor laws at least once with impunity.”<sup>82</sup> According to Justice Breyer, nothing in the immigration laws barred enforcing the NLRA with all of its remedies.<sup>83</sup>

Shortly after the *Hoffman* decision, the Board’s Office of the General Counsel issued a memorandum reiterating that, because *Hoffman* dealt only with remedies, “an individual’s work authorization status is irrelevant to a respondent’s liability under the Act . . . questions concerning that status should be left for the compliance stage of the case.”<sup>84</sup> Critically, for the purposes of collective action and representation of both authorized and unauthorized workers alike, a particular employee’s immigration status still remains irrelevant to identifying an appropriate collective bargaining unit.<sup>85</sup>

The Second Circuit extended *Hoffman* in 2013, ruling that all unauthorized immigrants are barred from a backpay remedy regardless of whether they engaged in fraud or misrepresentation in procuring employment.<sup>86</sup> In so doing, it focused on the fact that an unlawful employment relationship was in place, regardless of whether it was the employer or the employee who violated the IRCA. Notably, the Circuit concluded that backpay would be contrary to Congress’s intended immigration policy given that the employee was never legally entitled to work and awarding backpay would incentivize violations of the IRCA.<sup>87</sup> It thus prioritized the enforcement against unauthorized employee’s violation of IRCA over the employer’s violation of the NLRA and IRCA (if it knowingly employed an unauthorized worker).<sup>88</sup> Receiving the case again on a remand from the Circuit, the Board ordered conditional reinstatement subject to the unauthorized employees presenting

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80. *Id.* at 153–61 (Breyer, J., dissenting) (emphasis added).

81. *Id.* at 153–54.

82. *Id.* at 154.

83. *Id.* at 153, 155–56.

84. Memorandum from Arthur Rosenfeld, Gen. Counsel, NLRB, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, Memorandum GC 02-06, 1 (July 19, 2002), <https://apps.nlr.gov/link/document.aspx/09031d45800e2379>.

85. *Id.* at B.3.

86. *Palma v. NLRB*, 723 F.3d 176, 185 (2d Cir. 2013).

87. *Id.* at 184–87.

88. For a discussion of “comparable culpability” and relative fault, see Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1579–82 (2015).



the employer with documentation showing that they were now authorized to work in the United States. This remedy reflects the reality that the employer hired the workers in violation of IRCA and discharged them in violation of the NLRA.<sup>89</sup>

## II. SKEWED EMPLOYER INCENTIVES

The history of the NLRA shows the importance of maintaining industrial peace and ensuring that all workers are free to exercise their fundamental rights in the workplace.<sup>90</sup> At the same time, the legislative history of the IRCA shows it was intended to complement, not run counter to, federal labor and employment laws—including the NLRA.<sup>91</sup> House committee reports emphasize that, although it sought to prevent the employment of unauthorized workers, the IRCA would not limit the power of the Board to remedy violations against undocumented employees<sup>92</sup> because doing so would be counter-productive to congressional intent.<sup>93</sup> Indeed, the reports reflect an overall belief that immigration and labor law

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89. *Mezonos Maven Bakery Inc.*, 362 N.L.R.B. No. 41, 2015 WL 1439921, at \*3–4 (Mar. 27, 2015). In requiring the unauthorized employees to present documentation of their new authorized work status within a reasonable time, the Board recognized that “[b]ecause *Hoffman* limits the Board’s authority to order backpay, conditional reinstatement is the only means available to the Board to provide relief to the discriminatees and the principal means of deterring future unfair labor practices.” *Id.*

90. 29 U.S.C. § 151 (2012).

91. H.R. REP. NO. 99-682, pt. 1, at 58 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5662.

92. *Id.* (“It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term ‘employee’ in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan[,]* Inc. v. NLRB, 467 U.S. 883 (1984)[,] application of the NLRA ‘helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.’ 467 U.S. at 893.”).

93. H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986), as reprinted in 1986 U.S.C.C.A.N. 5757, 5758 (making the same point, and going even further: no provision of the IRCA should be read to “limit the powers of State or Federal labor standards agencies such as the Occupational Safety and Health Administration, the Wage and Hour Division of the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, or Labor arbitrators, in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment”).

could work together to create a disincentive for employer violations in both hiring of unauthorized workers and the commission of unfair labor practices.<sup>94</sup> Yet despite this potential cohesion, the current remedial structure incentivizes violations of both types of unlawful activity. As a result, *authorized* employees are more likely than ever to find themselves personally impacted by the harm caused by insufficient remedies for employers' violations in cases involving their unauthorized coworkers. The need to address the remedial hole for authorized employees is even more critical in a world where the proclivity for violations is high. Before suggesting how to fill that hole and remedy the harm to authorized workers, the next section of this Article surveys how and why the current structure incentivizes employers to act unlawfully under both statutes. Because violations are felt by authorized employees as much as unauthorized workers, understanding the impetus to commit unfair labor practices in workplaces that include unauthorized workers helps identify the nature of the harm that must be remedied.

This section will first discuss the minimal cost of the NLRA violations for certain employers who employ unauthorized workers. Next, it will discuss the vulnerability of unauthorized employees, which contributes to the temptation to violate the Act in ways that affect all employees. This section goes on to consider the financial savings and other costs associated with a potential violation. Finally, it will touch on the use of immigration status to thwart the purposes of NLRA, leading to adverse workplace consequences for all.

*A. Violations of the NLRA in Cases Involving Unauthorized Workers  
Presently Carry Little Meaningful Cost*

Successfully balancing remedial incentives means inducing two parties—employers and undocumented workers—to each adhere

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94. Elaine Dewhurst, *Models of Protection of the Right of Irregular Immigrants to Backpay: The Impact of the Interconnection Between Immigration Law and Labor Law*, 35 COMP. LAB. L. & POL'Y J. 217, 226 (2014). Dewhurst examines what a robust set of remedies against violations of both the IRCA and the NLRA could look like from an employer's perspective, recognizing that ideally

immigration law sanctions employers for hiring irregular immigrants (a disincentive) and labor law provides rights to such immigrants that can be enforced against the employer (a further disincentive). These dual disincentives work together to discourage employers from hiring irregular immigrants in the first instance, thereby reducing the availability and the pull factor enticing irregular immigrants to a state.

*Id.*

to two statutes in two different ways.<sup>95</sup> But *Hoffman* and its progeny mean the employer is incentivized to violate the NLRA rather than follow it, because the cost of violation is relatively low. Without backpay or reinstatement remedies made available to the employees, the employer faces little direct financial harm because of its unfair labor practices. If an employer violates the remaining terms of a settlement or Board order (such as notice posting, access, etc.) or engages in similar unfair labor practices, it may be subject to contempt proceedings before a court.<sup>96</sup> Some say these proceedings are sufficient not only to deter an employer from subsequent unlawful conduct but also to reassure employees of the sanctity of their rights. For example, the Supreme Court majority in *Sure-Tan* maintained that “were petitioners [i.e. the employers] to engage in similar illegal conduct, they would be subject to contempt proceedings and penalties. This threat of contempt sanctions thereby provides a significant deterrent against future violations of the Act.”<sup>97</sup> Yet the impact of the loss of employees’ *mental confidence* in their ability to safely exercise their legal rights under the NLRA means that once may be enough if there is no counterbalance specifically restoring the authorized employees.<sup>98</sup>

The employer may also be incentivized to violate the IRCA by hiring unauthorized workers in the first instance. “Employers would weigh the reduction in employment liability gained by hiring unauthorized workers against the risk of [the IRCA’s] fines. Given the

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95. I distinguish here between the argument that unauthorized workers may not be aware of their labor rights when deciding to immigrate on the one hand, and the workers’ existing knowledge that their status does not permit them to work legally. I also recognize that some employers may have satisfied their obligations under immigration laws due to the relatively low bar to confirm eligibility for employment.

96. See 29 CFR § 101.15 (2017) (outlining that after a Board order has been enforced by a circuit court, it falls to the Board to assess and obtain compliance with that decree. If the respondent has failed to comply, the General Counsel may petition the court to find the respondent in contempt and order remedial actions and penalties).

97. *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883, 904 n.13 (1983). Interestingly, the Court did uphold the Board’s cease-and-desist remedy, while also giving a nod to the possible inadequacy in existing Board remedies and the chance that reinstatement with backpay could do more to offer relief to the discriminatees while also deterring future misconduct by the employer. *Id.* at 898 n.8, 900 n.10.

98. The Board and General Counsel have recognized the “once is enough” problem in cases involving union organizing. See, e.g., *Eddyleon Chocolate Co.*, 301 N.L.R.B. 887, 891 (1991), Memorandum from Lafe E. Solomon, Acting Gen. Counsel, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, Memorandum GC 11-01 (Dec. 20, 2010), <https://apps.nlr.gov/link/document.aspx/09031d458042ba39>; Memorandum from Lafe E. Solomon, Acting Gen. Counsel, to All Reg’l Dirs., Officers-in-Charge, and Resident Officers, Memorandum GC 10-07, 1 (Sept. 30, 2010), <https://apps.nlr.gov/link/document.aspx/09031d4580989438> (nip-in-the-bud campaign). I submit that the principle applies equally to cases involving violations targeting unauthorized workers and impacted authorized employees.

improbability of actual prosecution by immigration authorities, many employers might seek to hire unauthorized workers as an explicit management strategy.”<sup>99</sup> The General Counsel of the AFL-CIO offered examples of ways employers capitalize on the skewed incentive structure in his 2007 testimony before the House of Representatives. He explained that employers often call for immigration raids on their own facilities when they suspect there is union organizing activity, reasoning that the price of immigration fines is relatively low, the labor law backpay is virtually non-existent, and the cost of unionization is enormous over the long term.<sup>100</sup> With the chance of fewer consequences for violations of the NLRA and a relatively low bar to prove the requisite status investigation under the IRCA, it becomes tempting indeed for employers to break the law.

### B. Vulnerability of Employees

The number of unauthorized residents willing to enter the workforce means that it is not difficult for an unscrupulous employer to act on that temptation, undercutting the goals of both IRCA and the NLRA. The Pew Research Center reports that out of approximately 11.2 million unauthorized immigrants in the United States, 8.1 million were members of the nation’s civilian labor force in 2012, making up fully 5.1% of the workforce.<sup>101</sup> Nevada has the largest number of unauthorized laborers, followed by California

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99. Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U.L. REV. 1361, 1395 (2009); see also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting); Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastics Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 490–91 (2005).

100. *Comprehensive Immigration Reform: Labor Movement Perspectives: Hearing Before Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 23–24 (2007) (testimony of Jonathan P. Hiatt, General Counsel, AFL-CIO) at 14–15. As one author put it in the immigration context, “[t]hose violators who are caught and assessed penalties, and can afford to pay the fines, simply pay them as part of the cost of doing business. Since they are rarely reinspected to ensure continued compliance, they repeatedly violate the law.” Lora Jo Foo, *The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2187 (1994).

101. Jeffrey S. Passel & D’vera Cohen, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, PEW RES. CTR: HISP. TRENDS (Nov. 18, 2014), <http://www.pewhispanic.org/2014/11/18/unauthorized-immigrant-totals-rise-in-7-states-fall-in-14/>; *Unauthorized Immigrant Population Trends for States, Birth Countries, and Regions*, PEW RES. CTR: HISP. TRENDS (Nov. 3, 2016), <http://www.pewhispanic.org/2014/12/11/unauthorized-trends/>.

and Texas.<sup>102</sup> A Pew analysis also shows that in most states, the largest number of unauthorized immigrant workers are concentrated in service occupations, which include maids, cooks, and groundskeepers; unauthorized workers make up the highest share of the overall workforce in farming occupations in most states.<sup>103</sup>

Lora Jo Foo notes that the underground economy means that employers can fairly readily evade taxes, minimum wage and hour statutes, and other worker protections.<sup>104</sup> IRCA plays no small part in these violations: the Commission on Agricultural Workers, a Congressionally created panel, concluded that rather than stopping unauthorized work, IRCA created a market for false documentation.<sup>105</sup> Because IRCA provides an affirmative defense to liability for employers that in good faith verify an applicant's eligibility to work,<sup>106</sup> businesses are incentivized to accept even questionable documents and forgers have a ready market in unauthorized workers who may have come to the United States specifically to find work.<sup>107</sup> Once in the system, the employer may be more confident in its ability to skirt liability given (1) the threat of exposure it holds over employees; (2) limited remedies under labor law; and (3) the employer's knowledge that it has a defense under immigration law. Although documented workers risk retaliation if they assert their statutory rights, "undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to the INS and they will be subjected to deportation proceedings or criminal prosecution."<sup>108</sup>

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102. Jeffrey S. Passel & D'Vera Cohen, *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession: Appendix B: Additional Charts*, PEW RES. CTR: HISP. TRENDS (Nov. 3, 2016), <http://www.pewhispanic.org/2016/11/03/appendix-b-additional-charts-2/#among-states>.

103. Jeffrey S. Passel & D'Vera Cohen, *Share of Unauthorized Immigrant Workers in Production, Construction Jobs Falls Since 2007*, PEW RES. CTR: HISP. TRENDS (Mar. 26, 2015), <http://www.pewhispanic.org/2015/03/26/share-of-unauthorized-immigrant-workers-in-production-construction-jobs-falls-since-2007/>.

104. Foo, *supra* note 100, at 2180, 2187 (using garment workers as an examples). Foo's observations regarding the context that may prompt certain employers to hire unauthorized workers are relevant to understanding the skewed incentives discussed in this Article, but this Article expresses no view as to whether her conclusions regarding the need to strengthen protections for such workers are desirable.

105. *Id.* at 2182–83.

106. 8 U.S.C. § 1324a(a)(3), (b) (2012).

107. Foo, *supra* note 100, at 2183.

108. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004); *see also* Jennifer Berman, *The Needle and the Damage Done: How Hoffman Plastics Promotes Sweatshops and Illegal Immigration and What to Do About It*, 13 KAN. J.L. PUB. POL'Y 585, 588–89 (2004); Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 654–55 (2012).

The effect from unregulated labor is equally poignant for other workplace laws, including widespread minimum wage and overtime violations. Kati Griffith observes that according to 2008 surveys, “low-wage undocumented workers are more than twice as likely to suffer minimum wage violations” as compared to authorized workers, with 37.1 percent of undocumented workers experiencing a violation in the week before the survey was conducted; 85% experienced an overtime violation during that period.<sup>109</sup> Reports suggest that *Hoffman* further exacerbated employers’ leverage in skirting workplace laws such as the NLRA by strengthening the threat of deportation even though backpay denials would have no direct bearing on that possibility.<sup>110</sup>

Due to these skewed incentives, the original goals prompting Congress to enact the NLRA in 1935—to promote industrial peace, remove barriers to the free flow of commerce caused by industrial strife between workers and corporations, protect the right of employees and employers, and address the inequality between the parties<sup>111</sup>—are now undermined. Particularly in an economy in which employers already have an overwhelming degree of leverage and unionization rates are down, the weakened NLRA remedies could give rise to greater risk of work disruptions, low wage rates, and the erosion of fundamental rights for authorized employees.<sup>112</sup>

### C. Financial Costs and Savings

As noted above, the nature of unauthorized work and fear of exposure makes it easier for employers seeking a business advantage to violate wage and hour laws. The same may be said for the cost-

109. Kati L. Griffith, *Undocumented Workers: Crossing the Borders of Immigration and Workplace Law*, 21 CORNELL J. L. & PUB. POL’Y 611, 616 (2012) (citing data collected and reported by Annette Bernhardt).

110. See Raquel E. Aldana, *The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 721 (2007); Ruben J. Garcia, *Ten Years After Hoffman Plastics Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J. L. & PUB. POL’Y 659, 667–68 (2012).

111. 29 U.S.C. § 151 (2012).

112. See *The Great Recession*, ECON. POL’Y INST.: ST. WORKING AM., <http://stateofworkingamerica.org/great-recession/> [<https://web.archive.org/web/20171201194427/http://stateofworkingamerica.org/great-recession/>] (last visited Nov. 30, 2017); *The Great Recession: The Jobs Shortage*, ECON. POL’Y INST.: ST. WORKING AM., <http://stateofworkingamerica.org/great-recession/the-job-shortage/> [<https://web.archive.org/web/20171201194521/http://stateofworkingamerica.org/great-recession/the-job-shortage/>] (last visited Nov. 30, 2017); *Union Coverage Rate in the United States, 1973–2013*, ECON. POL’Y INST.: ST. WORKING AM., <http://stateofworkingamerica.org/charts/union-coverage-rate-in-the-united-states-1973-2009/> [(last updated Aug. 27, 2014) (showing a drop in the unionization rate from 26.7% in 1973 to 13.6% in 2009)].

savings in violating the NLRA by interfering with attempts to unionize—violations that ultimately harm *authorized* workers as well. In a sense, therefore, these employers may be receiving a windfall under the current remedial structure akin to that which the system tries to avoid by denying backpay to unauthorized workers.<sup>113</sup> Calculated across industries, full-time wage and salary union members in the United States earned a median weekly pay of \$1,004 per week in 2016, while their non-unionized counterparts had median weekly earnings of \$802.<sup>114</sup> Backpay after an unfair labor practice represents an entirely separate cost; the Board ordered approximately \$94.3 million in total backpay relief in 2015.<sup>115</sup>

In a facility in which authorized and unauthorized workers work together (as may easily be the case in many facilities), the incentive structure created by the current remedial doctrine may allow the employer to reap a compounded windfall. First is the opportunity to start at a lower wage rate with the threat of exposure for unauthorized employees. Second is the knowledge that there is no risk of backpay or reinstatement costs should a violation be found. Coupled with the realization that one violation can be enough to dampen collective activity even among authorized employees who observe the employer's violations pass with less-than-full consequences, the employer may have created a perfect storm for a long-term success story.

#### D. *Use of Immigration Status to Thwart the Purposes of the NLRA*

An employer aware of the limited remedies available to unauthorized employees may also take advantage of an employee's immigration status to thwart the effective enforcement of the NLRA with respect to the rest of its workforce. For example, an employer may terminate an employee based on his or her immigration status as a pretext for retaliation after protected concerted activities that

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113. Correales, *supra* note 10, at 139–40.

114. Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members - 2016 (Jan. 26, 2017), <http://www.bls.gov/news.release/pdf/union2.pdf> [hereinafter BLS Union Members].

115. *Monetary Remedies*, NAT'L LAB. REL. BOARD, <https://www.nlrb.gov/news-outreach/graphs-data/remedies/monetary-remedies> [<https://web.archive.org/web/20171201195912/https://www.nlrb.gov/news-outreach/graphs-data/remedies/monetary-remedies>] (last visited Nov. 30, 2017). In 2015, the Board received 20,199 unfair labor practice charges, achieved settlements in 6,473 cases, and issued complaints in 1,272 matters. *Charges and Complaints*, NAT'L LAB. REL. BOARD, <https://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints> [<https://web.archive.org/web/20171201200033/https://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints>] (last visited Nov. 30, 2017).

affect the workforce overall, knowing that the employer has the defense of attempting to comply with the IRCA and is relatively secure against remedies under the NLRA due to the employee's immigration status. Alternatively, an employer may respond to general protected concerted activity by unlawfully terminating an employee with a non-immigrant work authorization conditioned on employment, causing that employee to lose status along with the opportunity for backpay under the NLRA.

The Board has attempted to limit the possibility of such abuses. After *Hoffman Plastic*, employers began asserting that alleged discriminatees were undocumented and therefore ineligible for backpay or reinstatement under *Hoffman Plastics*. To support their positions, employers served subpoenas on discriminatees, demanding proof of work authorization and putting them at risk of intimidation. In *Flaum Appetizing Corp.*,<sup>116</sup> the Board responded, holding that the "IRCA does not require that the Board permit baseless inquiry into immigration status in every case in which reinstatement or backpay is granted."<sup>117</sup> Instead, an employer was barred from asserting an affirmative defense based on *Hoffman Plastics* absent a factual foundation for doing so.<sup>118</sup> Yet it is unclear whether the *Flaum* standard is sufficient to overcome the incentives towards the violation described above, particularly as violations may go underreported.

### III. RESULTANT HARM FOR AUTHORIZED EMPLOYEES

Current interpretations and incentives in cases involving unauthorized employees mean that when an employer violates the NLRA, *authorized* employees are also discouraged from exercising their fundamental rights after seeing little has been done to repair

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116. *Flaum Appetizing Corp.*, 357 N.L.R.B. 2006 (2011).

117. *Id.* at 2012.

118. *Id.* The federal courts have also faced this question in the context of employment litigation under Title VII of the Civil Rights Act. In *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004), the court considered whether an employer could assert an employee's unauthorized status as a defense against backpay when evidence of the employee's unlawful status was acquired after the employer's alleged unlawful conduct. *Id.* at 1071–72. Applying the after-acquired evidence doctrine, the court held that "District courts need not condone the use of discovery to engage in 'fishing expedition[s]'" and can "invoke the Federal Rules of Civil Procedure when necessary to prevent employers from using the discovery process to engage in wholesale searches for evidence that might serve to limit its damages for its wrongful conduct." *Id.* at 1072.



the harm done.<sup>119</sup> This harm makes it that much more important to rebalance employers' cost/benefit analyses to uphold the core purpose of the NLRA: giving employees the freedom to choose to join together in a concerted manner for mutual aid and protection in the workplace, or refrain from doing so as they choose. It is this point that easily gets lost in the scholarly discussion of incentives and compliance.

This section will first discuss how the unlawful labor practices for unauthorized workers erode the NLRA's collective goals for all employees. After then addressing the ramifications of violations on the terms and conditions of employment for authorized workers, it will identify and examine the decrease in mental confidence among those authorized workers that results from the inadequately remedied violations.

### A. *Erosion of the NLRA's Collective Goals*

From the beginning, the NLRA has maintained a group orientation.<sup>120</sup> Congress enacted the statute to ensure employees' freedom "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."<sup>121</sup> In this context, "concerted" generally includes situations when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment, but it may also include a single employee acting for the group, trying to induce group action, or preparing for group action.<sup>122</sup> The overriding commonality of their action is the center of the concerted element of

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119. See *Montgomery Ward & Co., Inc.*, 232 N.L.R.B. 848, 848 (1977) ("The Board has decided that serious threats, even if made to a single employee, cannot be regarded as isolated, but are presumed to be the subject of discussion and repetition among the workers."). The need to repair the damper on employees' exercise of their rights underlines the "nip-in-the-bud" initiative. See Memorandum from Lafe E. Solomon, Memorandum GC 11-01, *supra* note 98, at 5 ("I want to ensure that, in addition to swiftly remedying unlawful discharges, the impact of these ancillary unfair labor practices is removed as well. In order to remove the impact, we must tailor remedies to recreate an atmosphere that allows employees to fully utilize their statutory right to exercise their free choice."). I suggest the same can be said for the employees left behind after egregious violations involving unauthorized workers.

120. Ellen Dannin, *No Rights Without A Remedy: The Long Struggle For Effective National Labor Relations Act Remedies*, AM. CONST. SOC'Y L. & POL'Y ISSUE BRIEF, 2011, at 17 ("Congress intended the rights and protections of [of the Act] to be collective.").

121. 29 U.S.C. § 157 (2012).

122. *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

the NLRA.<sup>123</sup> “Mutual aid and protection” is also infused with the collective: the employee must be acting for a collective goal, not a personal gripe.<sup>124</sup>

*Hoffman* and its progeny, however, have turned away from the collective nature of the statute. As a result, authorized employees may be losing the full value of their fundamental rights under the NLRA, at least when working with unauthorized workers, as existing incentives tempt employers towards non-compliance. Ellen Dannin’s analysis of the oral arguments in *Hoffman* touches on part of the problem.<sup>125</sup> Dannin points to Justice Scalia’s questioning regarding the impossibility of the unauthorized worker to mitigate any alleged losses, given that working would further violate the IRCA.<sup>126</sup> For Justice Scalia, a “wily discriminatee” could take advantage of a “hapless employer” by making this argument, an action just as bad as the employer’s violation.<sup>127</sup> Scalia’s approach, Dannin argues, turns the intent and analysis of the NLRA on its head: “Under the NLRA, only the discriminator’s intent matters. But the analysis advocated by justices who joined the *Hoffman Plastics*’ majority ‘rewrote’ the NLRA to shift that inquiry to reverse the roles of victim and victimizer.”<sup>128</sup> Rather than focusing on whether the employer’s objective actions and intent violated the law, the majority’s focus fell on the individual employee’s background, intent, and actions—an odd approach for analyzing a statute rooted in the rights of employees to band together collectively to address the common terms and conditions of their employment.

Kati Griffith makes similar observations regarding the divisions between authorized and unauthorized employees created under *Hoffman*. Under current law, even if an employee is unauthorized to work, he may still share a community of interest in the workplace with authorized employees sufficient to be included in the same union.<sup>129</sup> But if, as *Hoffman* requires, unauthorized workers have different remedial rights under the NLRA, divisions are likely to form that can ultimately harm the ability of authorized workers to act regarding their conditions of employment. In contrast, focusing on

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123. See *Wyndham Resort Dev. Corp.*, 356 N.L.R.B. 765, 767 (2011) (highlighting the commonality of a goal, even if no advance plan was made to act together, and even if employees had different motives for their action).

124. See *Holling Press, Inc.*, 343 N.L.R.B. 301, 302 (2004); *Gartner-Harf Co.*, 308 N.L.R.B. 531, 531 n.1 (1992).

125. Ellen Dannin, *Hoffman Plastics as Labor Law—Equality At Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393 (2009).

126. *Id.* at 400–02.

127. *Id.* at 401.

128. *Id.*

129. *Agri Processor Co. v. NLRB*, 514 F.3d 1, 9 (D.C. Cir. 2008).

the collective nature of the statute can foster a sense of common cause, becoming a “legitimacy-builder that unifies documented and undocumented workers around their mutual interests as workers.”<sup>130</sup> Griffith focuses on the possibilities of unity in support of broad advocacy,<sup>131</sup> but the point is equally applicable on the micro level of the workplace. Without attention to the effects of focusing on the unauthorized worker’s possible IRCA violation and the relative minimization of the employer’s NLRA violations, the shared identity and willingness to join together for the collective bargaining so central to the labor statute is at risk for authorized workers.<sup>132</sup>

I join Dannin and Griffith in affirming the focus on the collective. The NLRA was enacted to protect workers as a group, not as isolated individuals.<sup>133</sup> A collective focus creates a stable long term relationship between workers and management developed through bargaining that goes beyond a one-on-one affinity/dislike.<sup>134</sup> Existing law already recognizes that authorized and unauthorized workers can share a community of interest sufficient to place them in the same bargaining unit under the NLRA; erosion of the group based on *Hoffman* outcomes threatens that community and effectiveness of concerted action.<sup>135</sup> But the current remedial structure not only creates a subclass of employees that lack a stake in the goals of their authorized co-workers, but also erodes the willingness

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130. Kati L. Griffith & Tamara L. Lee, *Immigration Advocacy as Labor Advocacy*, 33 BERKELEY J. EMP. & LAB. L. 73, 112–13 (2012).

131. See *id.* Griffith takes the approach of framing “immigration advocacy as labor advocacy” using the NLRA to support a range of activity in support of the rights of immigrant and undocumented workers. This approach relies in large part on fostering solidarity between authorized and unauthorized workers. See *id.* at 111–12.

132. Meaningful exercise of rights under the NLRA are undermined even further when given that “[e]mployees without significant protection from unlawful discharge on the basis of their union activity are not likely to elect union representation because they do not have a comparable stake in the collective goals of their legally resident co-workers.” Andrew S. Lewinter, *Hoffman Plastic Compounds v. NLRB: An Invitation to Exploit*, 20 GA. ST. U.L. REV. 509, 535 (2003) (internal quotations omitted).

133. As one scholar put it, the NLRA “reduced certain individual values to secondary status.” James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1565 (1996).

134. See *NLRB v. Financial Institution Employees, Local 1182*, 475 U.S. 192, 208 (1986) (“the basic purpose of the National Labor Relations Act is to preserve industrial peace. The Act includes several provisions designed to encourage stable bargaining relationships, and the Board has devised rules to achieve the same ends.”) (internal citations omitted).

135. Notably for the question of unity, *Agri Processor* confirmed that both authorized and unauthorized employees could share a community of interest and be properly placed in the same bargaining unit. *Agri Processor Co. v. NLRB*, 514 F.3d 1, 9 (D.C. Cir. 2008); see also Memorandum from Arthur Rosenfeld, Memorandum GC 02-06, *supra* note 84, at 2–3 (citing cases and instructing that the Office of the General Counsel would continue treating them as such).

and ability of authorized employees to exercise their rights and impedes effective collective bargaining for the entire facility.<sup>136</sup>

Recognizing the importance of a shared employee identity to the operation of the NLRA, some unions have begun organizing attempts involving unauthorized workers.<sup>137</sup> This Article takes no position on whether such attempts to secure additional rights or remedies for this group are desirable, either as a social or political matter. Yet should a union begin an organizing campaign and meet with a positive employee reaction, it may press further—and learn that some employees are unauthorized to work. It is conceivable that, at least in some cases, the union will then back away from organizing to avoid unwanted publicity. Outside organizers can quickly realize that the employer may be immunized against consequences for unfair labor practices against those unauthorized employees and that union pressure might result in heightened scrutiny for the authorized employees with whom they work. The possibility for unionization is further weakened when one realizes that unauthorized employees without protection from unlawful discharge on the basis of their union activity are less likely to vote for union representation because they do not have a comparable stake in the collective goals of their authorized co-workers or share their confidence in the union's ability to support their goals. As a result, the opportunity for *authorized* employees to exercise their right under the NLRA to choose union representation is undermined.

Should a facility with both unauthorized and authorized workers manage to organize a union,<sup>138</sup> an unscrupulous employer may be motivated to use the strained relationship between the NLRA and the IRCA to oust the chosen representatives of its lawful, authorized employees. Under the NLRA, if an employer commits an egregious violation and refuses to bargain with a union, it may face an unfair labor practice charge ultimately resulting in an order to bargain—even if there are unauthorized employees in the unit.<sup>139</sup> But in this

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136. *Agri Processor Co.*, 514 F.3d at 8 (citing *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883 (1983)). Jennifer Berman identifies similar risks in her analysis of the ways *Hoffman* adversely impacts attempts to unionize for lawful employees. Berman, *supra* note 108, at 603.

137. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 545 n.141–42 (2007) (citing data and sources).

138. *Agri Processor Co., Inc.*, 514 F.3d at 9; Memorandum from Arthur Rosenfeld, Memorandum GC 02-06, *supra* note 84, at 2–3 (citing cases).

139. E.g., *Agri Processor Co.*, 347 N.L.R.B. 1200, 1200 n.2 (2006) (“[U]nless and until the employees are declared to be illegal and are discharged and/or deported, they remain employees of the Respondent, they remain employees under the Act, they lawfully voted in the election that the Union won, and since the Union lawfully represents the bargaining unit, we do not think it ‘peculiar’ to require the Respondent to bargain with the Union.”); Abramson, LLC, 345 N.L.R.B. 171, 176 (2005).

context, it is highly probable that the status of its unauthorized employees will already have been exposed, and those employees may now face immigration violations or deportation.<sup>140</sup> Without the full unit, the employer might try to claim that the union lacks majority support from the remaining authorized employees. Whether or not this argument is successful,<sup>141</sup> it is unlikely that those authorized employees will try to exercise their rights again, knowing that they risk another backlash from their employer.

### B. *Terms and Conditions of Employment*

Wages and other terms and conditions of employment for authorized employees are also at risk when employers face fewer consequences for violations of the NLRA. When “unscrupulous employers can exploit some low-wage workers with impunity, all low-wage workers suffer compromised employment protections and economic security.”<sup>142</sup> The NLRA’s collective nature contemplates that workers gain in strength when they join in mutual aid with respect to the terms and conditions of their employment. But when authorized employees are constrained in their ability to effectively act because violations against part of the workforce carry a different risk than against another, they are unable to work together towards change in their mutual terms and conditions of employment.

This inability may result in wages and working conditions below the industry standard. When an employer is incentivized to hire unauthorized workers (in violation of the IRCA) and can create a sufficient business rationalization for committing unfair labor practices against them (in violation of the NLRA), lawful employees face

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140. See *Deportable Aliens*, 8 U.S.C. § 1227 (2012) (deportable aliens); 8 U.S.C. § 1231(a) (2012) (detention and removal of aliens ordered removed).

141. A union enjoys a presumption of majority support for a certain time after an election; the Board frequently rejects employer arguments to the contrary when they rest on a claim of changed circumstances. See, e.g., *Grane Healthcare Co.*, 6-CA-36791, 2010 N.L.R.B. LEXIS 505, \*19–20 (Dec. 16, 2010) (stating reasons for majority presumption); *Pearson Educ., Inc.*, 336 N.L.R.B. 979, 980 n.6 (2001) (citing cases). While there may still be questions regarding the application of the Board’s position to a given case, the fact that the employer’s argument may still be made raises concerns regarding the effect of litigation and a challenge to the Union’s ability to represent its members on the mindset of the authorized employees.

142. EUNICE HYUNHYE CHO & REBECCA SMITH, NAT’L EMP’T LAW PROJECT, WORKERS’ RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS 1 (2013).

a race-to-the-bottom to remain competitive.<sup>143</sup> The Board itself has recognized this danger, as expressed in then-Chairman Liebman and Member Pearce's concurrence in *Mezonos Maven Bakery*:

[Although] Congress sought through IRCA to protect the interests of U.S. citizens and authorized-alien workers . . . undocumented immigrants, fearing detection and deportation, will work long hours, accept low wages, and tolerate substandard conditions. Thus, they possess a competitive edge in the labor market[,] particularly in the market for unskilled labor [,] over U.S. citizens and other authorized workers unwilling to submit to such exploitation. Also, undocumented immigrants' availability in a labor market tends to depress wages and working conditions for others in the same market. By deterring employers from hiring undocumented immigrants, IRCA seeks to counteract these forces. To the extent that precluding backpay awards encourages employers to hire undocumented immigrants, it is at cross-purposes with IRCA and injures the welfare of citizen and authorized-alien workers.<sup>144</sup>

Yet, as will be discussed below, there is an even greater danger to the working conditions of authorized workers: the impact on their willingness to freely exercise their rights under the NLRA as a result of the current inadequacy of remedies. This chill makes employees reluctant to freely share views on wages, hours, and other terms and conditions of employment. It also keeps them from acquiring the information they need to join together for mutual aid and protection regarding those terms, which depresses working conditions and suppresses rights of even authorized employees.

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143. *Agri Processor Co.*, 514 F.3d at 5 (citing *Sure-Tan, Inc., v. NLRB*, 467 U.S. 883 (1983)); see also Berman, *supra* note 108, at 603; Griffith and Lee, *supra* note 130, at 102 (citing AFL-CIO's "Change to Win" platform).

144. *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 383 (2011), *aff'd in part, remanded in part sub nom.* *Palma v. NLRB*, 723 F.3d 176, 187 (2d Cir. 2013).

C. *Decreased Mental Confidence Due to Inadequately  
Remedied Violations*

The same reverse incentive structure that fails to effectively deter employers from violating the NLRA also diminishes the fundamental rights of authorized employees when they self-censor.<sup>145</sup> Authorized workers may limit communications in front of unauthorized coworkers, thereby also limiting opportunities to talk to each other.<sup>146</sup> They may under-report other violations, lose some of their collective power, or even choose not to report at all, deeming it a futile exercise without more support.<sup>147</sup> When, as with the NLRA, a law depends so heavily on employees acting as “private attorneys general who will pull the workplace law fire alarm when necessary,” this kind of intimidation undermines the entire system of operations.<sup>148</sup>

The Office of the General Counsel has recognized that “no worker in his right mind would participate in a union campaign in [a] plant after having observed that other workers had previously attempted to exercise rights protected by the Act have been discharged and must wait for three years to have their rights vindicated.”<sup>149</sup> This observation is equally applicable to other forms of collective action when, under *Hoffman*, the employer escapes two of the most common remedies (backpay and reinstatement) for violations of the NLRA if the targeted employee is unauthorized. Just one violation can thwart an entire union movement when workers are vulnerable and create a “legacy of coercion” for the remaining authorized workers.<sup>150</sup> Authorized employees will not always know whether a coworker is unauthorized or not. Once they become aware of the termination of the unauthorized employee, they may

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145. This is a particularly poignant risk when an employer commits multiple violations, or when those violations occur during union organizing. At these times, violating the NLRA “inhibit[s] employees from engaging in union activity and dr[ies] up channels of communication between employees. Thus, in order to provide an effective remedy in these cases, it is just as necessary to remove that impact as it is to remove the impact caused by an unlawful discharge.” Memorandum from Lafe E. Solomon, Memorandum GC 11-01, *supra* note 98, at 2.

146. *See id.* at 4 nn.10–12 (citing cases).

147. When, as Justice Thurgood Marshall noted, the focus of the NLRA is collective, this effect is even more dangerous. *See Emporium Capwell Co. v. W. Addition Comm. Org.*, 420 U.S. 50, 62 (1975).

148. Griffith, *Undocumented Workers*, *supra* note 109, at 631.

149. Memorandum from Lafe E. Solomon, Memorandum GC 10-07, *supra* note 98, at 1.

150. *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 827–28 (D.C. Cir. 2001) (affirming the bargaining order); *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 380 (2011) (Chairman Liebman and Member Pearce, concurring), *aff’d in part, remanded in part sub nom.* *Palma v. NLRB*, 723 F.3d 176, 187 (2d Cir. 2013).

think twice before engaging in protected activity with their co-workers out of fear the employer will then target them.<sup>151</sup> Because of the paucity of demonstrable remedies for their colleagues, they may conclude that they too are unprotected.<sup>152</sup> As the employer's unlawful actions become part of the lore of the shop, employees' mental confidence in the legal system as well as in the meaning of their rights under the Act is shaken; traditional remedies under the NLRA often do little to address this erosion of the so-called status quo. "Indeed, rather than removing harm to employee collective action and union support caused by employer illegal action, co-workers may become afraid of the consequences of asserting their legal rights to organize, support one another, or bargain collectively."<sup>153</sup>

The available data bears out the danger. Although admittedly limited, a survey of low-wage workers in three cities found that employers do, in fact, threaten to call immigration authorities.<sup>154</sup> Nearly half of all employees who were retaliated against for filing workplace complaints or considering unionization were threatened with termination or exposure to immigration officials.<sup>155</sup> Additional empirical research is necessary to provide a deeper view into the mechanics and extent of the chill on authorized employees after seeing these types of NLRA violations. Nevertheless, at least some statistically-significant harm seems to flow to those authorized employees from the remedial structure governing violations involving unauthorized employees. This harm, though an unintended consequence, underlines the need for reform—regardless of what protections and rights unauthorized workers should enjoy.

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151. See, e.g., Thomas J. Walsh, *Hoffman Plastic Compounds v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 336 (2003).

152. *Mezonos Maven Bakery*, 357 N.L.R.B. at 381 (Chairman Liebman and Member Pearce, concurring) ("One purpose of a backpay order is to make all employees at a jobsite, regardless of whether they themselves were the target of unfair labor practices, more confident in the exercise of their statutory rights. One result of precluding backpay for undocumented workers will be to make authorized workers less confident in asserting those rights.") (internal quotations omitted) (footnote omitted).

153. Dannin, *No Rights Without A Remedy*, *supra* note 120, at 17; see also Berman, *supra* note 108, at 602; Nancy Schiffer, AFL-CIO, *Rights Without Remedies: The Failure of the National Labor Relations Act*, ABA SEC. LAB. & EMP. L., Sept. 10–13, 2008, at 7, <http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/153.pdf> ("The harm to the workers' organizing campaign and their support for their union, as well as the harm to the community and to the general enforcement needs of the Act are repeatedly ignored. . . . [Remedies such as backpay and reinstatement] may 'make whole' the workers directly affected, but they serve no remedial purpose for workers whose union support has been crushed and fail to serve as a deterrent for other employers contemplating similar wrong-doing.").

154. Griffith, *Undocumented Workers*, *supra* note 109, at 631–32.

155. *Id.* at 632.



As a hypothetical, imagine that an employer terminates Sam's employment (an unauthorized employee) after he discussed the employer's overtime and leave policies with John (an authorized employee). Imagine further that this discussion was overheard by two other authorized employees, Jane and Joe. Because the discussion constitutes protected activity, Sam's termination would normally constitute an unlawful unfair labor practice warranting Sam's reinstatement and an award of backpay. But because he was working without authorization, current law bars those remedies. And what then of Jane and Joe, authorized employees who observed or heard of—but were not a part of—Sam and John's discussion? They became aware of both the discussion and the employer's unlawful actions, including the termination, and they would likely think twice before engaging in additional protected activity with their other colleagues out of fear that the employer will repeat the violations with them as the targets. Addressing this chilling effect has been cited as grounds for reinstatement and other remedies. In this example, however, Jane and Joe have not seen such mitigation: the two primary tools in the remedial toolbox for such situations have been eliminated because of *Sam's* unauthorized status. If Jane and Joe are unaware of the legal nuances that make Sam's unauthorized status the reason for the limited remedy, or are simply unaware of his status altogether, they may assume that subsequent violations against even authorized workers such as themselves will result in the same limited relief.

Despite the majority view in *Hoffman*, an argument can be made that remedies such as notice readings and the possibility of compliance hearings serve little use to remedy the chill on the remaining employees or prevent subsequent violations. Here again is an example of the "once-is-enough" argument: even if an employer does not commit a subsequent violation, the harm to Jane, Joe, and other employees who hear of the incident may already have been done. Because Sam was the original target, authorized, protected workers are left with no readily available remedy against their employer's misconduct toward them unless the employer terminates *their* employment or engages in other forms of retaliation. Yet they too experience direct harm from the violation. This lies largely unaddressed under the current schema of analysis for unfair labor practices against unauthorized workers.

Chills and loss of confidence result in self-censoring even before the unauthorized employee is called to account. Authorized employees such as Jane, Joe, and John may limit their protected concerted activities in front of a coworker, such as Sam, whom they

know to be unauthorized—thereby also limiting opportunities for communications with each other. And effectively, Jane, Joe, and John cede the right to exercise their Section 7 rights out of fear that there will be no clear right to a strong remedy for any of them if an unauthorized worker is involved. For Sam, the risk of speaking with fellow employees and consequently exposing his own immigration violations should the employer's attention be focused on their concerted activity may well be too high. The risk is higher when the employer's own risk-reduction calculus leads it to naturally single out Sam should any activity take place among the group, given the limited remedies in play. Self-censoring can also take the form of lower reporting of unfair labor practices by authorized employees. If unauthorized employees abandon or choose not to participate in claims, the remaining authorized employees will lose some of the collective power of their arguments and struggle to show the extent of the employer's violations. In turn, they may then choose not to report at all, deeming it to be a futile exercise without broad support. Because the NLRA is structured as a collective statute, a significant unintended consequence comes from under-enforcement and under-reporting—more so than in statutes permitting a private right of action. Likewise, when employees hesitate to share views on wages, hours, and other terms and conditions of employment, even authorized employees are kept from acquiring the information they need to join together for mutual aid and protection regarding those terms.

#### IV. LEGAL AND PRACTICAL PROBLEMS WITH FOCUSING ON REMEDIES FOR UNAUTHORIZED WORKERS

The legal community has wrestled with the challenge of rebalancing the critical incentives discussed in this Article to no general agreement. Because the proposals to date generally focus on unauthorized workers, the controversy surrounding their treatment and rights has stalled progress on remedying the effect of the violations on the rest of the workforce: the authorized workers and their willingness to exercise their rights. Some of the proposals may also inadvertently undermine the policy underlying the NLRA itself and inadvertently allow opponents of the Act to call into question the integrity of those who administer it. Most of these, unfortunately, focus on unauthorized workers.

This section offers a literature review that analyzes some of the suggested remedial approaches in unauthorized worker cases. It divides them by their general approaches and considers the

implications of each group for impacted authorized employees as well as the integrity and purpose of the NLRA. The following section then offers modest proposals to address the under-recognized harm to authorized employees.

### A. Reform the NLRA

Those who advocate for reforming the NLRA call for Congressional action such as creating more deterrent mechanisms against employer violations. Some also advocate moving to punitive damages, which have been traditionally excluded under the Supreme Court's interpretation of the NLRA.<sup>156</sup> Approximately three years after the passage of the Act, the Supreme Court announced in *Consolidated Edison Co. v. NLRB* that the NLRA authorizes the Board to issue a cease-and-desist order and take other affirmative actions, but that "the power to command affirmative action is remedial, not punitive."<sup>157</sup> The Court's 1944 *Republic Steel Corp. v. NLRB* decision left no doubt: the Board could award backpay because it related directly to addressing the employees' grievances, but the NLRA did not "confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board may be of the opinion that the policies of the Act may be effectuated by such an order."<sup>158</sup>

While I am sympathetic with the desire to expand the scope of remedies available under the Act, I am skeptical of legislative action as an expedient solution. Although it may be a subject for long term advocacy, the taboo on punitive damages and the reality of congressional deadlock makes this, as a practical matter, a non-starter in today's climate. It also stalls consideration on an area of that law that might yield more concrete progress: identifying and remedying the harm an employer's violation of IRCA and the NLRA has on authorized workers and reworking the currently skewed incentives for employer compliance.

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156. E.g., James Meehan, Note, *Undocumented Workers, the National Labor Relations Act, and the Immigration Reform and Control Act: Irreconcilable Differences or a Match Made in Legal Heaven?*, 43 HOFSTRA L. REV. 601, 629–34 (2014).

157. 305 U.S. 197, 236 (1938).

158. 311 U.S. 7, 11–12 (2012).

### B. Rights for Unauthorized Workers

Some scholars and commentators suggest that giving additional rights to unauthorized workers (or highlighting the rights they already have) would change an employer's cost/benefit analysis and incentivize it to follow the law.<sup>159</sup> As Jarod Gonzalez noted, when the employer knows it will not be able to take advantage of unauthorized employees because they might invoke at least minimal rights under the NLRA, it may be less willing to hire them in the first instance and avoid violating both the NLRA and the IRCA.<sup>160</sup> Interviews with workers and those seeking to organize them indicate that when workers of any status are aware of the rights they do have, they may be more willing to speak out to expose violations.<sup>161</sup> Limited rights may also deter the unauthorized employee from violating immigration laws by fraudulently trying to work because fewer employers will be willing to risk violating the IRCA by hiring him in the first place. The approach may be taken even further with, as Michael J. Wishnie urges, reform including legalization and temporary-worker options.<sup>162</sup>

Such proposals seem reasonable to reset incentives for compliance with the law in the abstract. But when considered alongside

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159. *E.g.*, Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 999 (2008); Michael J. Wishnie, *Labor Law After Legalization*, 92 MINN. L. REV. 1446, 1447–48 (2008) (writing in support of immigration reform legislation, including a legalization option and temporary worker status); *see also* Saucedo & Morales, *supra* note 108 at 654–55. I use Professor Gonzalez's formulation as an example for discussion here. Even under current law, unauthorized workers are "employees" under the NLRA and technically have the same rights as their authorized counterparts. *See* 29 U.S.C. § 152(3) (2012); *Agri Processor Co. v. NLRB*, 514 F.3d 1, 5 (D.C. Cir. 2008). However, the phrase "Rights Without Remedies," explained in Catherine L. Fisk & Michael J. Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399, 406 (Laura J. Cooper & Catherine L. Fisk eds., 2005), among others, is particularly apt, questioning the practical value of those "rights."

160. Gonzalez, *supra* note 159 at 999.

161. *See* Leticia M. Saucedo, *Everybody in the Tent: Lessons From the Grassroots About Labor Organizing, Immigrants, and Temporary Worker Policies*, 17 HARV. LATINO L. REV. 65, 77 (2014); Saucedo & Morales, *supra* note 108 at 657. Professors Saucedo and Morales detail the various narratives at work among unauthorized employees, including their firm belief that they lack meaningful legal rights and the looming fear of deportation, and the effect of those narratives on their willingness to exercise their rights under labor and employment laws. *See* Saucedo, *Everybody in the Tent*, *supra*, at 77; Saucedo & Morales, *supra* note 108 at 657.

162. Wishnie, *Labor Law After Legalization*, *supra* note 159, at 1447–48. Wishnie focuses on the benefits to unauthorized workers themselves, rather than motivating employers' compliance with labor law or the effects on authorized workers. *Id.* at 1451. Nevertheless, his suggestions could be seen as the reverse of the proverbial coin: by strengthening the labor rights of unauthorized workers via legalization and other measures, employers would be deterred from violations given that those employees could respond with charges and unionization in the same way as lawful workers.

the extensive political sentiment against increased rights for unauthorized workers, this approach might not be the most immediately productive nor the most helpful for securing the rights of authorized employees. Moreover, to make this idea a realistic possibility, the NLRA remedies must be (1) strong enough to impose a relatively heavy loss on the employer and (2) specific enough to prevent the unauthorized worker from getting a benefit. Even with backpay and reinstatement in the toolkit, scholars have recognized the relative weakness of NLRA remedies.<sup>163</sup> With those options removed and punitive damages long since rejected,<sup>164</sup> the chances of meeting both the first and second requirements are faint.

Nor can the IRCA readily fill the gap. Although employers are forbidden from knowingly employing someone unauthorized to work (and must confirm that a new hire is so permitted) and must verify the individual's identity,<sup>165</sup> the bar to prove an adequate investigation is relatively low.<sup>166</sup> For example, employers might check an applicant's "other document evidencing authorization of employment in the United States" and a driver's license to see if they look real before finalizing the hire.<sup>167</sup> The requirement is also met if the applicant "attest[s]" under threat of perjury that he or she is allowed to work.<sup>168</sup> When these simple steps can fulfill immigration

163. *E.g.*, Correales, *supra* note 10, at 141; Morris, *supra* note 10, at 528; Arlen Spector & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 325 (2008); Summers, *supra* note 10, at 477–78; Weiler, *supra* note 10, at 1791.

164. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 7 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 197 (1938).

165. 8 U.S.C. §§ 1324a(b)(1)(B)–(D) (2012). This is generally done via the I-9 form and related procedures set forth in 8 C.F.R. § 274a.2 (2017).

166. The requirements for an adequate investigation of immigration status permit documentation that simply appears to be genuine, allow for the attestation of status from the potential hire under investigation, and offer a good faith defense for the employer. *See* 8 U.S.C. § 1324a(b)(1)(A)(ii) (2012) (for verification by documents, "[a] person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine"); 8 U.S.C. §§ 1324a(b)(2) (2012) (attestation of employee); 8 U.S.C. §§ 1324a(b)(6) (2012) (good faith defense).

167. 8 U.S.C. §§ 1324a(b)(1)(C)–(D) (2012). Certain documents will prove both identity and eligibility; others must be used in combination. Documents establishing both employment authorization and identity include a United States passport or resident alien card/alien registration card with certain security features, a picture, and personal identifying information. 8 U.S.C. § 1324a(b)(1)(B). Documents showing authorization to work include a social security account number card or "other documentation evidencing authorization of employment in the United States." 8 U.S.C. § 1324a(b)(1)(C). Identity documents include a driver's license or similar document issued for identification by a State with a photograph. 8 U.S.C. § 1324a(b)(1)(D); *see* 8 C.F.R. § 274a.2 (2017) (providing further specifics on the type, nature, and contents of acceptable documentation). The employer's inspection obligation requires it to physically examine the materials to "ensure that the documents presented appear to be genuine and to relate to the individual." 8 C.F.R. 274a.2(b)(ii)(A).

168. 8 U.S.C. § 1324a(b)(2).

law requirements, employers enter the employment relationship without much risk, and know that they can subsequently invoke the good faith affirmative defense to charges.<sup>169</sup> In light of the Board's decision to calculate backpay interest on a compounded daily basis,<sup>170</sup> the pseudo-"immunity" is worth even more to the employer. Unless the IRCA imposes stronger obligations on the employer, it is doubtful that it can help realign the currently reversed incentives to follow the NLRA.<sup>171</sup>

Gonzalez's proposals may, however, have more viability if the General Counsel's injunction initiative is expressly extended to organizing violations where unauthorized workers are employed. As currently implemented, regional field offices can demand a notice-reading by a member of management, union access to employee bulletin boards, and employer production of a list of employee

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169. 8 U.S.C. § 1324a(a)(3) ("A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral."); 8 C.F.R. § 274a.4 (2017). Exacerbating the problem, an employer is still entitled to the good faith defense even if there was a "technical or procedural failure" if that failure occurred in the context of a good faith attempt to comply with the statute. 8 U.S.C. § 1324a(b)(6)(A); *see also* Correales, *supra* note 10, at 140 ("[I]t is important to consider that the good faith defense under IRCA, and the ease with which documents that appear to satisfy the requirements of the INS I-9 forms can be obtained, enable the employer/employee relationship to form without much of a risk to the employer.").

170. *Jackson Hosp. Corp.*, 356 N.L.R.B. 6, 7–8 (2010) *enforcement denied on other grounds*, 647 F.3d 1137 (D.C. Cir. 2011).

171. A step in this direction may be the expanded use of E-Verify, "an Internet-based system that compares information from an employee's Form I-9, Employment Eligibility Verification, to data from U.S. Department of Homeland Security and Social Security Administration records to confirm employment eligibility." *What Is E-Verify?*, U.S. CITIZENSHIP & IMMIG. SERVS., <https://www.uscis.gov/e-verify/what-e-verify> [<https://web.archive.org/web/20171201213235/https://www.uscis.gov/e-verify/what-e-verify>] (last updated July 20, 2017). The system is currently "used nationwide by over 700,000 employers of all sizes." *Id.* Making E-Verify mandatory would slightly heighten the currently low "knowledge" standard for a good-faith defense under the IRCA. If more employers fall within the scope of penalties, they may be disincentivized from hiring unauthorized employees to avoid union activity and the heightened salaries, benefits, and other protections that often come with it. In turn, unfair labor practices involving unauthorized employees may decrease (because fewer of them are employed) and the strategy of employers calling raids on their own facilities to retaliate against workers may carry more risk of scrutiny. But this approach also risks encouraging employers to filter applicants based on national origin and/or ethnicity in violation of anti-discrimination laws. If an employer believes that it will be examined for immigration violations, it may try to dodge administrative complications by simply opting to hire fewer people who physically appear to be of minority origin or indicate their background on employment applications. *See* 8 U.S.C. § 1324b (2012); *U.S. v. Todd Corp.*, 900 F.2d 164, 165 (9th Cir. 1990) (citing H.R. REP. NO. 99-1000, at 87–88 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842).

names and addresses to the union, depending on the specific nature of the employer's violation.<sup>172</sup> They may also seek additional orders requiring the employer to grant the union access to its property and its email/electronic communication systems.<sup>173</sup> This provides at least some counterweight, tilting the scale in favor of employers' compliance with the NLRA for the authorized employees left behind as well as their unauthorized counterparts before the fact. Combined with the option of formal Board settlements that allow for liquidated damages to even unauthorized employees as the cost of avoiding avoid litigation,<sup>174</sup> the initiative may help give some impact to the approach Gonzalez envisions.

### C. Redirecting Backpay

Another approach envisions redirected backpay rather than a punitive fine to leverage the financial disincentive provided by a normal backpay award while avoiding a windfall for an employee unauthorized to work in the first instance.<sup>175</sup> Peter Shapiro suggests taking the amount the offending employer would normally have to pay in backpay and redirecting it to an "alternate recipient" from a list compiled by the Board.<sup>176</sup> In his view, "[u]sing backpay to fund worker organizing in immigrant communities uses the money to promote the workers' collective voice—thereby promoting the well-being of the entire community" while also encouraging the unauthorized employee to report an employer's unfair labor practices "even absent direct private gain."<sup>177</sup>

While appealing to those promoting immigrant rights, this proposal runs contrary to the core of the NLRA and the interests of

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172. See Memorandum from Lafe E. Solomon, Memorandum GC 11-01, *supra* note 98.

173. See Memorandum from Lafe E. Solomon, Memorandum GC 10-07, *supra* note 98, at 1.

174. See NLRB, CASEHANDLING MANUAL PART 1: UNFAIR LABOR PRACTICES §§ 10166.3, 10166.5 (2017), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM-February%202017.pdf>. [<https://web.archive.org/web/20171201213924/https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/CHM-February%202017.pdf>]. The Ninth Circuit has affirmed a formal settlement agreement requiring backpay and reinstatement to employees, and placed the burden on the employer to show that any of those employees was unauthorized and thus ineligible for those remedies. *NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d at 1096, 1099 (9th Cir. 2009). However, even if the employees were unauthorized, the employer still had to adhere to the remainder of the formal settlement, including liquidated damage payments to unauthorized workers as the cost of avoiding litigation (rather than wages earned). *Id.*

175. Peter Shapiro, *Union Shops, Not Border Stops: Updating NLRB Sanctions to Help Organize Immigrant Workers After Hoffman*, 78 GEO. WASH. L. REV. 1069 (2010).

176. *Id.* at 1081–82.

177. *Id.* at 1082.

both authorized and unauthorized employees. Most fundamentally, the essence of the NLRA is to protect the collective rights of employees with their common employer,<sup>178</sup> not between members of a common immigrant community. Moreover, any list prepared by the Board would create an impression of self-interest and partiality from an agency that would itself be evaluating the merits of the allegations against the employer. There are also problems for reshaping incentive structures: unauthorized employees are more likely to be paid a low wage,<sup>179</sup> so the amount of pseudo-backpay for the alternate recipient would also be low—and the impact on the employer even lower. This proposal may even create an incentive for employers to cut wages further for all employees and increase the desirability of committing labor violations, knowing that the lower the wages, the greater practical immunity under labor law. Even if the backpay amount is set at some abstractly determined “fair wage,” it would not capture the benefits garnered by the employer such as decreased costs in training, lower benefit obligations, etc.<sup>180</sup> Finally—but critically—like the other suggestions discussed in this Article, it is unlikely that Shapiro’s suggestions would meet with an enthusiastic reception in the current political climate. Funding an organization dedicated to the unionization rights of immigrant workers may be seen as facilitating more unauthorized employment—the very thing that both the NLRA and the IRCA are trying to avoid. Even though Shapiro notes that the proposed list would be closely vetted to ensure that organizations work for authorized employees,<sup>181</sup> much skepticism is likely to remain and it would be difficult to prove a clear separation between the two over time.

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178. See generally *Wyndham Resort Dev. Corp.*, 356 N.L.R.B. 765 (2011); *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882 (1986), *aff’d sub nom. Prill v NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988).

179. It has been shown that “[u]ndocumented workers earn considerably less than working U.S. citizens. About two-thirds of undocumented workers earn less than twice the minimum wage, compared with only one-third of all workers.” JEFFREY S. PASSEL ET AL., URBAN INST., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (2004), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/1000587-Undocumented-Immigrants-Facts-and-Figures.PDF>; see also Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 500 (noting low wages, long hours, and substandard conditions).

180. These are not insignificant. See Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Employer Costs for Employee Compensation—June 2016 (Sept. 8, 2017), <http://www.bls.gov/news.release/eccec.nr0.htm>. A detailed breakdown of costs by industry, employee type, geographic location, etc. is available in the Tables appended to the Department of Labor’s News Release. *Id.*

181. Shapiro, *supra* note 175, at 1081.



D. *Delegation of Board Authority to Immigration Authorities*

Taking another tack, the perceived weakness of remedies and ban on punitive damages under the NLRA have led Shahid Haque and others to propose delegating the Board's powers to the Immigration and Customs Enforcement department ("ICE"). In this formulation, ICE would impose fines equivalent to backpay or, more attractively to Haque, a fine in an amount equal to the full benefit the employer received from the individual's work.<sup>182</sup>

From a practical perspective, remedies under the IRCA often put a greater emphasis on criminal penalties, higher monetary sanctions, and even loss of the employer's business license than on addressing the actual *harm* caused by the violation of the law.<sup>183</sup> As with all governmental agencies, resources are also a concern. One scholar noted that "[e]ven though ICE is now placing more emphasis on work-site enforcement, it clearly lacks the resources needed to effectively enforce the law against employers who violate it. This deficiency must change in the future. Employers should face stiffer penalties for breaking illegal immigration workplace laws, and the government should actually enforce these laws."<sup>184</sup> If immigration agencies are struggling to enforce their own laws, it is unlikely that they will step up to also enforce the NLRA.

There have been some signs of cooperation between the agencies: ICE has recognized the importance of flexibility in cases of current violations of the NLRA, authorizing the use of prosecutorial discretion where certain mitigating factors are present.<sup>185</sup> As Director Morton explained, the department should consider "whether the [unauthorized alien] is currently cooperating or has cooperated with federal, state, or local law enforcement agencies, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others."<sup>186</sup> A Memorandum of Understanding between the Departments of

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182. Shahid Haque, *Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI-KENT L. REV. 1357, 1380 (2004). These would include benefits such as the cost of protective gear and training that was not provided to unauthorized employees, health care coverage, etc.

183. See 8 C.F.R. § 274a.10 (2017).

184. Gonzalez, *supra* note 159, at 997, 997 nn.77, 81–82 (text and citing scholarship).

185. Memorandum from John Morton, Dir. U.S. Immigration and Customs Enf't, to All Field Office Dirs., All Special Agents in Charge, All Chief Counsel 4 (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

186. *Id.*

Homeland Security and Labor reinforces this approach and recognizes that each law must work together for optimal results.<sup>187</sup> It is unclear how often the discretion will be used, but it points to at least some recognition that employers might have violated the NLRA in dealing with their unauthorized employees, and must be disincentivized from doing so.

The normative implication of Haque's suggestion is more difficult to overcome. His concept essentially admits that the Board cannot—or worse, will not—adequately prevent employers from violating the NLRA when it comes to unauthorized workers and create meaningful consequences for those whose conduct objectively does so. Using ICE to collect money for violations of the NLRA would also redirect the pseudo-backpay away from the labor arena and towards the immigration one,<sup>188</sup> deemphasizing the gravity of the actual NLRA violation for the employer. When requiring labor law to yield to immigration is already a large part of the current problem, it is difficult to see how delegating the application and weight of labor remedies to immigration will improve rather than compound it.

#### E. *Conditional Liability to Combat Employer Windfalls*

Much has been said about windfalls to unauthorized employees via an award of backpay and/or reinstatement, but in the intersection of the IRCA and the NLRA, there is just as much to say about economic windfalls to *employers* that knowingly hire those employees. Both windfalls must be discouraged. As Robert Correales observes, the latter kind of windfall “argue[s] strongly for treating cases involving knowing violators of immigration law differently

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187. Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites 1, (Dec. 7, 2011), <http://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf>. To this end, the Departments agreed that, among other types of coordination, “ICE agrees to refrain from engaging in civil worksite enforcement activities at a worksite that is the subject of an existing DOL investigation of a labor dispute during the pendency of the DOL investigation and any related proceeding.” *Id.* at 2. A labor dispute includes disputes over key aspects of the NLRA, including “the rights to form, join, or assist a labor organization, to participate in collective bargaining or negotiation, and to engage in protected concerted activities for mutual aid or protection” and retaliation for exercising those rights. *Id.* at 1–2.

188. This approach may also doubly threaten the unauthorized employee in the case: not only would he be denied backpay, but ICE would use that money to prosecute him and others like him. See Shapiro, *supra* note 175 at 1079. This may result in an even lower rate of reporting for employer unfair labor practices under the NLRA.

from those involving employers who are truly unaware of their employees' immigration status."<sup>189</sup> This approach is premised on the claim that *Hoffman* improperly shifts the IRCA's focus by failing to directly address the core problem: "unscrupulous employers who hire undocumented workers in violation of IRCA and who then discharge them in violation of the NLRA when they act in concert for mutual aid and protection, or attempt to form or join labor unions, to play both statutes against each other and enjoy the windfall."<sup>190</sup> In this view, the currently misaligned incentives justify backpay for knowing unlawful hires/violations—even more so when they would also "help to avoid the creation of unfair competitive advantages for violators over law-abiding businesses."<sup>191</sup>

A "conditional foreclosure approach" with a "disqualifying condition feature" tries to reach some of these problems.<sup>192</sup> Perhaps because he reads the *Hoffman* decision as implicitly relying on the fact that the unauthorized worker violated the IRCA by engaging in fraudulent conduct to gain employment,<sup>193</sup> Senn's formulation would tell employers that if they are sued by an undocumented worker under federal employment law, (a) they are liable for front and backpay remedies if the worker "obtained employment free of fraudulent conduct because you did not comply with your IRCA obligations" but (b) "that worker cannot recover back pay and front pay remedies if he or she resorted to obtaining employment via fraudulent conduct because you did comply with your IRCA obligations."<sup>194</sup>

Conditional liability tries to simultaneously create an incentive and a deterrent furthering compliance with the law for workers and unauthorized employees.<sup>195</sup> However, a practical question remains. What is to be done in cases where both employer and applicant engaged in knowing fraudulent conduct (i.e., had a tacit agreement to enter the employment relationship despite the known status of the applicant)? Too often, both parties know precisely what they are doing. An employer might do a cursory check of documents and determine they "appear" to be legitimate (thereby meeting the

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189. Correales, *supra* note 10, at 139.

190. *Id.*

191. *Id.* at 140.

192. Senn, *supra* note 76, at 161–63. Senn's work addresses the federal employment law context, however, the structure may be translated into the federal labor arena (with the exception of front pay, not available under the NLRA).

193. *Id.* at 159–61.

194. *Id.* at 162.

195. *Id.* at 163. A variation presented involves an amendment to the IRCA to "prevent knowing violators from enjoying the windfall generated by their illicit conduct." Correales, *supra* note 10, at 160.

minimum IRCA verification requirements) but know all the same that they are hiring an unauthorized worker. This stems from the fact that forged identity papers are rife and the difficulties in proving the requisite knowledge for an IRCA violation are many. In these cases, “with a wink and a nod, employers like Hoffman will accept practically any form of immigration documentation in order to hire the low-wage laborers they need to run their businesses profitably.”<sup>196</sup> This type of reform proposal, therefore, faces the challenge of heightened intent in cases where it is nearly impossible to prove. As a result, employers may well continue to escape at least some percentage of liability under the NLRA and continue to stall progress to restore the status quo with respect to the employees who, though not active participants, are the collateral damage of continuing violations.

#### V. REMEDYING THE REMEDIES FOR AUTHORIZED WORKERS

In a post-*Hoffman* memorandum, the Office of the General Counsel placed great emphasis on a formal settlement<sup>197</sup> in cases of employers that knowingly hired unauthorized workers and then used that status to retaliate if they exercised their fundamental rights under the NLRA.<sup>198</sup> The employer’s official admission of wrongdoing in this “meaningful remedy,” along with notice readings, was thought to be particularly appropriate given the need to reassure employees that their rights will be protected and the desire to further a general policy of using formal settlements in cases “where there is a likelihood of recurrence or extension of the instant unfair labor practices.”<sup>199</sup> This concern with the negative effect of the employer’s violation on the remaining employees and its damper on their subsequent exercise of their statutory rights rightly suggests that the problem runs far beyond the individual unauthorized worker and the single employer violation.

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196. Cameron, *supra* note 12, at 33.

197. See Memorandum from Arthur Rosenfeld, Memorandum GC 02-06, *supra* note 84. Formal settlements dispose of all allegations of the complaint. The procedural and substantive facts of the case and unfair labor practice in violation of the NLRA are set out, along with other necessary facts to support the ultimate Board order. Critically, unless there is a provision for court enforcement, the formal settlement also includes an admission that the respondent committed the alleged violations. A formal hearing and further proceedings are waived. NLRB, CASEHANDLING MANUAL PART 1, *supra* note 174, § 10166.3.

198. For an explanation on how a formal settlement with damages could be achieved without violations of IRCA or the *Hoffman* doctrine, see *NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1099 (9th Cir. 2009).

199. Memorandum from Arthur Rosenfeld, Memorandum GC 02-06, *supra* note 84, at 5 (citing NLRB, CASEHANDLING MANUAL PART 1, *supra* note 174, § 10164.3).

As discussed above, the current political environment and the judicially imposed limitations on the Board's authority, combined, have made many of the existing proposals to solve the problems of adequate remedial action in cases of unauthorized workers simply unfeasible and, to many, palpably unpalatable. Moreover, they do not fully recognize the impact of inadequately-remedied unfair labor practices on authorized employees. This Article advocates a potentially less polarizing approach that may do some good for the authorized workers, even though it does not resolve the remedial problems for unauthorized workers themselves. Because of the failures of the backpay and reinstatement remedies, the harms that authorized employees experience are perhaps equally poignant and cutting. They are severe enough to thwart the present and future protected concerted activity of authorized employees as well as any confidence in their statutory rights that they may have had before the employer's unfair labor practices. It is, therefore, even more important to invoke the most effective remedies possible and use them to their fullest extent, especially in favor of those whose harm often goes unremarked upon because it is often invisible.

It is well established that the Board must tailor its remedies to the violations in each case.<sup>200</sup> Its remedial goal is to reaffirm to employees their Section 7 rights and to reassure them that their employer will respect those rights in the future.<sup>201</sup> The Board therefore has the authority to craft appropriate remedies even when no party has raised remedial challenges to the administrative law judge's recommended remedies.<sup>202</sup> Indeed, in a 2015 memorandum, the General Counsel announced his intention to explore requests for more appropriate remedies in cases involving unauthorized employees to address the "potential limitations on backpay and reinstatement that may arise in compliance."<sup>203</sup>

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200. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938); *Ishikawa Gasket Am., Inc.*, 337 N.L.R.B. 175, 176 (2001) (the Board may impose additional remedies "where required by the particular circumstances of a case").

201. See, e.g., *Guardsmark, LLC*, 344 N.L.R.B. 809, 812 (2005), *enforced in relevant part*, 475 F.3d 369 (D.C. Cir. 2007);

202. See *WestPac Elec., Inc.*, 321 N.L.R.B. 1322, 1322 (1996); *Care Incentives, Inc.*, 321 N.L.R.B. 144, 144 n.3 (1996);

203. Memorandum from Richard F. Griffin, Jr. Gen. Counsel, NLRB, to Office of the General Counsel to All Reg'l Managers, Officers-in-Charge, and Resident Officers, Memorandum GC 15-03, 2-3 (Feb. 27, 2015), <https://apps.nlr.gov/link/document.aspx/09031d4581b1d428> (considering notice reading, publication of the notice in newspapers, training for supervisors, managers, and employees on the NLRA, bargaining orders, access to information for the union, reimbursement of bargaining expenses, and consequential damages). The General Counsel's memorandum also considers the value of formal settlements to help remedy the harm to unauthorized workers. See *id.* It does not, however, offer details concerning ways to target these remedies to the harmed authorized employees.

Taking this admirable goal a step further, in recent years, the Board has revived several remedies and expanded on others that may be particularly appropriate to protect authorized employees in cases involving unauthorized workers. Having identified some of the challenges from existing remedial proposals in this area, this section offers modest suggestions using those revived remedies. In so doing, it limits itself to tailoring those remedies to address the harm done to authorized employees, particularly their mental confidence and willingness to exercise their rights as protected under Section 7 of the NLRA, while leaving for another day the debates surrounding unauthorized workers. It begins with a consideration of the expanded notice reading, mailing and explanation of rights. It will then discuss the publication of the board notice in local newspapers and concludes with the possibility of visitation to ensure continued compliance with specific Board orders. These measures, already within the Board's arsenal, can be invoked in unauthorized worker cases as appropriate remedies that take some small steps towards restoring the impacted authorized workers currently left with little meaningful evidence of the sanctity of their own rights.

A. *Expanded Notice Reading, Mailing, and Explanation of Rights*

In *Pacific Beach Hotel*, the Board expanded on its usual notice remedies by requiring an extended period of notice posting and mailing, and expanded provisions for notice reading.<sup>204</sup> It also created an Explanation of Rights document that “set[ ] out the employees’ core rights under the Act, coupled with clear general examples that [were] specifically relevant to the unfair labor practices found in this case” to “fully inform employees, supervisors, and managers of the employees’ rights under the Act. Such a document will help to undo the likely impact of the violations on employees and help remedy the chilling effect of the Respondents’ conduct . . . when, as here, the rights of so many employees have been broadly suppressed for an extended period of time and in numerous ways.”<sup>205</sup> The Board ordered the employer to post the notice and Explanation of Rights in its facility for three years (as opposed to the standard sixty days), provide them to all new employees, mail

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204. HTH Corp., 361 N.L.R.B. 709, 714, 716 (2014).

205. *Id.* at 715–16.

them to the homes of all current and former employees and managers for private review free from potential surveillance,<sup>206</sup> and give them to all management personnel to impress upon them the employer's violations and responsibilities under the NLRA.<sup>207</sup> It further required the employer to retain a copy of the notice and Explanation of Rights provided to each individual in its personnel records along with receipts, proofs of mailing, and documentation of distribution for three years.<sup>208</sup>

Such an extensive effort reflects the need to mitigate the chilling "lore of the shop" and legacy of coercion concerning an employer's labor violations.<sup>209</sup> When an employer commits unfair labor practices, particularly pervasive ones that live on in employees' memories in a way that "erode[s] [their] willingness to exercise their rights years after the actual violations,"<sup>210</sup> that embedded fear is as much of a harm as the lost wages after a discriminatory or retaliatory discharge. Indeed, that fear may be even worse, because it represents an ongoing harm passed from coworker to coworker as part of workplace culture, even after the originally targeted employees are gone.<sup>211</sup> With the Explanation of Rights and the extended posting and notice requirements, the Board has recognized the importance of restoring the confidence of employees who

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206. Notice mailing is an established part of the Board's remedial repertoire in cases where posting is insufficient to dispel the effect of unfair labor practices, particularly when a labor force is decentralized, irregular, when there has been surveillance of employee activity, or when affected individuals may no longer be employed at the facility. *See, e.g.,* Sambo's Rest., Inc., 247 N.L.R.B. 777, 778 n.6 (1980), *enforced*, 641 F.2d 794 (9th Cir. 1981) (enforcing Board's remedies after employer failed to file motion for reconsideration to Board); J.P. Stevens & Co., 157 N.L.R.B. 869, 878 (1966), *enforced*, 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (1967). As the Board explained in *Pacific Beach Hotel*, "[c]urrent and newly-hired employees, as well as supervisors and managers, will be afforded the opportunity to privately review the documents free from the Respondents' potential scrutiny for as long as necessary to understand their contents and as often as necessary to reinforce their rights in the future. Providing employees with this information creates an immediate assurance of a workplace culture in which their rights will be respected, and encourages an expectation of compliance with the Act." *HTH Corp.*, 361 N.L.R.B. at 715.

207. *HTH Corp.*, 361 N.L.R.B. at 714–15.

208. *Id.* at 715.

209. *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978).

210. *HTH Corp.*, 361 N.L.R.B. at 714 (citing cases).

211. *Id.* at 713–15. As the Board explained,

When new hires learn of the employer's prior unlawful activity, particularly in cases involving a discriminatory discharge, they are likely to conclude that they are no less expendable than their predecessors. . . . As in those cases, the Respondents have sent a clear message that not only will they refuse to abide by the law, but they will take adverse action against those employees who exercise their rights.

*Id.* at \*26–27 (citing *Intersweet, Inc.*, 321 N.L.R.B. 1, 19 (1996), *enforced*, 125 F.3d 1064, 1070 (7th Cir. 1997)).

are left behind and strengthening their understanding of their rights.

An Explanation of Rights and a tailored variation of the extended mailing and posting remedies described above offer several advantages in restoring authorized employees to the status quo ex ante. Reinstatement of union supporters has been recognized as a way to solidify the right of organization.<sup>212</sup> This is due at least in part to the educating effect of those activists, particularly in the early stages of organizing.<sup>213</sup> In cases involving unauthorized workers ineligible for reinstatement, a workplace loses the voices of those who are willing to exercise their statutory right to engage in collective action. Without those voices, the lore of the shop and fear that taking collective action will result in unlawful adverse ramifications for the remaining authorized employees—at little cost to the employer—increases. Authorized workers see that there has been little to no direct remedy restoring their coworkers and will likely suspect that the same fate awaits them should they choose to act. When, as is often the case, employees may not even know if their coworkers are authorized or not, the risk increases. Inversely, willingness to engage in collective action decreases, as does confidence that the Board will effectively protect the rights of any employee. A tailored Explanation of Rights mailing to the remaining employees at the facility, along with the notice, offers a way to combat the lore of the shop and the harm to authorized workers, particularly their decreased mental confidence in exercising their collective rights and reporting employer violations.<sup>214</sup>

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212. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 195 (1941).

213. To that end, the Office of the General Counsel routinely seeks reinstatement in all cases of unlawful discharge during union organizing under Section 10(j)'s injunctive power. See Memorandum from Lafe E. Solomon, Memorandum GC 11-01, *supra* note 98, at 5.

214. Indeed, although the Board's policy weighs heavily in favor of reinstatement wherever possible, the expanded notice mailing/posting and use of the Explanation of Rights may be even more effective than reinstatement in some cases. Nancy Schiffer astutely identifies the underlying problem:

The harm to the workers' organizing campaign and their support for their union, as well as the harm to the community and to the general enforcement needs of the Act are repeatedly ignored. . . . [Remedies such as backpay and reinstatement] may "make whole" the workers directly affected, but they serve no remedial purpose for workers whose union support has been crushed and fail to serve as a deterrent for other employers contemplating similar wrong-doing.

Schiffer, *supra* note 153, at 8. There is also the additional problem of discharge or employee turnover following reinstatement, frequently because the reinstated employee has experienced subsequent mistreatment. As Paul Weiler points out, "[a]n employer that is sufficiently antiunion to break the law by firing a union supporter is also likely to feel quite vindictive when forced to take the employee back, and may well start looking for an excuse to get rid of him again." Weiler, *supra* note 10, at 1791; see also RICHARD D. KAHLBERG &



Application of an expanded notice reading further recognizes the role supervisors have in an employer's compliance with the Act. It also recognizes the likelihood that, as direct contact points between employees and management, supervisors likely have some measure of culpability in the unfair labor practices. Requiring supervisor and managerial attendance at public notice reading sessions conveys a message to the observing authorized employees that "supervisors are just as responsible as upper management for adhering to the law . . . [and] exposes the supervisors to information concerning their own substantive obligations under the Act."<sup>215</sup>

### B. *Publication of the Board Notice in Local Newspapers*

In addition to the standard posting in the employer's facility, the Board has, at times, ordered a respondent to publish the notice detailing the nature of its violations in multiple publications of general circulation in the area, such as newspapers, magazines, or circulars.<sup>216</sup> This remedy is well within the Board's authority under Section 10(c) of the NLRA;<sup>217</sup> it is contemplated in contexts where the violations are "flagrant and repeated."<sup>218</sup> In such situations, "the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in a warming wind of information and, more important, reassurance."<sup>219</sup> Notice publication in local newspapers can "better reach all those affected by

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MOSHE Z. MARVIT, WHY LABOR ORGANIZING SHOULD BE A CIVIL RIGHT 40, 124 n.47 (2012) (citing Thomas Geoghegan for the proposition that 80% of employees who are reinstated will be fired again within one year); Warren H. Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357, 359-61 (1981) (approximately 87% of reinstated employees stayed left their offending employers within less than one year, and 65% of those cited unfair treatment as the reason for their departure); Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 29-31, 29 nn.138-41 (1988) (30% of reinstated employees in a 1962-64 study were working at their employer two years after reinstatement; 83% of reinstated employees in a 1971-72 study left within 1 year after reinstatement and only 11% remained after the end of 2 years).

215. *HTH Corp.*, 361 N.L.R.B. at 716; see also *Domsey Trading Corp.*, 310 N.L.R.B. 777, 780 (1993), *enforced* 16 F.3d 517 (2d Cir. 1994) (requiring manager who had committed unfair labor practices to be present when notice is read to employees).

216. See, e.g., *HTH Corp.*, 361 N.L.R.B. at 715; *Fieldcrest Cannon, Inc.*, 318 N.L.R.B. 470, 473 (1995), *enforced in relevant part*, 97 F.3d 65 (4th Cir. 1996); *Three Sisters Sportswear Co.*, 312 N.L.R.B. 853, 854 (1993), *enforced mem.*, 55 F.3d 684 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1093 (1996); *Monfort of Colorado, Inc.*, 298 N.L.R.B. 73, 88 (1990); *Monfort of Colorado, Inc.*, 284 N.L.R.B. 1429, 1479 (1987).

217. *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

218. *HTH Corp.*, 361 N.L.R.B. at 715.

219. *Union Nacional de Trabajadores*, 540 F.2d at 12 (quoting *J. P. Stevens Co. v. NLRB*, 417 F.2d 533, 538-40 (4th Cir. 1969)).

the Respondents' unfair labor practices, particularly former employees for whom the Respondents do not have current mailing information, as well as future employees in the [industry]."<sup>220</sup> These concerns are also relevant in cases where affected employees do not report to a single job site.

Although a case involving unauthorized workers may not involve repeated violations, the employer's conduct may well be sufficiently flagrant when viewed in light of the resultant harm, particularly when the conduct violates both the IRCA and the NLRA. It also brings the employer's violations into the open when, because of the unauthorized status of some employees, they may otherwise remain buried. By reaching former employees and informing others who may be unreachable or in an impermanent residence, the publication remedy reinforces and supports the notice mailing goals discussed above. Moreover, it helps counter the chill to the free exercise of rights experienced by authorized employees after the violation, thereby helping to restore the status quo ex ante to the employer's violation.

### C. Visitation

Visitation allows an appointed Board agent to enter an employer's facility for a defined length of time and for the limited purpose of determining whether the employer is complying with the Board's remedial orders. Particularly when the remedy ordered covers an extended period of time, requires intricate recordkeeping, or has numerous components that require monitoring, visitation helps ensure the employer's continual compliance and "relieve[s] employees of . . . a watchdog role . . . a factor . . . particularly important in reducing the risk of retaliation against them and in restoring their confidence in their statutory rights."<sup>221</sup>

Although it has rejected standard or broad visitation clauses, the Board will consider narrowly tailored visitation on a case-by-case basis "when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance" and "it appears possible that the respondent may not cooperate in

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220. *HTH Corp.*, 361 N.L.R.B. at 715; see also *Local 3, IBEW (N. Telecom, Inc.)*, 265 N.L.R.B. 213, 219 (1982), *enforced*, 730 F.2d 870, 880–81 (2d Cir. 1984) (citing cases).

221. *HTH Corp.*, 361 N.L.R.B. at 717 (ordering visitation for a period of 3 years for the limited purpose of determining the employer's compliance with posting, distribution, and mailing requirements, and requiring the employer to maintain and make available for inspection proofs of mailing, receipts, sign-in sheets connected to its notice reading, mailing, and related remedial obligations).

providing relevant evidence unless given specific, sanction-backed directions to do so.”<sup>222</sup> Visitation is not a search for future violations or the monitoring of general compliance; rather, when granted it is tailored in time and scope to the specific remedies that require ongoing monitoring.<sup>223</sup>

Use of the tailored visitation remedy in cases involving unauthorized workers would allow the Board to confirm that the employer has complied with any appropriate remedies, including extended notice mailing and publication obligations. This is especially salient when one considers that the workers in these cases are unlikely to report non-compliance, particularly if they are uncertain about the relief and support the Board can offer them. Visitation therefore supports the remedies discussed above, eases the reporting burden on the authorized workers left behind, and reassures them that they have not been forgotten: their rights will be protected and repeated unlawful behavior in violation of the Board’s Order will not be tolerated.

#### CONCLUSION

Incentivizing compliance with the law is perhaps one of the most foundational goals of the legal system. Yet when two statutes, at least four interested parties, and much emotion come together, the task is no small challenge. The current remedial structure under the *Hoffman* doctrine leaves employers tempted to violate the NLRA and reap the financial windfalls by committing unfair labor practices and hiring unauthorized employees, a certain reversal of the intended outcome. As explained by the Board itself, the consequences are grim for creating effective law.<sup>224</sup> But realigning those incentives must also consider the thus far underexplored effects of violations of the NLRA on the authorized workers in a facility who observe the employer’s conduct towards unauthorized workers pass with weaker-than-usual consequences. The chill on the exercise of their protected rights, along with the erosion of the critical collective unity that the statute encourages, means that fully realizing the purpose of the law requires additional remedies to restore their

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222. Cherokee Marine Terminal, 287 NLRB 1080, 1083 n.14 (1988); see also *El Mundo Corp.*, 301 N.L.R.B. 351 (1991); 299 Lincoln St., Inc., 292 N.L.R.B. 172, 175 (1988); *Hilton Inn N.*, 279 N.L.R.B. 45 (1986), *enforced*, 817 F.2d 391 (6th Cir. 1987).

223. *HTH Corp.*, 361 N.L.R.B. at 717.

224. See *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 376, 380 (2011) (Chairman Liebman and Member Pearce, concurring), *aff’d in part, remanded in part sub nom. Palma v. NLRB*, 723 F.3d 176, 187 (2d Cir. 2013).

mental status quo ex ante to the violation. The application of additional appropriate remedies that this Article suggests, conceived of as restorative measures to support authorized workers, may help move at least a step towards that goal.