# WORKING BUT NOT "AVAILABLE TO WORK": RECONCILING THE RIGHTS OF UNDOCUMENTED LABORERS WITH THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

## I. INTRODUCTION

Prior to the enactment of the Immigration Reform and Control Act of 1986 (IRCA), federal courts generally held that labor laws protected undocumented workers, and that these laborers could receive benefits if they were terminated or injured in the workplace.[1] The Supreme Court's decision in *Sure-tan v. NLRB*,[2] which interpreted the National Labor Relations Act (NLRA) to cover undocumented workers who had been lawfully terminated from their jobs, led lower courts to extend labor rights to undocumented workers under the Fair Labor Standards Act (FLSA) and Title VII of the Civil Rights Act.[3] By analogizing the public policy concerns and the backpay provisions of the FLSA and Title VII to similar considerations and language in the NLRA, many appellate courts concluded that immigration status is irrelevant in cases involving employer violations of workers' rights.[4] In addition to holding that these labor laws cover undocumented workers, the courts often allowed such laborers to sue in tort for lost wages and granted workers compensation and unemployment benefits as long as the courts found no serious conflict with the wording of the applicable state statutes.[5] However, a few jurisdictions, while acknowledging that labor laws protect undocumented workers, followed the Supreme Court's lead in *Sure-tan* and severely limited available remedies.[6]

1. Sure-tan v. NLRB, 467 U.S. 883 (1984); Alvarez v. Sanchez, 482 N.Y.S.2d 184 (N.Y. App. Div. 1984); Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983), *cert. denied*, 464 U.S. 850 (1984); Cenvill Dev. Corp. v. Candelo, 478 So. 2d 1168 (Fla. Dist. 1985).

2. 467 U.S. 883 (1984).

3. *See Alvarez*, 482 N.Y.S.2d 184; Rios v. Local 638, 860 F.2d 1168 (2d Cir. 1988); EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).

4. *See, e.g.*, Bevles Co. v. Local 986, 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 484 U.S. 985 (1987); Local 512 v. NLRB, 795 F.2d 705 (9th Cir. 1986).

5. *See Cenvill Dev. Corp.*, 478 So. 2d 1168.

6. *See* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992).

This Comment focuses on how the enactment of IRCA, which included sanction provisions to penalize employers for hiring undocumented workers,[7] will alter the federal courts' position on the rights of these workers. Part I examines the purposes of the NLRA, FLSA, and Title VII and the reasons that some federal courts have held that prior to 1986, these statutes protected undocumented workers. Part II discusses how courts and legal commentators have responded to the labor claims brought by such workers after 1986 and proposes a more individualized approach that balances the goals of the labor laws with the requirements of IRCA. Part III details the way in which federal courts dealt with undocumented worker entitlements and tort actions for lost wages before Congress enacted IRCA. Lastly, Part IV evaluates the few administrative and district court decisions that involve post-IRCA claims and proposes an effective way of considering these claims without violating IRCA.

This Comment proposes that the enactment of IRCA should have no effect on the Supreme Court's holding in *Sure-tan* that the NLRA protects undocumented workers. This Comment also adopts the practice of the lower federal courts of analogizing the FLSA and Title VII to *Sure-tan*, thereby finding that undocumented workers are also protected under these Acts. In addition, because this Comment recognizes undocumented workers as "employees" within the meaning of the labor laws, it considers the possible benefits available to these workers under workers compensation and unemployment compensation laws, and examines the possibility of bringing tort claims for lost wages. However, deciding that these workers are "employees" within the meaning of the labor laws is not significant if, as in *Sure-tan*, the remedies traditionally awarded to the victims of labor law violations are unavailable to such employees; thus, this Comment also addresses the question of remedies.

Although most commentators and many courts have treated remedies for labor law violations and other employee entitlements as a bundle of benefits that should be either entirely available or completely denied to undocumented workers,[8] I assert that there can be no such blanket response. Instead, I suggest that because the language of the relevant Acts and the traditional remedies for violations of these Acts (or benefits for disability or termination) vary significantly, any workable solution must ad-

7. 8 U.S.C. § 1324(a) (1986).

8. *See* Albert Kutchins & Kate Tweedy, *No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers*, 5 INDUS. REL. L.J. 339, 341-42 (1983); Susan Charnesky, *Protection for Undocumented Workers Under the FLSA; An Evaluation in Light of IRCA*, 25 SAN DIEGO L. REV. 379 (1988).

dress the Acts individually. More specifically, I propose that in order to accommodate IRCA, courts must severely limit the available remedies for employer violations of the NLRA. Nevertheless, because the language and remedies of the FLSA differ from those of the NLRA, I propose that courts should grant undocumented workers the same backpay awards granted to authorized employees under the FLSA. Although I conclude that courts cannot provide traditional Title VII remedies and unemployment compensation to undocumented workers, I argue that workers compensation benefits and personal injury damages do not present the same conflicts, and, therefore, should be granted to undocumented workers.

## II. BACKGROUND SUMMARY

Before Congress enacted IRCA, the legislature had not specifically addressed the relationship between undocumented workers and their employers. Inferring from this that Congress did not intend to make such a relationship illegal, the Supreme Court held in *Sure-tan* that the NLRA protects undocumented workers from wrongful termination. The Supreme Court reasoned that the policy embedded in the two Acts (NLRA and the Immigration and Nationality Act (INA)) did not conflict because Congress intended for INA to preserve jobs for American workers, while enforcement of the NLRA with respect to undocumented workers would decrease the benefit to employers of hiring such workers.[9] Despite upholding the National Labor Relation Board's (NLRB) decision that the NLRA protects undocumented workers, the Court denied reinstatement and backpay to the plaintiffs. The dispositive fact was that the plaintiffs had left the country and were not available for work as required by the NLRA.[10] After *Sure-tan* federal courts began applying the Supreme Court's reasoning to claims brought by undocumented workers under FLSA and Title VII. Federal courts applied this reasoning because backpay provisions reflected similar policy considerations and contained language similar to that in the NLRA. However, the circuit courts have interpreted *Sure-tan* differently. Some circuit courts assert that although the *Sure-tan* Court ultimately denied reinstatement to the plaintiffs because of their "unavailability," undocumented workers who remain in the United States can be reinstated without encouraging illegal immigration.[11] Other circuit courts disagree insisting that the Supreme Court had left no such "back door" provision

9. *Sure-tan*, 467 U.S. at 892.
10. *Id.* at 903.
11. *See Bevles*, 791 F.2d at 1393; *Local 512*, 795 F.2d at 719.

open.[12] Like the Court in *Sure-tan*, these courts recognize that the labor laws protect undocumented workers; yet they suggest that fired workers do not suffer a legal harm because they do not have a right to work in the United States.[13]

Whether undocumented workers present in the United States are entitled to reinstatement was a question the Supreme Court had not yet resolved when a new issue surfaced. The *Sure-tan* Court's holding was partly based on the fact that Congress had not passed a law restricting the employment of undocumented workers—Congress enacted IRCA in 1986. Commentators feared that upon enactment of IRCA, the Court would change its previous position protecting the rights of undocumented workers.[14]

To date, a post-IRCA claim has not reached the Supreme Court. However, the NLRB and a few district courts have decided cases based on violations that occurred after IRCA's enactment.[15] In addition, appellate courts have commented on the effects that IRCA would have on the claims of undocumented workers. Meanwhile, the federal courts disagree on the implications of IRCA. Some insist that IRCA should have no effect, since enforcing the labor laws still reduces the desirability of hiring undocumented workers. Other courts contend that IRCA makes the unauthorized worker/employer relationship unlawful, thereby exempting undocumented workers from the protection of the labor laws.

The enactment of IRCA has spawned questions about the legality of other entitlements for undocumented workers as well. For example, prior to IRCA, undocumented workers often received workers compensation and were entitled to sue in tort for lost wages.[16] Although case law interpreting IRCA is sparse, commentators suggest that the requirement in many states that recipients of workers compensation and unemployment benefits be available for work might conflict with IRCA.[17] In contrast, tort actions that have come before the courts since 1986 indicate a consistent pattern of allowing an unauthorized worker to calcu-

12. *See Del Rey Tortilleria*, 976 F.2d at 1115.

13. *Id.* at 1121.

14. *See* Kutchins & Tweedy, *supra* note 8, at 341-42; *see also* Daniel R. Fjelstad, *The National Labor Relations Act and Undocumented Workers: Local 512 v. NLRB After the Immigration Reform and Control Act of 1986*, 62 WASH. L. REV. 595 (1987).

15. *See* Breakfast Productions, Inc. v. Local 3, 1989 N.L.R.B. LEXIS 177, 131 L.R.R.M. 1150; EEOC v. Tortilleria "La Mejor", 758 F. Supp. 585 (E.D.C.A. 1991).

16. *Cenvill Dev. Corp.*, 478 So.2d 1168; Hernandez v. Rajaan, 841 F.2d 582 (5th Cir. 1988).

17. *See, e.g.*, Mark A. Miele, *Illegal Aliens and Workers' Compensation: The Aftermath of Sure-tan and IRCA*, 7 HOFSTRA LAB. L.J. 393 (1990).

late lost wages based on salary earned while unlawfully employed.[18]

## III. UNDOCUMENTED WORKERS' RIGHTS—AVAILABLE REMEDIES FOLLOWING LABOR LAW VIOLATIONS

### A. *Prior to IRCA*

#### 1. *Under the NLRA*

In 1935, Congress enacted the NLRA[19] in order to regulate labor practices that affect the collective bargaining process. The NLRA prohibits employers from interfering with an employee's right to participate in union activity by firing, or threatening to fire, the employee. Additionally, Congress created the NLRB to evaluate when an employer has violated this provision. Further, the NLRA protects "any employee" not excluded on the specific list of exempted workers.[20] However, the NLRA also requires that the NLRB award remedies only to employees that are available to work during the period following their wrongful termination.[21]

Prior to IRCA's enactment, the Court in *Sure-tan* concluded that the NLRA definition of "employee" did not exempt undocumented workers. The Court further concluded that the legislature intended for the NLRA to protect undocumented workers.[22] Moreover, the Court reasoned that treating such workers as employees under the NLRA was consistent with the NLRA's purpose of promoting the collective-bargaining process. It stated that the "[acceptance] by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally authorized workers; and employment of undocumented workers under such conditions can diminish the effectiveness of labor unions."[23] Since the Court found nothing in the INA to suggest that the legislature intended to make the employment of undocumented workers illegal, the Court determined that no conflict exists between the INA and the NLRA.[24]

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18. *See, e.g.*, Barros v. E.W. Bliss Co., No. 91-12633-Z, 1993 U.S. Dist. LEXIS 4015 (Mass. Dist. Ct. Mar. 25, 1993).

19. 29 U.S.C. § 151 (1935).

20. *Id.* § 152(3). The Act exempts agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. *Id.*

21. *Id.* § 152.

22. *Sure-tan*, 467 U.S. at 891.

23. *Id.* at 892 (quoting De Canas v. Bica, 424 U.S. 351, 356-57 (1976)).

24. *Id.* ("Counterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented workers and the mandate of the Immigration and Nationality Act (INA).") *Id.*

In *Sure-tan*, the president of the defendant corporation sent a letter to the Immigration and Naturalization Service (INS) asking the agency to investigate the immigration status of a group of employees who had voted to unionize.[25] Following an INS inquiry, five of the employees left the country to avoid deportation proceedings, but later filed claims against Sure-tan for unfair labor practices.[26] Despite its decision that the undocumented employees were protected by the NLRA, the Court reversed the Court of Appeal's modification of the NLRB's remedial order, holding that because the workers had left the country, they were no longer available to work as required by the statute.[27]

Furthermore, the Supreme Court held that remedies can be awarded only in cases where the employee has been threatened, but not yet terminated.[28] The Court stated that ordering reinstatement of the fired employees would conflict with the purposes of the INA by encouraging undocumented workers to recross the border illegally.[29] In addition, the Court rejected the Seventh Circuit's creation of a minimum backpay award for terminated undocumented workers.[30] The Circuit Court substituted the minimum backpay award for traditionally computed backpay because the employees were never "available to work"; thus, the court could not isolate the period of time that the workers would have remained employed had they not been terminated unlawfully.[31] However, the Supreme Court criticized the arbitrariness of a minimum backpay award insisting that "[i]t remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of unfair labor practices."[32] Although the Supreme Court recognized NLRA protection for undocumented workers, the practical benefits to the employee plaintiffs were minimal.

Several circuits interpret the *Sure-tan* decision to be limited to undocumented workers who have left the country. In both *Bevles* and *Local 512*, the Court of Appeal for the Ninth Circuit awarded reinstatement and backpay to undocumented workers holding that the Supreme Court's remedial limitation did not apply because the workers had not been subject to deportation proceedings.[33] The Ninth Circuit court stated that the policy reason

25. *Id.* at 887.
26. *Id.*
27. *Id.* at 898.
28. *Id.* at 903.
29. *Id.*
30. *Id.* at 901.
31. *Id.*
32. *Id.* at 900 (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1991)).
33. *Bevles*, 791 F.2d at 1393; *Local 512*, 795 F.2d at 708.

for the Court's decision in *Sure-tan*—to avoid encouraging illegal immigration—lacked significance in these two cases because the workers were already present in the country and would not violate any additional laws by returning to work.[34]

Other circuit courts faced with similar cases refused to draw a distinction between undocumented workers who had returned to their countries and those workers who still lived in the United States.[35] The court in *Del Rey Tortilleria* reasoned that since the workers have no legal right to enter the country in the first place, they have not been harmed by being fired.[36] Because the NLRA provides for remedial compensation rather than punitive damages, the plaintiffs were not entitled to backpay.

### 2. *Under the FLSA*

The FLSA[37] was enacted in 1938 to set minimum labor standards to ensure that employers did not engage in unfair competition in commerce by exploiting laborers. The FLSA contains minimum wage and overtime provisions designed to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[38] The typical remedy for FLSA violations is an award of backpay for minimum wage or overtime infringements committed during the course of a worker's employment. Unlike the NLRA, the FLSA does not require that employees prove their availability to work because employees are necessarily working during the period for which they are eligible for backpay.

Prior to *Sure-tan*, although district courts typically awarded FLSA backpay to undocumented workers, the opinions did not address the complexities of allowing these workers to sue for FLSA violations by their employers.[39] In *Brennan v. El San Trading Corporation*, the court held that ten undocumented workers were entitled to backpay for minimum wage and overtime violations committed by the defendant wholesale clothing company.[40] Although the court did not specifically analyze whether the FLSA protected undocumented workers, it would have had to assume as much in order to grant the plaintiffs their remedy. Subsequently, the Ninth Circuit cited to *El San* as sup-

34. *Bevles*, 791 F.2d at 1393; *Local 512*, 795 F.2d at 719-20.
35. *E.g.*, *Del Rey Tortilleria*, 976 F.2d 1115 (7th Cir. 1992).
36. *Id.* at 1119.
37. 29 U.S.C. § 202 (1935).
38. *Id.*
39. *E.g.*, Brennan v. El San Trading Corp., 73 Lab. Cas. (CCH) ¶ 33,032 (W.D. Tex. 1973).
40. *Id.*

porting the proposition that "undocumented workers are entitled to backpay for violation of the FLSA."[41]

Following the *Sure-tan* decision, lower courts invariably held that the FLSA provisions covered undocumented workers, but they differed in their reasoning. While some jurisdictions justified FLSA protection for undocumented workers by analogizing *Sure-tan*, others referred to the "well established" rule that immigration status does not affect FLSA coverage.[42] In neither circumstance, however, did the courts merely recognize that the FLSA protected undocumented workers. Instead, the courts simply allowed workers to collect the backpay which they were owed.[43]

### 3. *Under Title VII of the Civil Rights Act*

Congress enacted Title VII of the Civil Rights Act of 1964[44] to prevent discrimination in the workplace. Through Title VII, the legislature created the Equal Employment Opportunity Commission (EEOC) to direct and further the implementation of Title VII[45] by prohibiting "discrimination in employment because of race, color, religion, sex, national origin, handicap, or age."[46] Although Title VII exempts some employers and employees from coverage,[47] undocumented workers and their employers are not among this group.

Few undocumented worker claims under Title VII generated written court opinions prior to IRCA. Courts faced with the problem of whether to protect undocumented workers under Title VII analogized it to the NLRA. The courts reasoned that because Title VII's backpay provision "was expressly modeled on the backpay provision of the NLRA,"[48] the Supreme Court's decision in *Sure-tan* was relevant authority. These courts followed the Ninth Circuit's reading of *Sure-tan* awarding backpay to workers who remained in the United States.[49]

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41. NLRB v. Felbro, 795 F.2d 705, 717-18 (9th Cir. 1986).

42. *In re* Reyes, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied sub nom.* Griffen & Brand v. Reyes, 487 U.S. 1235 (1988).

43. *Alvarez*, 482 N.Y.S.2d 184; *In re Reyes*, 814 F.2d 168.

44. 42 U.S.C. § 2000(e) (1964).

45. *Id.* § 2000(e-4).

46. *Id.* § 2000(e).

47. The definition of "employer" exempts the United States government and bona fide private membership clubs. *Id.* § 2000e(b)(1), (2). The term "employee" does not include "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor . . . ." *Id.* § 2000e(f).

48. *Rios*, 860 F.2d at 1172 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975)).

49. *See, e.g., Hacienda Hotel*, 881 F.2d at 1516.

## B. *After IRCA*

When the Supreme Court decided *Sure-tan*, the Court analyzed the INA and decided that the NLRA did not conflict with the INA's aim of reducing illegal entry into the United States.[50] Although Congress enacted IRCA to further the aims of the INA, IRCA amended the INA by adding sanctioning provisions to deter employers from hiring undocumented workers.[51] The sanction provisions require employers to verify potential employees' eligibility to work in the United States before hiring them,[52] and to terminate any worker if the employer discovers that the worker is undocumented.[53] The legislature hypothesized that since such individuals often enter the United States searching for work, making it illegal to hire them would further the goal of decreasing illegal immigration.

### 1. *Under the NLRA*

Because IRCA imposes employer sanctions for knowingly hiring undocumented workers, one of the Supreme Court's arguments for deciding that the NLRA protects undocumented workers in *Sure-tan* is now moot. Since the *Sure-tan* Court relied on the lawfulness of the employer/worker relationship in order to find that NLRA protection of undocumented workers did not conflict with the INA,[54] it is unclear how the Supreme Court

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50. *Sure-tan*, 467 U.S. 883.

51. *See* 8 U.S.C. § 1324a (1986). "It is unlawful for a person or other entity to hire, or to recruit for a fee, for employment in the United States . . . an alien knowing the alien is an unauthorized alien . . . with respect to such employment." *Id.* § 1324a(a)(1)(A). The Act defines an "unauthorized alien" as a person who is not "(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." *Id.* § 1324a(h)(3).

52. *Id.* § 1324a(a)(1)(B). *But see id.* § 1324a(a)(3) (Employers who inspect their workers' documents, in good faith, will not be held liable if the workers provide false documents.).

53. *Id.* § 1324a(a)(2). Although IRCA does not protect employees hired before 1986 from being discharged for not having appropriate authorization, employers who terminate their undocumented employees for other reasons cannot claim that a termination is lawful simply because the worker files a claim after 1986. *See Del Rey Tortilleria*, 976 F.2d 1115 (7th Cir. 1992).

54. *Sure-tan*, 467 U.S. at 892. The court stated:

> [We have] observed that "the central concern of the INA is with the terms and conditions of admission to this country and the subsequent treatment of aliens lawfully in this country." . . . The INA evinces "at best evidence of a peripheral concern with employment of illegal entrants." . . . For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization. . . . Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally. . . . Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that appli-

would treat a claim by an undocumented worker under the NLRA now.

Commentators generally agree that IRCA was likely to shift the balance so that courts deny all remedies to undocumented workers.[55] These commentators conclude that the courts will decide against reinstatement since courts can hardly order an employer to violate IRCA by employing an unauthorized worker, and backpay can not be granted since the employee can not be available for work if an employer can not legally hire the worker.[56] Since legislators designed the NLRA to protect the collective-bargaining process and since the goal of the INA and IRCA is to prevent illegal immigration, the purpose of the NLRA would be defeated if employers realized added benefits by hiring undocumented workers whom they could then manipulate to avoid problems from unions.

Despite concerns that courts will overlook important policy arguments and decide that protecting undocumented workers under the NLRA would conflict with IRCA, courts have actually split in the treatment of the issue.[57] While no post-IRCA NLRA violation case has reached the appellate level thus far, appellate courts have alluded to the issue in dicta, and the NLRB and some district courts have published opinions on a few cases concerning this issue.

In a recent case, the Seventh Circuit announced unequivocally that Section 1324 of IRCA, which makes it illegal for an employer to hire an undocumented worker, "clearly bars the Board [NLRB] from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment."[58] However, this case involved a violation that occurred before 1986. Unlike the Seventh Circuit, other appellate courts have preferred to remain less decisive in their dicta. These courts have distinguished pre-IRCA cases from *Sure-tan*—acknowledging that IRCA might change the balance of considerations in future cases—and yet have allowed workers to collect their remedies.[59]

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cation of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.

*Id.* at 892-93. *See generally* Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law,* 1988 WISC. L. REV. 955.

55. *See generally* Bosniak, *supra* note 54; Kutchins & Tweedy, *supra* note 8; Fjelstad, *supra* note 14.

56. Bosniak, *supra* note 54; Kutchins & Tweedy, *supra* note 8; Fjelstad, *supra* note 14.

57. *See Del Rey Tortilleria,* 976 F.2d 1115 (7th Cir. 1992); *Contra Hacienda Hotel,* 881 F.2d 1504 (9th Cir. 1989).

58. *Del Rey Tortilleria,* 976 F.2d at 1122.

59. *See, e.g., Hacienda Hotel,* 881 F.2d at 1516.

In *Breakfast Productions*, the NLRB held that undocumented workers remain protected under the NLRA.[60] The NLRB focused on the fact that the legislative history of IRCA suggests that Congress intended to protect workers. It stated:

> It is not the intention of the Committee that the employer sanctions provision of the bill be used to undermine or diminish in any way labor protections in existing law, or limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair labor practices committed against undocumented employees for exercising (sic) their rights before such agencies or for engaging in activities protected by existing law. . . . As the Supreme Court observed in *Sure-tan* . . . 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."[61]

However, the NLRB noted that the General Counsel had presented extensive evidence to demonstrate that the undocumented workers in question had made a prima facie case of eligibility for adjustment of their immigration status under the amnesty guidelines of IRCA.[62] Moreover, the NLRB asserted that although it was clear that the employees in question were protected by the NLRA despite IRCA, the NLRB did not have to decide whether the NLRA entitled them to a remedy because the employer was not found to have violated any of its provisions.[63] The NLRB suggested that if the employer had been found to have violated the Act, "it may have been necessary to reach an accommodation between IRCA's objectives and the policy of the Act [NLRA]."[64]

In addition to the NLRB's decision in *Breakfast Productions*, the federal district court for the Eastern District of California predicted that the Ninth Circuit will ultimately decide that undocumented workers should be protected by the NLRA despite IRCA.[65] In *Tortilleria "La Mejor,"* a case which involved a claim of Title VII violations, the district court analogized Title VII to the NLRA because the legislature fashioned the language of Title VII backpay provisions after those of the NLRA.[66] Although the district court has no binding effect on the Ninth

60. 1989 N.L.R.B. LEXIS at 177.
61. *Id.* at 178 (quoting H.R. REP. No. 1000, 99th Cong., 2nd Sess. (1986); *Sure-tan*, 467 U.S. at 893).
62. *Id.* at 175.
63. *Id.*
64. *Id.* at 178.
65. *See Tortilleria "La Mejor"*, 758 F. Supp. at 591.
66. *Id.* at 590.

Circuit, this case suggests that if an undocumented worker were to bring an NLRA case in district court, the court would allow the worker to receive backpay and would possibly order reinstatement.

### 2. *Under the FLSA*

Before IRCA's enactment, federal courts that addressed the question of whether undocumented workers could sue their employers for back wages under the FLSA analogized the FLSA to the NLRA in order to benefit from the Supreme Court's decision in *Sure-tan*.[67] Because cases in which employees bring FLSA claims against their employers are usually settled out of court,[68] only two appellate courts have addressed this issue since the enactment of IRCA: the Eleventh Circuit in *Patel v. Quality Inn South*,[69] and the Fifth Circuit in *In re Reyes*.[70] Legal commentators who argue for continued protection of undocumented workers under the FLSA incorporate court decisions prior to IRCA in analogizing the FLSA to the NLRA.[71] In *Patel*, the Eleventh Circuit distinguished the FLSA from the NLRA in order to allow post-IRCA remedies for undocumented workers seeking backpay for minimum wage and overtime violations.[72] The court noted that the plaintiffs did not seek to recover backpay for a period of time when they were not working and were unavailable for work. Instead, the court held that the plaintiff sought to recover backpay for work already performed.[73]

In *Patel*, the court emphasized that Congress did not explicitly repeal or amend the rights of undocumented workers when it enacted IRCA, and thus the court should not infer that Congress intended to revoke the workers' rights under the labor laws.[74] In fact, the court pointed to Section 111(d) of IRCA, in which the legislature specifically authorized increased funds for FLSA enforcement on behalf of undocumented workers.[75]

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67. *See Alvarez*, 482 N.Y.S.2d at 185 (citing *Sure-Tan*, 467 U.S. 883 (1984)).

68. Richard E. Blum, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. REV. 1342, 1348 (1988) (citing Comptroller General of the United States, Administrative Changes Needed to Reduce Employment of Illegal Aliens 24 (Jan. 30 1981)).

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

70. 814 F.2d 168 (5th Cir. 1987), *cert. denied sub nom.* Griffen & Brand, 487 U.S. 1235 (1988).

71. *See generally* Charnesky, *supra* note 8, at 391; *see also* L. Tracy Harris, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900, 906 (1988).

72. *Patel*, 846 F.2d at 705-06.

73. *Id.* at 705.

74. *Id.* at 704.

75. *Id.*

> There are authorized to be appropriated, in addition to such sums as may be available for such purposes, such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.[76]

This provision conflicts with the notion that Congress intended to repeal the FLSA's protection of undocumented workers. The court in *Patel* compared Congress's purpose in enacting IRCA—to remove the economic incentives for employers to hire undocumented workers—with the purpose of the FLSA—to ensure that employers do not exploit workers by paying them less than the minimum wage. Rather than conflict, the court found that the two Acts have a compatible goal of reducing the number of undocumented workers who enter the United States by eliminating the economic advantages to employers who hire them.[77]

The Eleventh Circuit also addressed the paradox of allowing undocumented workers to collect backpay for jobs held illegally. The court reasoned that, unlike the NLRA, the FLSA does not require employees to be available to work during the interval for which they are collecting backpay, because the workers would not be seeking damages for time they would have been working had they not been unlawfully discharged.[78] Instead, the court found that undocumented workers who sought protection from the FLSA were attempting to collect minimum wage and overtime pay that their employers unlawfully denied *while* they were working.[79] Thus, the court would not force employers to break the law by reinstating an unauthorized employee; instead, it ordered the employers to pay the amount they should have paid the workers they hired illegally.[80]

### 3. *Under Title VII of the Civil Rights Act*

The same California district court which predicted that the Ninth Circuit would grant backpay benefits despite the enactment of IRCA alluded to similar results with respect to the FLSA and Title VII.[81] In *Tortilleria "La Mejor,"* the court deferred to the EEOC's interpretation that Title VII must protect undocumented workers because Title VII includes specific exemptions from the employees covered, in which undocumented

76. *Id.* (quoting Pub. L. No. 99-603, § 111(d), 100 Stat. 3357, 3381 (1986)).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991).

workers are not included.[82] In addition, the district court echoed the reasoning of the circuit courts that decided the NLRA and FLSA cases arguing that had Congress intended for IRCA to repeal coverage for undocumented workers, it had ample opportunity to do so explicitly.[83]

### C. *Whether Undocumented Workers Should Be Protected Under the NLRA, FLSA and Title VII*

Whether to allow undocumented workers to receive protection under the labor laws when Congress has chosen to sanction the relationship between these workers and their employers may be compared to the court decisions deciding whether to grant relief when an illegal contract is involved. In contract disputes, courts do not automatically void agreements that violate the law. Instead, courts consider several relevant factors, including any legislative purpose at issue, the language and legislative history of applicable statutes, and the party on which the statutes focus. Each of these factors is helpful to the question of whether undocumented workers should receive protection under relevant labor laws.

#### 1. *Legislative Purpose*

Undocumented workers should be protected under the NLRA, FLSA and Title VII, despite the enactment of IRCA, because failing to do so would thwart the goals of IRCA and the labor laws. Although IRCA utilizes employer sanction provisions to discourage employers from hiring unauthorized workers, Congress added the provisions to further the broader goal of curbing illegal immigration. Refusing to protect undocumented workers under the labor laws only makes those workers more attractive to employers. On the other hand, providing protection for unauthorized workers removes the benefits of hiring such workers. If undocumented workers cannot be paid substandard wages, threatened into abstaining from labor union activities, and otherwise treated differently from legal employees, the employer will not have an incentive to hire undocumented workers over legal workers.

Of course, some commentators argue that making immigration status irrelevant in labor law cases rewards undocumented individuals who enter the country illegally.[84] However, because undocumented individuals continue to enter the United States in search for work despite assured exploitation by employers, it is

82. *Id.* at 589.
83. *Id.* at 590-93.
84. *See* Miele, *supra* note 17, at 410.

illogical to encourage exploitive working environments as a way to achieve IRCA's goal.

Yet despite the legislature's distaste for employers who use laborers' vulnerability to exploit them, as evidenced by the labor laws, the legislature also wants to decrease illegal immigration. One way to reduce illegal immigration might be to remove the availability of the jobs altogether. Likewise, it can be argued that removing any incentive for employers to hire undocumented workers will do just that.

2. *Language and Legislative History*

Courts interpreting the NLRA, FLSA, and Title VII to protect undocumented workers argue that when enacting IRCA, the legislature had the opportunity to explicitly exempt undocumented individuals. In fact, the legislative history, as analyzed by the courts in *Breakfast Productions* and *Patel*, suggests that the legislature was well aware that the courts had extended labor law protection to undocumented workers.[85] In addition, Congress used broad language in the labor law statutes in order to protect as many employees as possible. The NLRA, FLSA, and Title VII all apply to "any employee" not specifically exempted, and none of the statutes exempts undocumented immigrants.

3. *Party on Which the Statute Focuses*

In enacting IRCA, the legislature apparently believed that placing sanctions on the employer was the most effective way to achieve its goal of reducing immigration. IRCA contains no penalty against unauthorized workers other than the penalty that attaches to illegal entry. The sanctions focus on the employer because Congress believes that if no jobs are available, illegal immigration is likely to decrease.

Similarly, the enforcement of labor laws should focus on employers. If the NLRA, FLSA, and Title VII provisions are not enforced against employers, the incentive to hire undocumented workers remains. If Congress believes that reducing illegal immigration begins with preventing employers from hiring unauthorized workers, then the labor laws should be interpreted to protect these workers.

D. *Remedies Available to Undocumented Workers Under the Labor Laws*

The decision to grant undocumented workers protection under the labor laws has meaning only if such workers can re-

85. *See Breakfast Productions*, 1989 N.L.R.B. LEXIS 177; *Patel*, 846 F.2d 700.

ceive the corresponding remedies. Most courts and commentators treat the awards under the NLRA, FLSA and Title VII similarly: where a reason is found to justify the provision of remedies under one, the other two are similarly interpreted to provide remedies. In fact, because of differences in the language of statutes and the remedies authorized under each, courts cannot treat the laws the same without disregarding IRCA on the one hand, or allowing employers to exploit workers, and thereby encourage illegal immigration on the other hand.

### 1. *Under the NLRA*

NLRA violations involve firing, or threatening to fire, workers for participating in union activities. Because the primary remedy for NLRA infringements is reinstatement, the passage of IRCA severely limited the remedies undocumented workers could seek under the NLRA. Because IRCA made the employer/undocumented worker relationship unlawful through its imposition of employer sanctions, courts cannot order an employer to violate IRCA by reinstating an unauthorized worker. Also, if unauthorized workers are not unavailable for work during the period following their wrongful termination, they cannot receive backpay. However the *Sure-tan* Court recognized that establishing a minimum backpay award would be arbitrary,[86] because no court can accurately gauge how long an undocumented employee might have remained working had they not been wrongfully terminated.

An analysis of the remedies available under the NLRA might lead to the conclusion that protection under the Act is meaningless. However, other, albeit lesser, remedies exist, and many plaintiffs who have not had an unfavorable deportation determination might be eligible for the same remedies as legal workers. First, the order to cease and desist is still available if the employer has only threatened to fire the employee and has not yet terminated the worker.[87] Secondly, without an INS determination, it is not within the authority of the court to decide if a plaintiff is undocumented.[88] Finally, the legislature has the authority to add a provision allowing punitive damages against an employer who violates the NLRA.[89] This latter remedy might be the most effective in removing the incentive for employers to hire undocumented workers.

86. *Sure-tan*, 467 U.S. at 898-901.
87. *Id.* at 894.
88. *See* Bosniak, *supra* note 54 at 1032.
89. *Id.* at 955.

2. *Under the FLSA*

The FLSA authorizes backpay for employees who have not been paid the minimum wage or who have not been fairly compensated for overtime. Because employees who bring a claim under the FLSA must have been working during the period for which they seek backpay, and because reinstatement is not an issue, courts may award undocumented workers FLSA remedies without arbitrary speculation.

3. *Under Title VII*

Despite the gravity of the offense of an employer who discriminates against employees on the basis of race, gender, religion, or national origin, a wrongfully terminated worker must have the same limited remedies under Title VII as under the NLRA. Because Title VII only provides for reinstatement or backpay for the period during which an undocumented person is available for work, a claim brought by an unauthorized worker for one of these remedies must fail. Again, employees have a remedy if they have been treated unfairly but are not yet terminated, because the court could order the employer to cease and desist. Under Title VII, it can be argued that the court should not, without an INS determination, deny a remedy to plaintiff based on their immigration status. As with the NLRA, the best solution may be for the legislature to allow punitive damages against the employer.

## IV. UNDOCUMENTED WORKERS RIGHTS—COMPENSATORY AWARDS

### A. *Prior to IRCA*

1. *Workers Compensation*

In addition to being cited as the authority for interpreting the NLRA, FLSA, and Title VII to protect undocumented workers, *Sure-tan* has been used to provide compensatory entitlements to undocumented workers.[90] One such entitlement, workers compensation, has been granted almost uniformly to unauthorized workers who are injured in the workplace.[91] Unlike the labor laws, workers compensation is not governed by the federal government, but regulated by individual state statutes. Although state programs vary, and these variations can be important in deciding whether an undocumented laborer has a

90. *See Cenvill Dev. Corp.*, 478 So. 2d 1168 (Fla. Dist. Ct. App. 1985); *Hernandez*, 841 F.2d 582 (5th Cir. 1988), *cert. denied*, 488 U.S. 981 (1988).

91. *See* Miele, *supra* note 17, at 406.

claim, most states require the existence of an employment contract and a work-related injury.[92]

Before 1986, undocumented workers could receive workers compensation benefits in nearly every state because the majority of state laws did not have limitations based on alienage.[93] The main issue facing state courts had been to determine whether undocumented workers' status should be considered when determining the availability of other suitable employment.[94] Courts in New York, Texas, and Florida explicitly ruled that undocumented workers are eligible for workers' compensation benefits under their applicable state statutes.[95] For example, the court in *Commercial Standard Fire* asserted that "violation of the immigration law did not make illegal the employment contract on which the workers' compensation claim was based."[96]

Prior to IRCA, a Florida appellate court held that an employer who knew or should have known that an employee was undocumented could not avoid paying benefits by suggesting that the employee's undocumented status, not the injury, prevented the employee from finding a job.[97] However, a D.C. circuit court dismissed this argument emphasizing that the term "disability" "clearly requires a causal connection between the worker's physical injury and his or her inability to find suitable employment."[98]

### 2. *Unemployment Compensation*

Congress enacted the Federal Unemployment Tax Act (FUTA) to encourage a uniform system of compensation by the states, which in turn would ameliorate conditions of unemployment.[99] FUTA requires states to set aside funds for a system to aid persons who have been terminated from their jobs "through no fault of their own."[100] FUTA specifically addresses which workers may be eligible for unemployment compensation by requiring that each person be:

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92. *Id.* (citing AM. JUR. 2D *Workmen's Compensation* § 153 (1976).

93. *See* Bosniak, *supra* note 54, at 1033.

94. *See* Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1, 24 n.116 (1992) (citing Testa v. Sorrento Restaurant, Inc., 197 N.Y.S.2d 560 (N.Y. App. Div. 1960); Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635 (Tex. Ct. App. 1972); Gene's Harvesting v. Rodriguez, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982)).

95. *Testa*, 197 N.Y.S.2d 560 (N.Y. App. Div. 1960); *Commercial Standard Fire*, 484 S.W.2d 635 (Tex. Ct. App. 1972); *Gene's Harvesting*, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982).

96. 484 S.W.2d at 635.

97. *Cenvill Dev. Corp.*, 478 So. 2d 1168.

98. *Rivera*, 948 F.2d at 775.

99. Robert Rubin, *Walking a Gray Line: The 'Color of Law' Test Governing Noncitizen Eligibility for Public Benefits*, 24 SAN DIEGO L. REV. 411, 417 (1987).

100. *Id.* at 417-18.

> [A]n individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of provisions of section 203(a)(7) [8 U.S.C. § 1153(a)(7)] or section 212(d)(5) [8 U.S.C. § 1182(d)(5)] of the Immigration and Nationality Act).[101]

Although employees may prove their color of law status without providing work authorization, Congress added the "color of law" language "to prevent the payment of unemployment compensation to illegal aliens who work in the United States."[102] In addition, much like the NLRA, many state unemployment compensation statutes require recipients to be available for work.[103]

Because the statute does not precisely define "under color of law," some courts have determined that undocumented people not under orders for deportation are eligible for benefits.[104] Prior to IRCA, eight jurisdictions considered undocumented workers' rights to unemployment benefits without disqualifying plaintiffs based on federal law.[105] Of these jurisdictions, five held that undocumented people could not be considered available for work as required by the unemployment statutes in their states.[106] Nevertheless, courts in Minnesota, Ohio, and Oregon have allowed undocumented people to receive unemployment compensation.[107]

### 3. *Torts—Damages for Lost Wages*

Before IRCA, federal and state courts routinely permitted undocumented workers to sue in tort actions for future lost wages.[108] These courts reasoned that such claims were enforceable because Congress chose not to establish criminal penalties for an undocumented person's acceptance of employment or to de-

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101. *Id.* at 418 (citing 28 U.S.C. § 3304 (a)(14)(A) (1982)).

102. *Id.* (citing S. REP. NO. 67, 95th Cong., 1st Sess. 1, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 79, 91).

103. *Id.* (citing Alonso v. State, 50 Cal. App. 3d 242, *cert. denied*, 425 U.S. 903 (1976); Duenas-Rodriguez v. Industrial Comm'n, 199 Colo. 95 (1980); Pinella v. Dep't of Labor & Indus., 155 N.J. Super. 307 (1978)).

104. *Id.* at 417 n.30. For a judicial examination of the possible interpretations of "under color of law," see Arteaga v. Industrial Comm'n, 703 P.2d 654 (Colo. 1985).

105. *See, e.g.,* Carillo v. Employment Div., 744 P.2d 1304 (Or. 1987).

106. *Id.*; *see also* Flores v. Dep't of Jobs and Training, 393 N.W.2d 231 (Minn. 1986); Vespremi v. Giles, 427 N.E.2d 30 (Ohio 1980).

107. *See, e.g., Carillo*, 744 P.2d 1304.

108. *See* Bosniak, *supra* note 54, at 978.

clare such person's employment contract illegal.[109] In *Peterson v. Neme*, the Virginia Supreme Court examined the policy of immigration laws, and acknowledged that allowing undocumented people to work under substandard conditions for lower wages hurts lawfully employed workers. In spite of this, Virginia's highest court argued that a claim for lost wages would not encourage other undocumented people to enter the country.[110] It said, "[O]rdinarily, a person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses occasioned by a tortious injury."[111]

Despite arguments that undocumented people are not entitled to live and work in the United States, some courts have awarded future lost wages basing their calculations on the wage the worker received while working without documentation.[112] These courts generally distinguish *Sure-tan* by emphasizing that the plaintiff workers have not left the country.[113]

### B. *After IRCA*

After IRCA's employer sanction provisions went into effect, some private insurance companies began requiring workers to fill out I-9 forms before they could receive job retraining benefits.[114] These insurance companies often make participation in the retraining program a prerequisite for receiving cash awards,[115] and justify the requirement by pointing to the language in many state workers compensation laws that an employee must be "available for work."[116]

Similarly, some commentators have focused on the "available for work" requirement to argue that undocumented laborers cannot receive workers compensation benefits after IRCA.[117] One commentator's suggestion that "the latest changes to federal immigration policy should compel the withdrawal of the labor protections granted by state legislation to illegal aliens," has not been adopted by any court.[118] Some courts have, however, refused to allow unauthorized workers to collect workers compensation indefinitely.[119] Yet currently in every state, but Vermont,

109. *See, e.g.*, Peterson v. Neme, 281 S.E.2d 869, 871 (Va. 1981).
110. *Id.* at 872.
111. *Id.*
112. *See Hernandez*, 841 F.2d 582.
113. *See Barros*, No. 91-12633-Z, 1993 U.S. Dist. LEXIS 4015 (Mass. Dist. Ct. Mar. 25, 1993).
114. *See* Bosniak, *supra* note 54, at 1033.
115. *Id.* at 1034.
116. *Id.*
117. *See* Miele, *supra* note 17, at 393.
118. *Id.* at 408.
119. *Rivera*, 948 F.2d 774 (D.C. Cir. 1991).

statutes require employers to provide workers compensation protection for both documented and undocumented workers who are injured in the workplace.[120] California's workers compensation statute actually defines eligible employees as including "aliens" and those "unlawfully employed."[121]

Prior to IRCA, courts more strictly interpreted the "available for work" language in unemployment statutes than in similar provisions found in workers' compensation statutes.[122] Although courts have interpreted the "color of law" provision of FUTA with respect to undocumented people seeking amnesty under IRCA's legalization process,[123] no court has yet issued an opinion on whether after IRCA, unauthorized workers may receive benefits under unemployment compensation laws. Nevertheless, even before Congress enacted IRCA, courts were wary that undocumented people would be able to receive more unemployment benefits than authorized workers, because it was thought that they would take longer to find work.[124] This suggests that courts are unlikely to be sympathetic, especially since employer sanctions now make job prospects for undocumented people even worse.

### 3. *Torts—Damages for Lost Wages*

Claiming to follow precedent, courts have allowed undocumented plaintiffs to recover future lost wages without justifying the decisions in light of IRCA.[125] For example, the court in *Barros* cited the NLRA, FLSA, Title VII, and earlier tort cases as authority for its decision to allow the plaintiff to recover lost wages, even though he was working in violation of the INA.[126] The court failed to address any possible changes in policy considerations since all of the cases on which it based its opinion dealt with pre-IRCA violations.[127] Similarly, although the Fifth Circuit in *Hernandez v. Rajaan* distinguished the plaintiff's tort claim from the NLRA claim in *Sure-tan*, the court did not consider the implications of IRCA on its decision.[128]

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120. Miele, *supra* note 17, at 406.

121. Reich, *supra* note 94, at 24 n.116.

122. Miele, *supra* note 17, at 393; *but see Carillo*, 744 P.2d 1304.

123. Pickering v. Labor & Ind. Rev. Comm'n, 456 N.W.2d 874 (Wis. App. 1990); Brambia v. Board of Rev., N.J. Dep't of Labor & Ind., 591 A.2d 605 (N.J. Super. 1991).

124. Vespremi v. Giles, 427 N.E.2d 30 (1980).

125. *Barros*, No. 91-12633-Z, 1993 U.S. Dist. LEXIS 4015 (Mass. Dist. Ct. March 25, 1993); *Hernandez*, 848 F.2d 498 (5th Cir. 1988).

126. *Barros*, 1993 U.S. Dist. LEXIS at 4015, *1-*4.

127. *Id.*

128. *Hernandez*, 848 F.2d at 500.

### C. *Compensatory Benefits Available to Undocumented Workers After IRCA*

#### 1. *Workers Compensation*

Workers compensation statutes are generally designed to stabilize conditions for employees disabled in the workplace while the worker heals from the injury. The statutes' goals are to allow injured employees to return to work or train for another position. However, if any worker sustains a permanent injury, he or she is usually eligible to receive continued benefits. Because state legislatures typically view workers compensation as an important right for workers who have been injured on the job, courts consistently award benefits to undocumented workers despite "available for work" requirements in many states. This approach, with some modifications, appears to be an appropriate way to promote the aim of workers compensation programs.

Defendant employers argue that they should not be required to provide workers compensation to undocumented workers since they may receive compensation indefinitely if no one else will hire them due to their immigration status.[129] This concern, although perhaps valid, need not prevent unauthorized workers from receiving benefits during the time their injury prevents them from working. Moreover, it is a legal fiction to say that undocumented workers are unavailable when many employers will continue to hire them. In fact, most unauthorized workers require workers compensation for the same period as authorized workers. An effective solution would be to provide compensation only for the time the employee is incapacitated by the work-related injury as determined by a physician.

#### 2. *Unemployment Compensation*

Like workers compensation, unemployment compensation serves to stabilize conditions for employees terminated through no fault of their own until they can resume employment. Unlike workers compensation, the court cannot isolate the period during which an employee may be entitled to benefits by deciding whether a similarly situated authorized employee would be entitled to compensation. Because undocumented workers are not legally "available for work," theoretically they cannot find employment and will receive unemployment compensation indefinitely. Although the defendant can establish that employees' inability to find suitable employment is status-related, it would be very difficult to determine whether an employee is not hired during a given period because of industry conditions or because

129. *Rivera*, 948 F.2d 774 (D.C. Cir. 1991).

of their immigration status. Because the possibility of receiving unemployment benefits indefinitely might serve as an incentive for illegal immigration, this approach would conflict with the purpose of IRCA. Thus undocumented workers should not be allowed to collect unemployment compensation.

### 3. *Torts—Damages for Lost Wages*

Claims by undocumented workers for lost earnings have been upheld by courts consistently and appropriately.[130] Tort actions for lost wages serve to provide relief for a plaintiff injured through the defendant's negligence. Because the defendant has been found negligent, and the wages earned while the undocumented worker was working are the best indicators of what the worker would earn had he or she not been injured, it is reasonable to use these wages to calculate lost earnings. Any other basis for calculating lost earnings would be arbitrary. As the court indicated in *Peterson v. Neme*, allowing an undocumented worker to sue in tort for lost wages is not likely to encourage illegal immigration, since a tort generally requires an injury inflicted by a negligent defendant.[131]

## V. CONCLUSION

Despite the tendency to lump together labor laws with workers' entitlements in deciding whether undocumented workers should be granted protection, the differences in language and remedies authorized under the different statutes render such an all-encompassing solution impossible. Analysis of the positions of the courts on unauthorized workers rights under the NLRA, FLSA, Title VII, workers compensation, unemployment compensation, and tort actions for lost wages (before and after IRCA), leads to the conclusion that these rights must be treated separately. While all three of the labor laws discussed should be interpreted (even after IRCA) to provide protection for undocumented workers, only under the FLSA can such laborers receive remedies equivalent to those awarded to legal employees. Because reinstatement and backpay for the period during which the worker was available for work cannot be granted without ordering the employer to violate the law, the NLRA and Title VII provide limited remedies to undocumented workers. Thus, the legislature should allow punitive damages for violations under the Acts.

130. *See Barros*, 1993 U.S. Dist. LEXIS 4015, at *3; *Hernandez*, 848 F.2d at 500.
131. *See Peterson*, 281 S.E.2d at 871.

Workers compensation, unemployment compensation, and tort actions for lost wages should be considered separately as well. Courts have consistently allowed undocumented workers to receive workers compensation and to sue in tort for lost wages even after IRCA. This response is appropriate because the workers were employed at the time they were injured, and the remedies for those injuries can be awarded without violating the purposes of IRCA. In workers compensation cases, a definite period can be isolated during which an undocumented worker is incapacitated by the work-related injury, and, thus, the worker does not receive benefits simply because another employer will not hire them. In an action for lost wages, the primary question the court must answer is whether the calculation of future wages may be based on the earnings of undocumented workers while they worked illegally. Because awarding damages in such situations does not conflict with IRCA by encouraging illegal immigration, future earnings should be based on the worker's wages earned illegally, and which the worker would still be earning had it not been for the negligent defendant. Finally, unemployment compensation benefits cannot be justified for the unauthorized laborer because the employee is unavailable for work; the courts cannot determine whether the worker can find suitable employment due to industry conditions or because of their immigration status.

*MICHELLE MCALOON*†

† Second year law student, University of California, Los Angeles, School of Law. The author thanks Professor Lynn Alvarez for her guidance and constructive criticism.