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Emerging From the Jungle: New Jersey Workers' Compensation and Workers Without Lawful Immigration Status

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EMERGING FROM THE JUNGLE*: NEW JERSEY WORKERS' COMPENSATION AND WORKERS WITHOUT LAWFUL IMMIGRATION STATUS

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* Upton Sinclair's novel, The Jungle, was published in 1906 by Doubleday and details the horrors experienced by a Lithuanian immigrant working in the Chicago slaughterhouses. This novel raised public consciousness on many levels to the plight of unregulated and unprotected working conditions. It is credited with being the inspiration for the Meat Inspection Act, the creation of the Food and Drug Administration, and many workers' compensation developments.

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INTRODUCTION

The law distinguishes between an undocumented alien worker's right to economic damages stemming from termination of his unlawful employment and his right to certain non-economic damages incurred during such prohibited activities—particularly compensation for injuries suffered during the course of unlawful employment. Under the federal Immigration Reform and Control Act ("IRCA"),[1] economic damages, such as back or front pay, are unavailable to aliens unlawfully present in the United States who procured their employment in violation of the IRCA.[2] On the federal level, these individuals do not have authorization to work and consequently have no lawful entitlement to unemployment or wage benefits. However, New Jersey permits undocumented alien workers to recover non-economic damages under its statewide Workers' Compensation scheme, despite the fact that such individuals are not authorized to work in the United States.[3]

Although the Supreme Court held that undocumented alien workers[4] are not entitled to back pay when they experience wrongful termination under the federal National Labor Relations Act ("NLRA")

[1] Immigration Reform and Control Act of 1986 (ICRA), 8 U.S.C. §§ 1324a–1324c (2013).

[2] Davila v. Grimes, No. 2:09-CV-407, 2010 WL 1737121, at *2 (S.D. Ohio Apr. 29, 2010) (declining to decide on motion to compel, but determining that immigration status is relevant to claim for lost wages in tort action).

[3] Many state courts, including those in New York, Pennsylvania, Connecticut, New Hampshire, and, most recently, in Delaware and the District of Columbia, have found that the IRCA does not preempt state law on lost wages in workers' compensation cases. *See, e.g.*, Asylum Co. v. D.C. Dep't of Emp't Servs., 10 A.3d 619, 632–33 (D.C. 2010).

[4] The term "unlawfully present alien" is considered by some to be synonymous with "illegal alien," though the latter has a more pejorative ring and is therefore not being employed herein. For purposes of this article, it may be more accurate to describe the group as "non-citizens unauthorized to work," though this phrase is a bit too unwieldy to include throughout.

because of their lack of work authorization in the first instance, undocumented workers in the state of New Jersey maintain access to the statewide Workers' Compensation scheme if they suffer from work-related injuries. Unlike the NLRA, which creates independent causes of action for those employees falling under its umbrella, New Jersey Workers' Compensation is a statutory scheme utilized in part as a substitute for civil lawsuits to which everyone would traditionally have access regardless of immigration status.[5] Thus, undocumented alien workers have access to workers' compensation benefits just as they would have access to civil remedies in courts of law. Although New Jersey grants undocumented alien workers access to Workers' Compensation Courts despite their lack of authority to work in the United States, the state does not extend economic remuneration, such as unemployment benefits, to these workers. This Article explains the unlawfully present alien's access to New Jersey's Workers' Compensation Courts—and not economic programs, such as unemployment benefits—and the basis for allowing an unlawfully present alien to pursue certain work-related injury claims under New Jersey Law.[6]

I. Background on the Immigration Reform and Control Act[7]

Immigration law falls exclusively within the federal domain.[8] The authority to admit or exclude non-citizens from the United States is a fundamentally sovereign act.[9] The statutory and regulatory schemes governing immigration law are found at the federal level. The Immigration Reform and Control Act is a "comprehensive scheme

[5] Mendoza v. Monmouth Recycling Corp., 672 A.2d 221, 225 (N.J. Super. Ct. App. Div. 1996).

[6] The issue of temporary disability compensation and undocumented alien workers is not addressed in this Article, but it is important to note that such benefits are an additional way for undocumented alien workers to seek compensation from employers. The extent of undocumented alien workers' access to such benefits is beyond the scope of this piece. Anecdotally, it appears that many undocumented alien workers would have trouble accessing such benefits due to the fact that it is common for them to be paid in cash, and proof of wages is one essential element of temporary disability compensation claims.

[7] 8 U.S.C. §§ 1324a–1324c (2006).

[8] *C.f.* Arizona v. United States, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part, dissenting in part) ("Nor can federal power over illegal immigration be deemed exclusive because of what the Court's opinion solicitously calls 'foreign countries[']concern[s] about the status, safety, and security of their nationals in the United States.").

[9] Ping v. United States, 130 U.S. 581, 600 (1889); Ting v. United States, 149 U.S. 698, 705 (1893); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

prohibiting the employment of illegal aliens in the United States."[10]

The IRCA "forcefully" made combating the employment of unlawfully present aliens central to "[t]he policy of immigration law."[11] It did so by establishing an extensive employment verification system[12] designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States.[13] This verification system is critical to the IRCA regime. To enforce it, the IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.[14] If an alien applicant is unable to present the required documentation, he cannot be hired.[15] Furthermore, it is a crime under the IRCA for an alien to undermine the employer verification system by using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States.[16] Violation of the IRCA can result in fines, incarceration, or both for the alien offender.[17] Similarly, employers may be subject to significant civil money penalties and even criminal sanctions for knowingly hiring unauthorized aliens.[18] Employers that unknowingly hire an unauthorized alien, or later discover that the alien has lost his lawful status during employment, must immediately discharge that employee.[19]

[10] Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137, 147 (2002) (citing 8 U.S.C. § 1324a). The U.S. Supreme Court has denied certiorari on other cases on this issue. Cont'l Pet Techs., Inc. v. Palacias, 546 U.S. 825 (2005); Vaughan Roofing & Sheet Metal, LLC v. Rodriguez, 131 S. Ct. 1572 (2011).

[11] Immigration & Naturalization Serv. v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 194 n.8 (1991).

[12] 8 U.S.C. § 1324a(b)(2006).

[13] 8 U.S.C. § 1324a(h)(3)(2006).

[14] 8 U.S.C. § 1324a(b)(1)(2006).

[15] 8 U.S.C. § 1324a(a)(1)(2006).

[16] 8 U.S.C. §§ 1324c(a)(1)–(3)(2006).

[17] 18 U.S.C. § 1546(a) (2013).

[18] 8 U.S.C. §§ 1324a(e)(5), 1324a(f)(1)(2006).

[19] 8 U.S.C. § 1324a(a)(2)(2006).

II. The Supreme Court on Economic Remedies to Undocumented Alien Workers Based on Labor Law Violations: Hoffman Plastic Compounds

Hoffman Plastic Compounds, Inc. v. National Labor Relations Board is the most recent U.S. Supreme Court case to address the rights of undocumented workers pursuant to the National Labor Relations Act in light of the broad restrictions of the IRCA.[20] The case arose in the context of an action contesting an order of the National Labor Relations Board (hereinafter "Board") awarding back pay to an undocumented worker in response to his improper termination under the NLRA.[21] Castro, the undocumented alien worker, originally secured employment via the use of fraudulent documents, a criminal act under the IRCA.[22] The offending employer fired Castro because he supported a union-organizing effort, a violation of the NLRA.[23] As a result of its violation of the NLRA, Hoffman was ordered by the Board to award back pay to Castro from the date of improper termination to the date Hoffman learned of Castro's undocumented status.[24] The *Hoffman* Court stated that it was being asked to permit an "award [of] backpay [sic] to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud."[25] The Court ultimately held "that awarding backpay [sic] to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer."[26]

The Supreme Court further concluded that "allowing the Board to award backpay [sic] to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."[27]

The IRCA and *Hoffman* were later relied upon by lower courts to deny undocumented workers the right to seek alternative remedies for

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[20] *Hoffman*, 535 U.S. at 137.
[21] *Id.* at 140.
[22] *Id.* at 141.
[23] *Id.* at 140.
[24] *Id.* at 141–42.
[25] *Id.* at 148–49, 159–60.
[26] *Hoffman*, 535 U.S. at 149.
[27] *Id.* at 151.

other employment-related wrongful conduct, such as workplace discrimination. In *Crespo v. Evergo Corp.*,[28] the plaintiff, a former employee and an undocumented alien worker, claimed that Evergo refused to permit her to return to work after going on maternity leave.[29] The New Jersey Appellate Division held that an undocumented alien who gained employment using fraudulent documentation was disqualified from legal employment and thus is ineligible for economic or non-economic recovery (i.e., back pay and reinstatement to her former position, respectively) under the New Jersey Law Against Discrimination ("LAD").[30] The court made clear that Crespo's claims arose solely from her wrongful termination and not from any mistreatment during the course of her employment.[31] In reconciling the facial disconnect between the IRCA and the LAD, the court noted that, although the LAD provides that all persons have the right to be employed without fear of discrimination, the LAD also allows an employer to "'restrict employment to citizens of the United States where such restriction is required by federal law. . . .'"[32]

While *Hoffman* and *Crespo* deny undocumented workers the right to recover economic and non-economic damages under the LAD and the NLRA, these cases do not leave workers without any state and federal workplace rights, including the right to receive workers' compensation benefits after suffering a job-related injury or illness.

III. An Undocumented Worker's Right to Personal Injury Damages

"Each person is entitled to the equal protection of the law" and "every alien, whether in this country legally or not, has a right to sue those who physically injure him."[33] The principal goal of damages in personal-injury actions is to compensate fairly the injured party.[34] Fair

[28] Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Super. Ct. App. Div. 2004).

[29] *Id.* at 472.

[30] *Id.* at 477; N.J. STAT. ANN. § 10:5–1.

[31] *Crespo*, 841 A.2d at 477.

[32] *Id.* at 474 (quoting § 10:5–12(a) (West 2013)).

[33] Hagl v. Jacob Stern & Sons, Inc., 396 F. Supp. 779, 784 (E.D. Pa. 1975) (citing Sugarman v. Dougall, 413 U.S. 634, 641–42 (1973); Graham v. Richardson, 403 U.S. 365, 371 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Wo v. Hopkins, 118 U.S. 356 (1886)).

[34] Deemer v. Silk City Textile Mach. Co., 475 A.2d 648, 652 (N.J. Sup. Ct. App. Div. 1984).

compensatory damages resulting from the tortious infliction of injury encompass no more than the amount that will make the plaintiff whole, that is, the actual loss.[35] "The purpose, then [,] of personal injury compensation is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses."[36]

New Jersey case law regarding the universal right to access the courts for civil remedies generally provides the key to understanding the basis for granting workers' compensation to undocumented alien workers. New Jersey courts have long held "'that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries.'"[37] The New Jersey Appellate Division has held that "a well established body of law holds that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries."[38] The New Jersey Appellate Division reaffirmed this sentiment even after the 1996 IRCA immigration reforms.[39] Other post-*Hoffman* courts have also attempted to reconcile the IRCA with the availability of workers' compensation and personal injury economic damages.[40]

The highest federal court to address an instance of personal injury of an undocumented alien worker is the Second Circuit Court of Appeals in *Madeira v. Affordable Housing Fund, Inc.*[41] That court heard an appeal from a jury verdict in a personal injury action under New York state law awarding compensatory damages for lost earnings to an undocumented alien worker, as well as out-of-pocket expenses and pain and suffering.[42] *Madeira* distinguished the holding in *Hoffman*, noting that "the injury being remedied in *Hoffman Plastic* was termination while the wrong being compensated in this case is disabling personal

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[35] Ruff v. Weintraub, 519 A.2d 1384, 1386 (N.J. 1987) (citing Tenore v. Nu Car Carriers, 341 A.2d 613, 619 (N.J. 1975)).

[36] *See Domeracki*, *supra* note 38.

[37] *Crespo*, 841 A.2d at 476 (quoting Montoya v. Gateway Ins. Co., 401 A.2d 1102, 1103 (N.J. Super. Ct. App. Div. 1979)).

[38] *Montoya*, 401 A.2d at 103–04 (citations omitted).

[39] *Mendoza*, 672 A.2d at 225 (citing *Montoya*, 401 A.2d at 103–04) ("We fully subscribe to that proposition.").

[40] *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 239 n. 21 (2d Cir. 2006).

[41] Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219 (2d Cir. 2006).

[42] *Id.*

injury.'"[43] Generally, for public policy reasons, undocumented workers who are injured on the job should be eligible to recover lost wages when the employer is at fault. Where "(1) the wrong being compensated is personal injury, conduct not authorized by IRCA; (2) it was the employer and not the worker who [knowingly] violated IRCA by arranging for the employment; and (3) the jury was instructed to consider the worker's removability in assessing damages," New York could, consistent with the IRCA, allow an injured worker to be compensated with lost earnings at United States pay rates.[44]

Following *Madeira*, the court in *Hocza v. City of New York* determined lost wages were recoverable in a negligence claim, stating "neither [*Madeira* nor *Balbuena v. IDR Realty LLC*] held that a claim for lost earnings by an undocumented alien should be treated differently than such a claim 'by any other injured person.'"[45] The court in *Hocza* concluded that a plaintiff's immigration status could not be introduced for the possibility that he would be deported, but it could be used to address its "impact on opportunities for employment in the United States."[46]

Although not precedential, it should be noted that, in 2011, the U.S. District Court for New Jersey, in *Kalyta v. Versa Products*,[47] an unpublished case, held that an undocumented worker may seek damages for lost wages in connection with a personal injury suit. Kalyta initially entered the United States on a student visa but, instead of going to school, he went to work at a satellite dish installation company where he was injured after falling from a ladder while on the job.[48] He sued the ladder manufacturer and related sales entities for personal injuries and lost wages due to his inability to work as a result of his injuries.[49] Unlike in *Hoffman*, this was not a suit by an employee against his employer, and there were no allegations that Kalyta gained employment by use of fraudulent documents. The court noted that *Crespo* had previously held

[43] *Id.* at 236.

[44] *Id.* at 223, 228.

[45] Hocza v. City of New York, No. 06–3340, 2009 WL 124701, at *4 (S.D.N.Y. Jan. 20, 2009) (referencing *Madiera*, 469 F.3d 219 and Balbuena v. IDR Realty LLC, 845 N.E.2d 1246 (N.Y. 2006).

[46] *Id.*

[47] Kalyta v. Versa Prods., No. 07-1333 (MLC), 2011 U.S. Dist. LEXIS 27719 (D.N.J. Mar. 17, 2011).

[48] *Id.* at *2.

[49] *Id.* at *3.

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."[50] The court also noted the absence of any New Jersey authority creating such a prerequisite for the recovery of lost wages in a personal injury action. Accordingly, the court held that "neither IRCA nor New Jersey law prohibits lost wages damages for undocumented workers in the personal injury tort context."[51]

IV. The New Jersey Workers' Compensation Act, Work Injury Claims, and the "Intentional Wrong" Caveat

Workers' Compensation is a state insurance program designed to provide compensation to employees who suffer job-related injuries or illness. In New Jersey, the Workers' Compensation Act ("WCA") provides that "[w]hen personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor [sic] from his employer. . . ."[52] The WCA also provides that the parties' use of the statute

> shall be a surrender by the [employer and employee] of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all of the provisions of [the Workers' Compensation Act], and shall bind the employee. . . as well as the employer. . . .[53]

There are three types of benefits to which workers are entitled under New Jersey's WCA: medical, temporary disability, and permanent disability.[54] Medical benefits compensate the worker for expenses paid for medical treatment to treat or cure the injury.[55] If an injury produces a temporary disability, the worker is eligible to receive seventy percent of his or her wages at the time of the injury, subject to a

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[50] *Id.* at *19 (quoting *Crespo*, 841 A.2d at 476).

[51] *Kalyta*, 2011 U.S. Dist. LEXIS 27719, at *20.

[52] N.J. STAT. ANN. § 34:15–1 (West 2013).

[53] § 34:15–8.

[54] Many attorneys list an additional benefit: reopener rights. This is the ability to seek additional benefits within two years of the last payment received if the worker's injury becomes worse than initially projected. This benefit is distinct from the others in that it is not an immediate, monetary benefit resulting from an initial claim. § 34:15–27.

[55] § 34:15–15.

certain statutory minimum and maximum, for up to 400 weeks.[56] For a permanent and total disability, a worker may receive seventy percent of his or her wages at the time of the injury, subject to statutory limitations, for 450 weeks.[57] To receive benefits for longer than 450 weeks, the worker must demonstrate continued injury.[58] For partial, permanent disability, a worker is entitled to seventy percent of wages for a period, to be paid in accordance with the Disability Wage and Compensation Schedule embodied in the Act.[59]

New Jersey case law further supports that the WCA creates an exclusive remedy for employees who sustain injuries arising in and out of the course of their employment.[60] "It is the plain, unambiguous language of the statute itself . . . which clearly demonstrates that Workers' Compensation is the exclusive remedy afforded to the employee who is injured during the course of his employment."[61] The WCA embodies "an [sic] historic 'trade-off' whereby employees relinquish their right to pursue common-law remedies in exchange for prompt and automatic entitlement to benefits for work-related injuries."[62] "If an injury . . . is compensable under [the WCA], a person shall not be liable to anyone at common law or otherwise on account of such injury . . . *except for intentional wrong*."[63] Thus, even if an undocumented worker recovers damages under the WCA scheme, he is likely stuck with those benefits as the exclusive remedy. He may only recover further in court if he can get beyond the statute's exclusivity provision and establish that the injury meets the high bar of being an "intentional wrong."

A plaintiff—any plaintiff, regardless of immigration status—claiming such an "intentional wrong" bears a high burden of proof

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[56] § 34:15–12(a).

[57] § 34:15–12(b).

[58] *Id.*

[59] § 34:15–12(c).

[60] Part of Title 34 Chapter 15 of the New Jersey statutes is the New Jersey Workers' Compensation Act. §§ 34:15-1 to –142 (2012).

[61] DeFigueiredo v. U.S. Metals Refining Co., 563 A.2d 76, 78 (N.J. Super. Ct. Law Div. 1988), *aff'd*, 563 A.2d 50 (N.J. Super. Ct. App. Div. 1989).

[62] Laidlow v. Hariton Mach. Co., 790 A.2d 884, 886 (N.J. 2002) (citing Millison v. E. I. du Pont de Nemours & Co., 501 A.2d 505, 512 (N.J. 1985)); *see also* Seltzer v. Isaacson, 371 A.2d 304, 307 (N.J. Super. Ct. App. Div. 1977).

[63] § 34:15–8 (emphasis added). The New Jersey Supreme Court explained the nature of "intentional wrong" in this context in *Millison*. *Millison*, 501 A.2d at 509–10.

requiring a showing of a deliberate intent to injure.[64] The Supreme Court of New Jersey in *Millison v. E. I. du Pont de Nemours & Co*. held that, in order to show intentional wrong on the part of the employer, the plaintiff must show that there was both (1) conduct that amounts to substantial certainty of harm, well beyond negligence or recklessness, and (2) a context in which the injury or illness is "plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the [WCA]," excluding risks that are inherent in the industrial industry.[65] The court clarified that:

> [e]ven if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering [a] claimant to perform an extremely dangerous job, willfully failing to furnish a safe place to work, or even willfully or unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.[66]

Noting that the Workers' Compensation system "confronts head-on the unpleasant, even harsh, reality . . . that industry knowingly exposes workers to the risks of injury and disease . . . . The essential question [that must be answered is] what level of risk-exposure is so egregious as to constitute an 'intentional wrong.'"[67]

Mere knowledge and appreciation of a risk does not constitute intent. The New Jersey Appellate Division, in analyzing this issue, concluded that "if the risk is great [,] the conduct may be characterized as reckless or wanton, but it is not an intentional wrong."[68] "[A]n intentional wrong is not strictly a deliberate assault and battery."[69]

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[64] *Millison*, 501 A.2d at 510; *see also* Bryan v. Jeffers, 248 A.2d 129, 130 (N.J. Super. Ct. App. Div. 1968) ("[T]he Legislature intended the words 'intentional wrong,' in this context, to have their commonly understood signification of deliberate intention.").

[65] *Millison*, 501 A.2d at 514–15 (emphasis in original); *see also Laidlow*, 790 A.2d at 894 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 80, at 569 (5th ed. 1984) (emphasizing that "an intentional wrong is not limited to actions taken with a subjective desire to harm, but also includes instances where an employer knows that the consequences of those acts are substantially certain to result in such harm.")).

[66] *Millison*, 501 A.2d at 510 (quoting 6–103 ARTHUR LARSON, THE LAW OF WORKMAN'S COMPENSATION § 103.03, at 13–22 to 13–27 (1983)).

[67] *Millison*, 501 A.2d at 513–14.

[68] Crippen v. Cent. Jersey Concrete Pipe Co., 823 A.2d 789, 795 (N.J. 2003) (citations and internal quotation marks omitted).

[69] Tomeo v. Thomas Whitesell Constr. Co., 823 A.2d 769, 772 (N.J. 2003) (citing *Millison*, 501 A.2d at 513).

Rather, the "substantial certainty" standard is determinative.[70]

The *quid pro quo* of workers' compensation "can best be preserved by applying the 'intent' analysis of Dean Prosser to determine what is an 'intentional wrong' within the meaning" of N.J. STAT. ANN. § 34:15-9.[71] The meaning of intent is that an actor desires to cause the consequences of his act or is substantially certain that such consequences will result from his actions.[72] The distinction between negligence, recklessness, and intent is a matter of degree; "the dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the statutory framework of the Act is not circumvented simply because a known risk later blossoms into reality."[73] There must be "a virtual certainty."[74]

Laidlow v. Hariton Machinery Company, Inc. involved a serious hand injury arising from the plaintiff's use of an industrial rolling mill at his place of employment.[75] Thirteen years prior to the plaintiff's accident, his employer disabled a safety guard on the mill, replacing it in its proper position only when Occupational Safety Health Administration ("OSHA") representatives visited the plant.[76] Despite the employer's knowledge of the dangerous condition, the plaintiff's prior requests for reinstallation of the safety guard, and various "close calls" resulting from the removal of the guard, the employer refused to reinstall the guard, electing instead to forego the safety of its employees in favor of increased "speed and convenience."[77] The *Laidlow* court determined that a reasonable jury could find that, in light of such circumstances, the defendant-employer "knew that it was substantially certain that the removal of the safety guard would result eventually in

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[70] *Millison*, 501 A.2d at 514 (quoting Keeton et al., *supra* note 67, § 8, at 36) (Relying upon The Law of Torts: "the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great, the conduct may be characterized as reckless or wanton, but it is not an intentional wrong.").

[71] *Id.*

[72] RESTATEMENT (SECOND) OF TORTS § 8A.

[73] *Millison*, 501 A.2d at 514.

[74] *Id.* (citations omitted).

[75] *Laidlow*, 790 A.2d at 887.

[76] *Id.* at 888.

[77] *Id.* at 897.

injury to one of its employees."[78] The court made it clear that the absence of a prior accident did not preclude a finding of an intentional wrong.[79] Thus, the court held that a jury question was presented as to the conduct prong of the *Millison* test.[80] With regard to the context prong, the *Laidlow* court found that, "if an employee is injured when an employer deliberately removes a safety device from a dangerous machine to enhance profit or production, with substantial certainty that it will result in death or injury to a worker, and also deliberately and systematically deceives OSHA . . . such conduct violates the social contract" and falls outside the scope of the workers' compensation bar.[81]

While ordinarily the same set of facts and circumstances will be germane to both prongs, the conduct prong is a question of fact to be determined by a jury, while the context prong is question of law for the court.[82]

V. The Position of the New Jersey Workers' Compensation Courts on Non-Economic Damages for Undocumented Workers Injured on the Job versus Non-access to Certain Economic Benefits[83]

In the context of undocumented workers' rights of access to courts generally for civil remedies, New Jersey courts have interpreted

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[78] *Id.* at 897–98.

[79] *Id.* at 897 (citing Cook v. Cleveland Elec. Illuminating Co., 657 N.E.2d 356, 364 (Ohio Ct. App. 1995)).

[80] *Laidlow*, 790 A.2d at 897–98.

[81] *Id.* at 898. The Court was careful to circumscribe its ruling, however, noting that it should not be understood to establish a per se rule that an "intentional wrong" is committed whenever a safety device is removed from machinery or some other OSHA violation is found. *Id.* Rather, what is necessary is the consideration of the "totality of the facts contained in the record and the satisfaction of the standards established in *Millison* and explicated here." *Id. See also Tomeo*, 823 A.2d at 373, 384; Mull v. Zeta Computer Prods., 823 A.2d 782, 786 (N.J. 2003); *Crippen*, 823 A.2d at 797–99.

[82] *Laidlow*, 790 A.2d at 898.

[83] In a related area of law, the New Jersey Department of Labor ("Department") has been unmistakable in making immigration status a non-issue in its enforcement of the New Jersey Wage and Hour Law ("NJWHL"). The Department "[refuses to] investigate or inquire into the legal status of any worker[;] applies New Jersey's labor laws without regard to a worker's legal status; [and] does not share information with 'Immigration.'" The Department's position is supported by New Jersey courts, which have held that immigration status is immaterial to the enforcement of the state's worker protections. *Wage and Hour Disclaimer*, N.J. DEP'T OF LABOR & WORKFORCE DEV., http://lwd.dol.state.nj.us/labor/wagehour/content/wage_and_hour_disclaimer.html (last visited Apr. 2, 2013).

workers' compensation benefits to be more like personal injury or contract remedies, to which all workers are entitled, and thus as distinct from other statutory economic payments, such as back pay and unemployment benefits. In a very pointed decision, New Jersey Appellate Judge Sylvia Pressler opined that workers' compensation benefits are analytically distinct from economic payments, such as unemployment benefits, and specifically held that undocumented employees are entitled to workers' compensation benefits under the WCA.[84]

The unavailability of economic payments to undocumented workers, such as unemployment compensation or back pay under the NLRA, does not mean that workers' compensation is also unavailable to the same population.[85] A claimant's availability for work is a prerequisite for eligibility for unemployment compensation, and the Supreme Court interpreted the NLRA to essentially contain an identical prerequisite.[86] Unlawfully present aliens are not qualified for unemployment compensation because they are prohibited by law from accepting employment at all.[87] The rationale for prohibiting access to unemployment compensation and back pay are very similar: one cannot have a right to payment, which turns on gaining access to work one is not authorized to engage in. The *Hoffman* court held that one is not entitled to back payments for work he was not authorized to have in the first place.[88] Similarly, one may not receive unemployment benefits "[s]ince an illegal alien is prohibited by law from accepting a new job, . . . [and therefore he] must be deemed unavailable for work, thus not temporarily unemployed and therefore not qualified for unemployment

[84] *Mendoza*, 672 A.2d at 225 (holding that "the right to workers' compensation is as much an incident of the employment as the right to receive salary, and has been earned once the labor has been performed.") *Accord* Fernandez-Lopez, Inc. v. Cervino, Inc., 671 A.2d 1051, 1053 (N.J. Super. Ct. App. Div. 1996) (quoting N.J. STAT. ANN. § 34:15–36) (finding that, because "the term 'employee' is synonymous with servant", the Act does not specifically exclude illegal aliens from recovery for injuries suffered on the job because the statutory definition of employee is "all natural persons . . . who perform service for an employer for financial consideration," and explaining that IRCA does not pre-empt state workers' compensation laws). *Cf.* Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 229–30 (2d Cir. 2006) (finding that federal law does not preempt New York state law allowing injured undocumented workers to recover compensatory damages for lost earnings).

[85] N.J. STAT. ANN. § 43:21–4(i)(1) (West 2013).

[86] § 43:21–4(c)(1); *Hoffman*, 535 U.S. at 144.

[87] § 43:21–4(c)(1).

[88] *Hoffman*, 535 U.S. at 150–52.

compensation."[89]

Unlike the unemployment compensation system, which primarily has a prospective focus of seeing a worker through a temporary period of unemployment, the conceptual basis of the Workers' Compensation system is the substitution of the statutory remedy for a common-law right of action, the statutory remedy becoming an integral component of the contract of employment.[90] As such, workers' compensation inhabits a legal landscape situated somewhere in between a statutory benefit and a civil legal remedy. New Jersey has found workers' compensation to be more like a civil remedy in its role and purpose, and thus it should be accessible even to undocumented alien workers.

Further, in New Jersey, the Workers' Compensation system, unlike the unemployment compensation system, is not governmentally funded. Rather, it is primarily subsidized by employers' insurance premiums or self-insurance funds.[91] New Jersey courts have found that public policy is well served by causing the private sector to bear the responsibility for payment of workers' compensation as it encourages employers to ensure workplace safety.[92]

In *Mendoza v. Monmouth Recycling Corp.*, Judge Pressler opined that

> none of these predicates is in the least degree compromised by the eligibility of an injured illegal alien for workers' compensation. Surely, the effect on the worker of his injury has nothing to do with his citizenship or immigration status. If his capacity to work has been diminished, that disability will continue whether his future employment is in this country or elsewhere. Moreover, his need for medical treatment and his right thereto as an incident of his employment do not derive from or depend upon his immigration status. They are, rather, a function of work he has actually performed during the course of which he sustained an injury.[93]

There are fundamental reasons, in the absence of an express statutory bar, for according undocumented workers the benefit of the

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[89] *Mendoza*, 672 A.2d at 224.

[90] *See* Dudley v. Victor Lynn Lines, Inc., 161 A.2d 479, 484 (1960).

[91] *See Mendoza*, 672 A.2d at 224 (citing Romanny v. Stanley Baldino Const. Co., 667 A.2d 349, 351 (1995)).

[92] Eger v. E. I. du Pont de Nemours & Co., 539 A.2d 1213, 1217 (1988); Stephenson v. R.A. Jones & Co., 510 A.2d 1161, 1173 (N.J. 1986) (Stein, J., dissenting).

[93] *Mendoza*, 672 A.2d at 224–25.

Workers' Compensation laws.[94] "'[A] well established body of law holds that illegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries.'"[95] Workers' compensation rests upon both contract and tort principles; the contract right in effect substitutes for the tort right an employee would otherwise have.

"It would not only be illogical but it would also serve no discernible public purpose to accord illegal aliens the right to bring affirmative claims in tort for personal injury but to deny them the right to pursue the substitutionary remedy for personal injuries sustained in the workplace. . . ."[96] New Jersey recognizes that, with respect to undocumented workers, "the *sui generis* nature of unemployment compensation and the considerations uniquely relevant to its administration are not transferrable to or in any way applicable to the alien's right to prosecute personal injury claims."[97] Judge Pressler noted that a rule of law denying workers' compensation to an undocumented worker is more likely to encourage, rather than to deter, employers to employ unlawfully present aliens.[98] Such a rule would therefore disserve the public policy expressed by federal law.

Most importantly, the *Mendoza* court observed, "[s]urely, the effect on the worker of his injury has nothing to do with his citizenship or immigration status. If his capacity to work has been diminished, that disability will continue whether his future employment is in this country or elsewhere."[99]

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[94] *Id.* at 225.

[95] *Id.* (quoting *Montoya*, 401 A.2d at 1103).

[96] *Mendoza*, 672 A.2d at 225.

[97] *Id.* at 248.

[98] *Id.* at 225 ("We also regard the *desideratum* of workplace safety enhanced by according workers' compensation benefits to an illegal alien since an employer's immunity from payment of compensation to that class of employees might well provide a disincentive to assuring workplace safety. Moreover, such an immunity from accountability might well have the further undesirable effect of encouraging employers to hire illegal aliens in contravention of the provisions and policies of the Immigration Reform and Control Act.").

[99] *Id.* at 224.

CONCLUSION

Undocumented alien workers in New Jersey are entitled to non-economic benefits if they are injured on the job. They are not entitled to back pay or front pay because they are not lawfully entitled to work. Thus, providing access to workers' compensation is not in conflict with the Supreme Court's interpretation of the NLRA in light of the IRCA. The Supreme Court made clear that undocumented workers are not entitled to compensation solely for work in the United States in which they are not authorized to engage in the first instance. However, Workers' Compensation in New Jersey is distinct from those facts. While it is a statutory scheme all the same, workers' compensation is a legislative alternative for recovery in the courts under tort and contract principles. One need not have work authorization in the United States to bring those suits, and thus, in the words of Judge Pressler, it would be "illogical" to deny access to a legislated substitute remedy. New Jersey understands the limits of benefits to which undocumented workers have access—there are those benefits for which work authorization is a prerequisite and those for which it is not. One line that has been drawn to highlight this difference is the denial of unemployment benefits for undocumented alien workers, versus the grant of access to workers' compensation. Consistent with the Supreme Court's holding in *Hoffman*, New Jersey has held that one may not recover for lack of *access* to employment in which one is not authorized to partake, but one may utilize a statutory scheme to make one whole again where one has been injured in the course of employment.

APPENDIX: OVERVIEW OF STATE COURT RULINGS[100]

California

Farmers Bros. Coffee v. Workers' Comp. Appeals Bd., 35 Cal. Rptr. 3d 23 (Cal. Ct. App. 2005); *Liberty Mut. Ins. Co. v. Workers' Comp. Appeals Bd.*, No. B150724, 2002 WL 14515 (Cal. Ct. App. Jan. 4, 2002); *Del Taco v. Workers' Comp. Appeals Bd.*, 94 Cal. Rptr. 2d 825 (Cal. Ct. App. 2000); *Foodmaker, Inc. v. Workers' Comp. Appeals Bd.*, 78 Cal. Rptr. 2d 767 (Cal. Ct. App. 1998).

Colorado

Champion Auto Body v. Indust. Claim Appeals Office of State of Colo., 950 P.2d 671 (Colo. App. 1997).

Connecticut

Dowling v. Slotnick, 244 Conn. 781, 805 (Conn. 1998) (holding that undocumented workers are able to pursue remedies under the Connecticut Workers' Compensation Act).

District of Columbia

Marboah v. Ackerman, 877 A.2d 1052 (D.C. 2005).

Florida

Arreola v. Admin. Concepts, 17 So. 3d 792 (Fla. Dist. Ct. App. 2009); *Safeharbor Emp'r Svcs. I, Inc. v. Cinto Velazquez*, 860 So. 2d 984 (Fla. Dist. Ct. App. 2003); *Cenvill Dev. Corp. v. Candelo*, 478 So. 2d 1168 (Fla. Dist. Ct. App. 1985); *Gene's Harvesting v. Rodriguez*, 421 So.2d 701 (Fla. Dist. Ct. App. 1982).

Georgia

Cont'l PET Techs., Inc. v. Palacias, 604 S.E.2d 627 (Ga. Ct. App. 2004);
Earth First Grading v. Gutierrez, 606 S.E.2d 332 (Ga. Ct. App. 2004); *Wet Walls, Inc. v. Ledezma*, 598 S.E.2d 60 (Ga. Ct. App. 2004); *Dynasty Sample Co. v. Beltran*, 479 S.E.2d 773 (Ga. Ct. App. 1996).

[100] *See generally* Margaret A. Shield, *Application of Workers Compensation Laws to Illegal Aliens*, 121 A.L.R. 5TH 523 (2013).

Hawaii
Gambalan v. Kekaha Sugar Co., 39 Haw. 258 (Haw. 1952).

Illinois
Econ. Packing Co. v. Ill. Workers' Comp. Comm'n, 901 N.E.2d 915 (Ill. App. Ct. 2008).

Kansas
Doe v. Kan. Dept. of Human Res., 90 P.3d 940 (Kan. 2004).

Louisiana
Rodriguez v. Integrity Contracting, 38 So. 3d 511 (La. Ct. App. 2010); *Artiga v. M.A. Patout & Son*, 671 So. 2d 1138 (La. Ct. App. 1996).

Maryland
Design Kitchen & Baths v. Lagos, 882 A.2d 817 (Md. 2005).

Michigan
Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510 (Mich. 2003).

Minnesota
Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003).

Nebraska
Visoso v. Cargill Meat Solutions, 778 N.W.2d 504 (Neb. Ct. App. 2009).

Nevada
Tarango v. State Indus. Ins. Sys., 25 P.3d 175 (Nev. 2001).

New Hampshire
Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1001 (N.H. 2005) ("Allowing recovery of lost wages under limited circumstances will not, in our opinion, bar enforcement of our Immigration laws.").

New Jersey
Crespo v. Evergo Corp., 841 A.2d 471 (N.J. Sup. Ct. App. Div. 2004); *Fernandez-Lopez v. Jose Cervino, Inc.*, 671 A.2d 1051 (N.J. Sup. Ct. App. Div. 1996); *Mendoza v. Monmouth Recycling Corp.*, 672 A.2d 221 (N.J. Sup. Ct. App. Div. 1996).

New Mexico
Gonzalez v. Performance Painting, Inc., 258 P.3d 1098 (N.M. Ct. App. 2011).

New York
Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002) (Hoffman did not apply to preclude an illegal alien's claims under the federal Fair Labor Standards Act (FLSA) for work already performed.); *Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 26 (N.Y. App. Div. 2005) ("[N]o court has held, that an undocumented alien may be deprived of wages for work already performed."); *Nizamuddowlah v. Bengal Cabaret, Inc.*, 69 A.2d 875, 876 (N.Y. App. Div. 1979) (ruling that "the practice of hiring unlawfully present aliens, using their services and disclaiming any obligation to pay wages because the contracts were illegal is to be condemned"); *Testa v. Sorrento Rest., Inc.*, 10 A.D.2d 133 (N.Y. App. Div. 1960); *see also Amoah v. Mallah Mgmt., LLC*, 57 A.D.3d 29, (N.Y. 2008); *Ramroop v. Flexo-Craft Printing, Inc.*, 896 N.E.2d 69 (N.Y. 2008); Tracy A. Bateman, *Annotation, Validity, Construction, and Application of Workers' Compensation Provisions Relating to Nonresident Alien Dependents*, 28 A.L.R. 5TH 547 (1995).

North Carolina
Roset-Eredia v. F.W. Dellinger, Inc., 660 S.E.2d 592 (N.C. Ct. App. 2008); *Ruiz v. Belk Masonry Co., Inc.*, 559 S.E.2d 249 (N.C. Ct. App. 2002); *Rivera v. Trapp*, 519 S.E.2d 777 (N.C. Ct. App. 1999).

Oklahoma
Lang v. Landeros, 918 P.2d 404 (O.K. Civ. App. 1996).

Oregon
Hernandez v. SAIF Corp., 35 P.3d 1099 (Or. Ct. App. 2001).

Pennsylvania
DDP Contracting, Inc. v. Workers' Comp. Appeal Bd., 826 A.2d 830 (Pa. 2003); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 570 Pa. 464, 810 A.2d 99 (Pa. 2002); *Mora v. Workers' Comp. Appeal Bd.*, 845 A.2d 950 (Pa. Commw. Ct. 2004); *Morris Painting, Inc. v. Workers' Comp. Appeal Bd.*, 814 A.2d 879 (Pa. Commw. Ct. 2003).

South Carolina
Curiel v. Envtl. Mgmt. Servs., 655 S.E.2d 482 (S.C. 2007).

Tennessee
Silva v. Martin Lumber Co., No. M2003-00490-WC-R3-CV, 2003 WL 22496233 (Tenn. Special Workers' Comp. App. Panel Nov. 5, 2003).

Texas
Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233 (Tex. App. 2003); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. App. 1972).

Virginia
Granados v. Windson Dev. Corp., 509 S.E.2d 290 (Va. 1999); *Peterson v. Neme*, 281 S.E.2d 869, 872 (Va. 1981) (holding that immigration status is "immaterial to Neme's right to recover damages for lost wages"); *Mendoza-Garcia v. Cho Yeon HWI/Best Cleaners*, No. 1257-00-4, 2001 WL 292316 (Va. Ct. App. Mar. 27, 2001); Rios v. Ryan Inc. Cent., 542 S.E.2d 790 (Va. Ct. App. 2001); *Alvarado v. Krajewski*, No. 0981-00-4, 2001 WL 15827 (Va. Ct. App. Jan. 9, 2001); *Billy v. Lopez*, 434 S.E.2d 908 (Va. Ct. App. 1993); *Manis Const. Co. v. Arellano*, 411 S.E.2d 233 (Va. Ct. App. 1991).

Wisconsin
Arteaga v. Literski, 265 N.W.2d 148, 150 (Wis. 1978) (holding that undocumented immigrants have a right to sue in the courts of Wisconsin).

Wyoming
Felix v. State ex rel. *Wyo. Workers' Safety & Comp. Div.*, 986 P.2d 161 (Wyo. 1999).