

## EMPLOYEES IN THE WORKPLACE

## Expert Analysis

# Undocumented Immigrant Workers: Enforcing Rights

**C**ity nail salons.<sup>1</sup> The report revealed that exploitation of its mostly undocumented female immigrant workforce, which included sub-minimum wages, wage theft, and exposure to hazardous chemicals on the job resulting in cancer and miscarriages, was the lifeblood of the industry. The public outcry that followed had an immediate response from both New York city and state officials demanding change.<sup>2</sup>

While a myriad of laws exist at the state and federal level to protect undocumented workers from exploitation, discrimination and abuse, enforcement is often lax and many in the legal community have turned a blind eye, or worse, have watched undisturbed while their clients commit crimes against humanity. It is our duty as lawyers and legislators to make sure that our clients are aware of and are complying with employment rights and protections available to undocumented workers.

*WENDI S. LAZAR is a partner at Outten & Golden. Olivia Quinto, an associate at the firm, assisted in the preparation of this column.*

By  
**Wendi S.  
Lazar**



While Governor Andrew Cuomo acted swiftly by calling for a new multi-agency task force to examine the industries where abuse is most prevalent after the nail salon expose, without compliance and enforcement there will be no meaningful change.

### Wage and Hour Laws

The most prevalent violation experienced by undocumented workers is wage theft. Every year, 6.5 million undocumented workers suffer wage theft.<sup>3</sup> Generally, wage theft includes claims for unpaid wages, being paid less than minimum wage, unpaid overtime and off-the-clock work, worker misclassification, withholding an employee's last paycheck or not providing employees with wage statements or pay notices.<sup>4</sup> Wage theft has a disparate impact on

gender: In New York, 40 percent of undocumented women workers reported wage violations.<sup>5</sup>

Federal and state laws require employers to pay minimum wage and overtime to all workers, including undocumented workers.<sup>6</sup> For instance, the Fair Labor Standards Act (FLSA) "contains no exception to or exclusion for persons who are not U.S. citizens or who are in this country illegally."<sup>7</sup> Accordingly, with few exceptions, undocumented immigrants can bring actions in court for unpaid wages.<sup>8</sup> This includes the ability to bring collective or class action lawsuits, which can offer greater protection for undocumented workers who often do not bring individual wage claims for fear of retaliation and deportation.

### Prohibiting Discrimination

Federal, state and local laws also prohibit employers from discriminating and retaliating against employees based on certain protected characteristics. Title VII of the Civil Rights Act of 1964 applies simply to persons "employed by an employer"<sup>9</sup> and protects workers

from discrimination based on sex, color, race, religion and national origin. The Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) protects workers from discrimination based on age and disabilities, respectively. New York state and city Human Rights Law go further than the federal laws to include more expansive categories.<sup>10</sup> While all of these statutes extend protections to undocumented workers however, some court decisions have limited damages and relief for them.

In *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the Supreme Court prevented undocumented workers from receiving back pay and reinstatement under federal law, specifically under the National Labor Relations Act (NLRA) because both would render compensation for work that was not legally authorized to the worker. But New York courts have not applied *Hoffman* to state law claims, arguably permitting undocumented immigrants to claim back pay under state and city antidiscrimination laws. The U.S. Court of Appeals for the Second Circuit has held that federal immigration law does not preempt state labor law on this issue.<sup>11</sup>

In addition to Title VII, Section 1981 of the Civil Rights Act of 1866 may also be used successfully by undocumented workers to sue for job discrimination. Summarily, Section 1981 makes it illegal for employers to discriminate based on race or alienage in making and enforcing contracts, including employment contracts. It applies

to private and public employers regardless of the number of employees. Remedies available include compensatory damages, attorney fees, punitive relief and injunctive relief. Reinstatement and back pay for undocumented workers remain available in some circumstances. The Immigration Reform and Control Act of 1986 (IRCA) also prohibits discrimination based on alienage or national origin in employment matters, but does not apply to undocumented workers.

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In 2014, a class action applying Section 1981 was mounted against Northwestern Mutual on behalf of an undocumented youth who was a recipient of President Barack Obama's 2012 executive order called the Deferred Action for Childhood Arrivals (DACA). The plaintiff was denied a paid internship with Northwestern Mutual due to his status. However, DACA recipients, despite not having legal immigration status, were granted temporary work authorizations, and therefore the right to work. Northwestern Mutual moved to dismiss the complaint, but the court denied it and held that the company's policy, as alleged, did facially discriminate against a protected class under Section 1981.<sup>12</sup>

## Other Laws

There are several other laws that provide key rights to undocumented workers such as the National Labor Relations Act, allowing all workers the right to organize and negotiate with their employers, and the Occupational Safety and Health Act (OSHA), which protects their rights to healthy and safe work conditions.<sup>13</sup> Under New York state law, undocumented workers have the right to be compensated for injuries received on the job,<sup>14</sup> or to bring a personal injury lawsuit against an employer if injured on the job.<sup>15</sup> Further, they are protected under New York City's Pregnant Workers Fairness Act, passed in January 2014, and Earned Sick Time Act of 2013, which requires certain employers to provide paid sick time for their employees.<sup>16</sup> Both of these laws contain anti-retaliation provisions. However, undocumented workers are still not entitled to unemployment benefits under New York state law.<sup>17</sup>

## Challenges

Despite many robust laws available to undocumented workers in New York, many of them do not report worker abuse or bring claims because of a fear of retaliation. Primary among them is the fear of being reported to immigration authorities, being deported and ultimately being separated from their loved ones in the United States.<sup>18</sup> Indeed, employers' use of the threat of deportation is well documented and has been used against undocumented workers

who try to claim unpaid wages, complain about safety standards or try to unionize.<sup>19</sup>

But reporting workers to immigration authorities has long been considered unlawful and exposes employers to a range of penalties.<sup>20</sup> This is because such intimidation of undocumented workers not only compromises all American workers' employment standards

gal wage deductions for supplies, training or uniforms, and human trafficking. The task force will initially target industries with the highest rates of worker complaints and employer non-compliance of labor laws, as well as industries where workers are isolated and retaliation frequently occurs. This includes nail salons, farming, child care, cleaning, home health care,

begin a year-long program using "matched pair testing" to investigate whether employers are discriminating against job applicants in their screening or hiring process. Matched pair testing involves sending a pair of testers who have similar qualifications to apply for the same job at the same company, but one of the testers will have a characteristic protected by the New York City Human Rights Law.

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and economic security, but also undercuts law-abiding employers by competing against those who use illegal practices.

New York City also has an executive order that prevents any city agency from asking undocumented workers about their immigration status or disclosing that information to any other government agencies, such as Immigration and Customs Enforcement (ICE) or Homeland Security.<sup>21</sup> In addition, undocumented workers are generally protected during litigation from releasing information related to their immigration status during discovery.<sup>22</sup>

### The Governor Acts

After the nail salon travesties were reported, Governor Cuomo created his new Task Force to Combat Worker Exploitation, focused on wage theft, retaliation, unsafe conditions, unstable hours, ille-

laundry, restaurants, retail, construction, food markets, truck and waste drivers, janitorial, landscaping and car wash businesses.

Composed of 10 state agencies, including the Division of Criminal Justice Services and State Police, the task force will be armed with more than 700 investigators who will increase scrutiny of employers' practices throughout the state.<sup>23</sup> Utilizing investigative tools such as unannounced site visits, payroll audits, covert investigations and an anonymous call hotline, the task force will hopefully reach those who want to report worker abuse and exploitation. Not surprisingly, the task force has already made a difference in the nail salon industry where as of June 2015, it issued 1,799 violations after inspecting 755 salons throughout the state.

At the same time, starting on Oct. 1, 2015, the New York City Human Rights Commission will

### Conclusion

Although New York state and city officials should be commended for taking innovative and aggressive steps toward protecting undocumented workers, these issues cannot be left solely to the government. The employment bar has a role in preventing labor violations and mitigating damages for violations that may have already occurred. While plaintiffs' counsel can pursue a variety of private actions against exploitative employers, defense counsel can also ensure that their clients are in active compliance with the law.

The latter role is particularly significant because immigrants increasingly make up the portion of employers and business owners in New York. According to the New York Department of Labor, while immigrants make up 12 percent of entrepreneurs nationally, in New York City and State that figure is 49 percent and 25 percent, respectively. As immigrant workers may be unaware of the laws that protect them, immigrant employers may also be unfamiliar with U.S. law as

many of the nail salon owners in The New York Times story were themselves immigrants.

The reality is and has always been that America depends on the contribution of its undocumented immigrants. In New York State alone, undocumented immigrants paid \$1.1 billion in state taxes, while remaining overtly excluded from many governmental benefits.<sup>24</sup> The face of the undocumented worker is also changing as more and more undocumented immigrants are working white-collar jobs.<sup>25</sup> Thus, protecting undocumented workers from wage and labor exploitation is not simply good policy, it is lawful, patriotic and beneficial to the economy and reflective of who we are as a society. To do so is to preserve and defend Lady Liberty, empowered to look over our great city and those most vulnerable toiling in her shadow.

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1. Sarah Maslin Nir, "The Price of Nice Nails," N.Y. TIMES (May 7, 2015), [http://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html?\\_r=0](http://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html?_r=0); "Perfect Nails, Poisoned Workers," N.Y. TIMES (May 7, 2015), <http://www.nytimes.com/2015/05/11/nyregion/nail-salon-workers-in-nyc-face-hazardous-chemicals.html>.

2. Tara Culp-Ressler, "If You're In A Nail Salon In New York, You'll Now See A Workers' Bill Of Rights On The Wall," THINK PROGRESS (May 30, 2015), <http://thinkprogress.org/economy/2015/05/30/3664338/nail-salon-bill-rights/>.

3. Arjun Sethi, "Protect Undocumented Workers Who Fight Abusive Employers," ALJAZEERA AMERICA (June 12, 2015), <http://america.aljazeera.com/opinions/2015/6/protect-undocumented-workers-who-fight-abusive-employers.html>.

4. See e.g., *Montano-Perez v. Durrett Cheese Sales*, No. 08 Civ. 1015, 2010 WL 1959452, at \*1 (M.D. Tenn. May 12, 2010) (defining wage theft as employer's refusal to pay for weeks worked); *Admiral Ins. Co. v. Kay Auto. Distributors*, 82

F.Supp.3d 1175, 1182 (C.D. Cal. 2015) (defining wage theft as underpaying employees). See also New York's Wage Theft Prevention Act, N.Y. Lab. Law §195.

5. Annette Bernhardt, Diana Polson and James DeFilippis, "Working Without Laws: A Survey of Employment Labor Law Violations in New York City," NAT'L EMP'T LAW PROJECT 5 (2015) <http://www.nelp.org/content/uploads/2015/03/WorkingWithoutLawsNYC.pdf> at 38.

6. Fair Labor Standards Act, 29 U.S.C. §201 et seq.; New York Labor Law §170 et seq.

7. *Solis v. Cindy's Total Care*, No. 10 Civ. 7242, 2011 WL 5170009 (S.D.N.Y. Oct. 31, 2011) supplemented, No. 10 Civ. 7242, 2011 WL 6013844 (S.D.N.Y. Dec. 2, 2011) (holding that an employee's immigration status is not relevant to claims of unpaid wages under FLSA).

8. See e.g., *Garcia v. Paquareto*, 812 N.Y.S.2d 216, 217-18 (App. Term 2004); *Nizmuddowlah v. Bengal Cabaret*, 415 N.Y.S.2d 685, 686 (2d Dept. 1979). See also *Pineda v. Kel-Tech Construction*, 15 Misc.3d 176, 190 (Sup. Ct. New York Co. 2007) (holding that undocumented immigrants who worked on municipal construction projects were entitled to the "prevailing wage" under state law).

9. The Equal Employment Opportunity Commission has affirmed that undocumented workers are protected by federal employment discrimination laws. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973); *EEOC v. Tortilleria "La Mejor"*, 758 F.Supp. 585, 590 (E.D. Cal. 1991).

10. N.Y. Exec. Law §290 et seq.; N.Y.C. Admin. Code §8-107 et seq.

11. See *Madeira v. Affordable Housing Foundation*, 469 F.3d 219, 249 (2d Cir. 2006).

12. *Juarez v. Nu. Mut. Life Ins. Co.*, 69 F.Supp.3d 364, 368-74 (S.D.N.Y. 2014), appeal withdrawn (June 4, 2015).

13. 29 USCS §152(3); 29 U.S.C.A. §652(6).

14. NYS WORKERS' COMPENSATION BOARD, EMPLOYERS' HANDBOOK, <http://www.wcb.ny.gov/content/main/Employers/EmployerHandbook.pdf>. See also *Amoah v. Mallah Mgmt.*, 57 A.D.3d 29, 34 (2008); *New York Hosp. Med. Ctr. of Queens v. Microtech Contracting Corp.*, 22 N.Y.3d 501, 504 (2014).

15. *Balabuena v. IDR Realty*, 6 N.Y.3d 338, 363 (2006).

16. NYC CONSUMER AFFAIRS, PAID SICK LEAVE LAW: WHAT EMPLOYEES NEED TO KNOW, <http://www1.nyc.gov/site/dca/about/paid-sick-leave-what-employees-need-to-know.page>; Fact Sheet, New York City's Pregnant Workers Fairness Act, Legal Momentum, [https://www.legalmomentum.org/sites/default/files/reports/NYC\\_PWFA\\_Fact\\_Sheet\\_012814\\_FINAL\\_\(2\).pdf](https://www.legalmomentum.org/sites/default/files/reports/NYC_PWFA_Fact_Sheet_012814_FINAL_(2).pdf).

17. NYS Dept. of Labor, UNEMPLOYMENT INSURANCE, <https://labor.ny.gov/ui/dandedcovered1.shtm>.

18. According to the Center for American Progress, "a total of 16.6 million people currently live in mixed-status families—with at least one unauthorized immigrant—and a third of U.S. citizen children of immigrants live in mixed-status families." Joanna Dreby, CENTER FOR AMERICAN PROGRESS, HOW TODAY'S IMMIGRATION ENFORCEMENT POLICIES IMPACT CHILDREN, FAMILIES, AND COMMUNITIES: A VIEW FROM THE GROUND (June 2012), available at [https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamilies\\_execsumm.pdf](https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamilies_execsumm.pdf).

wp-content/uploads/2012/08/DrebyImmigrationFamilies\_execsumm.pdf.

19. Eunice Hyunhye Cho and Rebecca Smith, THE NATIONAL EMPLOYMENT LAW PROJECT, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS (Feb. 2013), available at <http://www.nelp.org/content/uploads/2015/03/Workers-Rights-on-ICE-Retaliation-Report-California.pdf>.

20. See 29 U.S.C. §2169(b) (stating that an employer who violates antiretaliation provision of FLSA "shall be liable for such legal or equitable relief as may be appropriate"); 49 U.S.C. §2000e-5(g) (listing remedies available when employer engaged in unlawful employment practice). See also *Sure-Tan v. N.L.R.B.*, 467 U.S. 883, 890 (1984) (stating that employer's retaliatory call to the INS, which then conducted a workplace raid and arrested unionizing workers, constituted "constructive discharge" in violation of the NLRA); *U.S. v. Kozminski*, 487 U.S. 931, 948 (1988) (holding "it is possible that threatening...an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude").

21. Executive Order No. 41, C.F.R. (2003),

22. *Liu v. Donna Karan International*, 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002).

23. The task force also includes the Department of Labor, Department of State, Department of Health, Workers' Compensation Board, Department of Tax and Finance, Department of Agriculture and Markets, Office of Children and Family Services, and the Office of Faith Based Services.

24. Albor Ruiz, "Corporate Giants Often get Huge Tax Breaks, While Poor, Undocumented Immigrants Have Paid Billions in State Taxes," N.Y. DAILY NEWS (Apr. 20, 2015), <http://www.nydailynews.com/new-york/corporate-giants-subsidized-undocumented-workers-article-1.2188061>.

25. Rob Wile, "One in Eight Undocumented Immigrants in the U.S. Now Has A White-Collar Job," FUSION (March 26, 2015), <http://fusion.net/story/110023/one-in-eight-undocumented-immigrants-now-has-a-white-collar-gig/>.