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Undocumented Aliens And Union Activity: Ruling Shows Employers' Dilemma When Dealing With Conflicting Federal Laws

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On January 4, the United States Circuit Court of Appeals for the District of Columbia held that undocumented aliens are entitled to all protections accorded to all "employees" under the National Labor Relations Act (NLRA). In *Agri-Processor Co., Inc. v. NLRB,* the Court confirmed those rights even though undocumented aliens may not lawfully work in U.S. workplaces under the Immigration Reform & Control Act of 1986 (IRCA). Therefore, while it is unlawful for employers to hire undocumented workers or for such undocumented workers to seek employment in U.S. workplaces, once hired, they have all the rights of lawful workers to unionize - with the blessing of the National Labor Relations Board (NLRB) and several U.S. Circuit Courts of Appeal.

Agri-Processor Co. (Agri) is a wholesaler of kosher meats in Brooklyn, New York. In September 2005, the company's employees voted to join United Food & Commercial Workers Union. Following the election, the employer placed the Social Security numbers provided to it by all voting employees into the Social Security Administration's online database. This revealed that most of those numbers were either nonexistent or belonged to other people. Agri then refused to bargain with the union, asserting that most of the workers who had voted in the election were undocumented aliens who were not authorized to work in the United States. The union responded by filing an unfair labor practice charge with the regional office of the NLRB, alleging that Agri violated the NLRA by its refusal to bargain. Following an investigation and an administrative trial, the NLRB sided with the union and ordered Agri to bargain with the union. Agri continued its refusal to bargain while appealing to the D.C. Circuit Court of Appeals to vacate the NLRB's order. The crux of the company's appeal was that its refusal to bargain should be excused because of the necessity to comply with IRCA.

A divided three-judge panel agreed with the NLRB's conclusion that an undocumented worker still falls within the NLRA's definition of "employee," citing a 1984 pre-IRCA Supreme Court decision. The court further noted that the enactment of IRCA two years after the Supreme Court's 1984 ruling neither amended the NLRA, nor did it affect the Supreme Court's 1984 ruling. The D.C. Circuit Court noted that the Circuit Courts of Appeal for the Seventh, Ninth and Eleventh Circuits had likewise held that the NLRA continues to control this issue despite the later enactment of IRCA. In addition, the D.C. Circuit in *Agri* agreed with the NLRB that the undocumented workers shared a "community of interest" with lawful workers with respect to wages, hours and other terms and conditions of employment.

The implications of *Agri* for employers in the private sector are both significant and ominous. As Judge Henderson said in her concurrence, "It seems somewhat peculiar indeed . . . to order an employer to bargain with a union representing employees that the employer would be required to discharge under [IRCA]." The ruling underscores the need for employers to ensure, to the extent possible, that their employees are properly documented during the I-9 and hiring process. If not, the undocumented workers would acquire "employee" status for purposes of Federal labor law. Further, an employer's obligations under IRCA would provide no defense if such undocumented workers seek the protections of Federal labor law.