

MEMORANDUM

To: Client

From: Lawfinders Associates, Inc.

Date: January x, 200x

Re: Research on Effect of Co-Employee's Illegal Alien Status on Application of Worker's Compensation Law as Exclusive Remedy for Injured Worker

You stated that the facts of your case were as follows:

Your client was run over by a truck operated by a co-worker during the course of their employment by a landscaper. The co-worker is believed to be an illegal alien. Your client accepted Worker's Compensation benefits from his employer, and has sued the illegal alien co-worker. The co-worker is raising the exclusivity provisions of the Worker's Compensation Law as a defense.

You asked us to research whether the illegal alien co-worker's Worker's Compensation defense could be dismissed because, under Federal immigration law, the illegal alien could not legally be employed, and therefore is not a "co-worker" within the meaning of the statute.

There is no New York case law addressing this issue, and the New York Worker's Compensation Law makes no reference to the putative employee's legal or illegal status in defining the term "employee". NY Worker's Compensation Law § 2. The Federal Immigration Reform Act (IRCA), however, makes it clear that it is illegal to employ an "unauthorized" alien. 8 U.S.C. § 1324a(a). An "unauthorized" alien is any alien not lawfully admitted to the country for permanent residence or otherwise authorized to be employed by the statute or the United States Attorney General. 8 U.S.C. § 1324a(h)(3). Notwithstanding this clear prohibition against employment of illegal aliens, most jurisdictions concluded that the IRCA did not prevent illegal aliens from being included in a state's definition of "employee" for the purposes of receiving worker's compensation benefits. *See, e.g., Ruiz v. Belk Masonry Co.*, 148 N.C.App. 675, 678-79, 559 S.E.2d 249 (N.C. Ct App. 2002). It follows that, if an illegal alien may be an "employee" for the purposes of claiming worker's compensation benefits, he can also be a "co-employee" for the purpose of claiming the benefits of the statute as a defense to a litigation against him by an injured co-worker.

A minority of jurisdictions, however, concluded that illegal employment precludes the

application of a worker's compensation law to the illegally employed party. In *Granados v. Windson Development Corp.*, 257 Va. 103, 509 S.E.2d 290 (Va. 1999), the Virginia Supreme Court held that, because an illegal alien could not be lawfully employed under the IRCA, he could not be an "employee" within the meaning of the worker's compensation statute, notwithstanding that the Virginia statute did not mention anything about the putative employee's legal or illegal status. *Id.* at 108-09. The court reasoned that an illegal alien could not be "employed" within the meaning of a worker's compensation statute, because any purported hiring of an illegal alien would be void and unenforceable under the IRCA. *Id.*

In *Rios v. Ryan Inc. Central*, 35 Va.App. 40, 542 S.E.2d 790 (Va. Ct App. 2001), the Virginia Court of Appeals (Richmond) reaffirmed this rule. In *Rios*, the plaintiff employee was employed by the defendant as a truck driver and laborer. *Id.* at 43. He was injured in the course of his employment, and filed a claim for worker's compensation benefits. *Id.* The defendant employer denied the claim, arguing that the plaintiff was an unauthorized alien under the IRCA, and therefore could not be an "employee" for the purpose of the worker's compensation law. *Id.* The court agreed, stating that the statute as written at the time of the claim¹ precluded his claim, because he was illegally employed under the IRCA. *Id.* at 47.

Wyoming law also holds that a worker's compensation statute may not be asserted as a defense in an action where the subject employment was unlawful or illegal. *Barnette v. Doyle*, 622 P.2d 1349, 1353 (Wyoming 1981); *Mauch v. Stanley Structures, Inc.*, 641 P.2d 1247, 1250 (Wyoming 1982); *Matter of Felix v. State*, 986 P.2d 161, 163-64 (Wyoming 1999). It should be noted, however, that the Wyoming worker's compensation statute specifically permits an injured employee to sue his co-workers if they were responsible for his injuries, *Barnette, supra, Mauch, supra*, and that the definition of "employee" under the Wyoming statute specifically states that only "aliens authorized to work by the United States department of justice, immigration and naturalization service [sic]" qualify. *Felix*, 986 P.2d at 164. These provisions are not present in the New York Worker's Compensation Law.

The United States Supreme Court recently issued an opinion that is consistent with the minority jurisdictions' conclusion that an illegal alien should not be an "employee" for worker's compensation purposes. In *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board*, 535 U.S. 137, 122 S.Ct. 1275 (2002), the majority of the United States

¹The Virginia Legislature amended Virginia's worker's compensation statute after *Granados* to specifically include unlawfully employed individuals as "employees" under the statute. Because the New York statute does not contain this express inclusion of unlawfully employed aliens as "employees", these Virginia cases arguably support the conclusion that a New York court should conclude that illegally employed aliens are not "employees" under the New York Worker's Compensation Law.

Supreme Court held that an illegal alien could not be awarded back-pay in a dispute over an allegedly illegal discharge. *Id.* at 1282-85. The Supreme Court reasoned that, because he was never lawfully entitled to be present or employed in the United States, he was not entitled to back-pay. *Id.* at 1282. It continued that the IRCA was enacted to “forcefully” combat the employment of illegal aliens, and that under the IRCA, an illegal alien cannot obtain employment without someone directly contravening explicit federal law. *Id.* at 1282-83. The Supreme Court reasoned that it would eviscerate the IRCA for an unlawfully employed illegal alien to recover back-pay for wages that could not be lawfully earned, and for a job obtained through criminal fraud. *Id.* at 1283. Because the award of back-pay in such a case runs counter to the IRCA’s policies, and “unduly trench[es] upon explicit statutory prohibitions critical to federal immigration policy”, it was impermissible. *Id.* at 1283-85.

After *Hoffman*, a New Jersey court held that “where the governing workplace statutory scheme makes legal employment a prerequisite to its remedial benefits, a worker’s illegal alien status will bar relief thereunder”. *Crespo v. Evergo Corp.*, 366 N.J.Super. 391, 399, 841 A.2d 471 (NJ Sup. Ct, App. Div. 2004). Based on the Supreme Court’s interpretation of the IRCA in *Hoffman*, the New Jersey court concluded that an illegal alien could not recover damages for an alleged wrongful termination. *Id.* at 399-402. In doing so, however, the New Jersey court expressly acknowledged that its pre-*Hoffman* decisions did not preclude illegal aliens from obtaining worker’s compensation benefits, and that courts in other states had reached the same conclusion post-*Hoffman*. *Id.* at 398-99. Thus, it appears that the New Jersey courts have not yet decided whether *Hoffman* would preclude an illegal alien from obtaining benefits under a worker’s compensation statute.

The majority jurisdictions, however, still adhere to their prior determination that the IRCA does not preclude an illegal alien from being considered an “employee” for worker’s compensation purposes, notwithstanding *Hoffman*. *Safeharbor Employer Services v. Velazquez*, 860 So.2d 984, 985-86 (1st DCA Fla. 2003) (*Hoffman* does not preclude states from awarding worker’s compensation benefits to illegal aliens); *Cherokee Indus., Inc. v. Alvarez*, 84 P.3d 798, 799-802 (Ok. Ct. Civ. App. 2004) (Oklahoma worker’s compensation statute does not exclude illegal alien workers from coverage); *Silva v. Martin Lumber Co.*, 2003 WL 22496233 (Tenn. 2003) (Tennessee worker’s compensation law does not exclude illegal aliens from coverage); *Sanchez v. Eagle Alloy Inc.*, 254 Mich.App. 651, 661, 658 N.W.2d 510 (Mich. Ct. App. 2003) (Michigan worker’s compensation statute² does not exclude illegal aliens); *Reinforced Earth Co. v. Worker’s Compensation Appeal Bd.*, 570 Pa. 464, 474, 810 A.2d 99 (Pa. 2002) (public policy did not exclude unauthorized alien from claiming benefits under worker’s compensation statute). It therefore still follows that, if an

²The Michigan statute expressly includes “aliens” in its definition of “employee”, without reference to their legal or illegal status.

illegal alien could claim benefits under a worker's compensation statute, he could still assert it as a defense. Although New York has not addressed this issue, it must be noted that, in an amicus brief submitted on the District Court appeal in *Hoffman*, the New York Attorney General took the position that the illegal alien was entitled to back-pay.