

Client Alert

A report
for clients
and friends
of the firm January 2005

New York Appellate Division Holds That Injured Illegal Aliens Can Recover Lost Wages, But Only For Amount They Would Have Earned In Their Home Country

In two decisions issued on the same day by the New York Appellate Division, undocumented workers who were suing to recover wages lost as a result of injuries incurred at work were precluded from calculating their damages based on U.S. earnings. They were, however, permitted to seek damages based on the prevailing wage in their home countries. *Sanango v. 200 East 16th Street Housing Corporation*, N.Y. App. Div., No. 2571, 12/28/04; *Balbuena v. IDR Realty*, N.Y. App. Div., No. 2191, 12/28/04.

Both Sanango and Balbuena were working illegally in the United States and were seriously injured while working on construction sites. Sanango sued the owner of the worksite under New York Labor Law Section 240, which provides that an owner or contractor may be liable when a worker is injured on a construction site due to a failure to provide proper safety protection. The owner asserted a cross-claim against Sanango's employer for indemnification. A jury awarded Sanango more than \$2 million dollars for pain and suffering, as well as \$96,000 for past and future lost earnings based on what he would have been able to earn in the United States, if he had not been injured.

Balbuena similarly sued a number of entities under the labor laws after he was injured while working at a construction site. The trial court held that Balbuena's illegal status did not preclude him from seeking lost wages, but that his recovery should be limited to what he might legally have earned in another country.

On appeal in both cases, the issue was whether, in light of the federal Immigration Reform and Control Act of 1986 ("IRCA") and the Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*, 535 US 137 (2002), the plaintiffs' status as undocumented aliens barred or limited their recovery for lost earnings. IRCA prohibits employers from knowingly hiring illegal aliens to work in the United States. 8 U.S.C.A. §§ 1324a(a)(1)-(a)(2). Relying on IRCA's strong policy against the employment of illegal aliens, the U.S. Supreme Court in *Hoffman* held that the National Labor Relations Board ("NLRB") could not award back pay to an illegal alien who had falsely represented his status as a United States citizen. Such an award, the Supreme Court concluded, would "encourage successful evasion of apprehension by immigration authorities, condone prior violations of immigration laws, and encourage future violations." 533 U.S. at 151.

Prior to the *Hoffman* decision, there was some support in New York case law for the proposition that an illegal alien could pursue a claim for lost U.S. wages. In *Public Adm'r of Bronx County v. Equitable Life Assur. Socy. of U.S.*, 192 A.D.2d 325 (1993), the court held that an undocumented alien's estate could recover wages the decedent might have earned in the United States. The Appellate Division concluded, however, that this case law was no longer valid after *Hoffman*. Any "award of compensation for wages that an alien, but for some violation of his rights, would have earned illegally in the United States 'runs counter to,' and 'unduly trenches upon' the federal immigration policies embodied in IRCA." *Sanango* at *5, quoting from *Hoffman*.

Accordingly, the Court held that “state tort law, to the extent it permits an undocumented alien to recover compensation for lost illegal wages as an element of damages, is preempted by IRCA.” *Id.* at 7. Nevertheless, the Court decided that IRCA did not require a total bar to recovery of lost wages. Federal policy “would [not] be offended by awarding an undocumented alien damages for lost earnings based on the prevailing wage in the alien’s country of origin.” *Id.* at **7-8. Both cases were remanded to afford the plaintiffs an opportunity to offer proof of lost wages on that basis.

EDITORS’ COMMENT:

The impact of IRCA and the *Hoffman* decision on awards for lost wages is an evolving area of law, as the courts consider the issue under various federal and state employment laws. In *Hoffman*, the U.S. Supreme Court held that the NLRB could not award any back pay to the illegal worker, who had presented false working papers to his employer at the time of hire, but was later terminated for his union activity. As recently reported in the New Jersey Edition of Law & the Workplace, the Appellate Division in that state has held that illegal aliens cannot recover any damages, economic or noneconomic, resulting from an allegedly wrongful termination of employment under the discrimination law. *Crespo v. Evergo Corp.*, 366 N.J. Super. 391 (App. Div. 2004).

The New York Appellate Division did not offer an explanation as to why a limited award for lost pay based on the prevailing wage in the country of origin was appropriate, in light of *Hoffman*’s total preclusion. It may be that the holdings in *Sanango* and *Balbuena*, where the plaintiffs had suffered physical injuries that affected their ability to work anywhere, will be limited to situations in which there is a claim of wrongful conduct other than mere termination of employment. Thus, it is not clear what New York courts will do with claims for lost wages under other employment laws. In any event, defendant employers should consider whether to seek information in discovery as to a plaintiff’s immigration status, as such may serve to limit or preclude damages.

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For questions regarding immigration concerns raised in this alert, please email Larry Sandak at lsandak@proskauer.com.

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