

PUBLICATION

NLRB and EEOC Change Practices Based on Hoffman Case

Authors: Robert C. Divine

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In follow up to the Supreme Court's decision in *Hoffman Plastic Compounds Inc. v. NLRB*, the General Counsel of the National Labor Relations Board has distributed a memorandum to all regional and local NLRB officials instructing them how Hoffman should change what NLRB does when undocumented workers are involved.

In summary, NLRB regional offices are instructed to follow the following procedure.

- Oppose an employer's challenge to an election ballot based on an employee's immigration status.
- Regions generally should presume that employees are lawfully authorized to work. They should refrain from conducting a sua sponte immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.
- Regions should investigate the discriminatee's immigration status only after a respondent establishes the existence of a genuine issue.
- Regions should conduct an investigation by asking the Union, the charging party and/or the discriminatee to respond to the employer's evidence.
- If a party raises the issue of an employee's immigration status at a representation case hearing, the Hearing Officer should not permit the evidence to be adduced, but rather should allow the party to present a brief offer of proof.
- If an employer knowingly employed undocumented workers, seek reinstatement, conditioned upon I-9 verification after giving the employee a reasonable time to present documents.
- NOT seek backpay for unlawful discharge of an undocumented worker regardless of the circumstances of hire, even if hired with knowledge of undocumented status.
- Seek compensation for an undocumented worker whose pay or benefits were unilaterally reduced by the employer based on concerted activity, but seek NLRB advice if the worker was demoted to a lower paying job.
- If an employer knowingly hires undocumented workers and uses their work authorization status to threaten and discharge them in retaliation for their Section 7 activity, seek actual NLRB cease and desist orders through litigation or formal settlement, and seek contempt sanctions for violations of the orders. Seek to compel an employer to continue to assist an undocumented worker in his or her efforts to become regularized where the discrimination itself is the employer's discontinuance of its previous support. Consider seeking union access to employees or employee rosters. Require that notice of the order be read to employees.

The EEOC issued a rescission of its prior guidance on undocumented workers, since the NLRB rulings upon which it was based were overruled by Hoffman. The EEOC then issued a public statement about a field memorandum instructing officers to continue to pursue cases of discrimination against undocumented workers, to refrain from inquiring into the immigration status of alleged discriminatees, and to ignore immigration issues before the remedial stages of a case.