



2006

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## Recommended Citation

Annie Decker, *Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal*, 115 *YALE L.J.* (2006).  
Available at: <https://digitalcommons.law.yale.edu/ylj/vol115/iss8/8>

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## COMMENT

### Suspending Employers' Immigration-Related Duties During Labor Disputes: A Statutory Proposal

Immigration and labor law can be uncomfortable bedfellows. The Immigration Reform and Control Act (IRCA) of 1986<sup>1</sup> requires employers on pain of sanctions to check employees' work papers, such as Social Security cards and work permits, and to have new hires fill out forms.<sup>2</sup> At the same time, labor and employment laws give workers the right to be free from intimidation and retaliation while engaging in protected activities, such as organizing unions and protesting unsafe working conditions. This Comment addresses situations in which an employer's doubt—sincere or not—about the validity of an employee's papers arises during a labor dispute.<sup>3</sup> Adhering to immigration duties might require the employer to verify work authorization even if doing so chilled workplace rights enforcement; protecting labor rights could bar verification efforts during a labor dispute. The law is unclear about

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1. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C. (2000)). IRCA amended the Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1537 (2000)).
  2. All citizens, nationals, and noncitizens must fill out a Form I-9. 8 U.S.C. § 1324a(b) (2000); 8 C.F.R. § 274a.2(b)(1) (2005); *see also* U.S. Citizenship and Immigration Services, Form I-9, Employment Eligibility Verification, <http://uscis.gov/graphics/formsfee/forms/i-9.htm> (last visited Apr. 9, 2006).
  3. The National Labor Relations Act (NLRA) of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2000)), provides rights to private-sector employees seeking to form, join, or assist labor organizations. The Act defines a labor dispute as a dispute "concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9). In this Comment, "labor dispute" refers to those activities as well as other workplace activities protected under federal and state labor, employment, health, occupational safety, and antidiscrimination laws.

whether immigration duties or labor rights should prevail. This confusion undermines shared national and state policy goals for both workplace protection and immigration control.<sup>4</sup> While the agencies implementing those goals have found much common ground,<sup>5</sup> the specific issue of whether employers should check workers' documents during labor disputes has slipped through the cracks.

This uncertainty hurts the parties involved on the ground: employers, employees, agencies, and courts. Employers who comply dutifully with immigration and labor laws are at a competitive disadvantage compared to noncompliant employers who use document verification after the time of hire as a trump card over employees who voice grievances.<sup>6</sup> Documented workers suffer from lowered wages and workplace standards because they do not report unlawful employer behavior, fearing that employers will replace them with undocumented workers, especially in industries with heavy immigrant worker concentrations.<sup>7</sup> Undocumented workers are harmed because they do not

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4. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (noting that the lower cost of noncompliance “increases the employer’s incentive to find and to hire illegal-alien employees”); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404, 407 (E.D.N.Y. 2004) (“[E]mployers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.” (quoting *Rivera v. Nibco*, 364 F.3d 1057, 1072 (9th Cir. 2004))).
  5. For example, employers cannot contact immigration agencies in order to retaliate against workers for protected activities. See, e.g., *In re Herrera-Priego* (Immigr. Ct. July 10, 2003) (on file with author) (terminating deportation hearings based on Immigration and Naturalization Service (INS) operating rules for how to question persons during labor disputes); see also *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (resolving a Fair Labor Standards Act (FLSA) dispute); Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice, and the Employment Standards Division, Department of Labor (Nov. 23, 1998) [hereinafter Memorandum of Understanding], reprinted in *Daily Lab. Rep. (BNA) No. 227*, at E-10 (Nov. 25, 1998); Orrin Baird, *Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond*, 19 LAB. LAW. 153, 161 & nn.54-55 (2003) (listing relevant NLRB cases); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 516-21 (2004). But see *Montero v. INS*, 124 F.3d 381, 385 n.4 (2d Cir. 1997) (interpreting the INS operating instructions in a different manner than *Herrera-Priego* did).
  6. For example, the INS and Department of Labor (DOL) Memorandum of Understanding, *supra* note 5, notes the “business advantages that may be gained through the employment of highly vulnerable and exploitable workers at sub-standard wages and working conditions,” while labor law enforcement can “foster a level competitive playing field for employers who seek to comply with the law.” *Id.*
  7. See, e.g., Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 145 (2002) (describing effects on documented workers); see also JEFFREY S. PASSEL, PEW HISPANIC CTR., *SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.:*

enforce their statutory rights<sup>8</sup> or are fired unlawfully in retaliation for their protected activity.<sup>9</sup> Finally, courts and the relevant agencies face increased enforcement problems; to fill the void they have had to patch together agreements about their respective roles and to create imperfect motive-seeking tests for identifying when employers' verification efforts are unlawful.

Congress is in the best position to address the document-verification uncertainties.<sup>10</sup> In *Hoffman Plastic Compounds v. NLRB*, the Supreme Court concluded that a different immigration-labor problem "must be 'addressed by congressional action,' not the courts."<sup>11</sup> That invitation tees up the proposal here: Congress should amend IRCA to provide a strong and clear rule suspending employers' verification duties during labor disputes.

## I. THE IRCA PROBLEM THROUGH THE LENS OF LABOR LAW

Congress enacted IRCA in 1986 primarily to "end[] the magnet that lures [undocumented workers] to this country."<sup>12</sup> IRCA establishes procedures for verifying employees' work authorization, prohibits employers from knowingly hiring or continuing to employ undocumented workers, and provides penalties

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ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 12 tbl.1 (2006), available at <http://pewhispanic.org/files/reports/61.pdf> (ranking job categories with high immigrant concentrations).

8. For a description of these rights, see, for example, Memorandum from the Office of the Gen. Counsel, NLRB, to All Regional Dirs., Officers-in-Charge and Resident Officers, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.* (July 19, 2002) (on file with author) [hereinafter NLRB GC-02]. The EEOC and DOL have provided similar guidance. As of March 2005, an estimated 11.1 million undocumented individuals lived in the United States; unauthorized workers constituted 4.9% of the civilian labor force. PASSEL, *supra* note 7, at i-ii.
9. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004) (observing that "most undocumented workers are reluctant to report abusive or discriminatory employment practices" because they fear retaliation); Michael J. Wishnie, *Immigrants and the Right To Petition*, 78 N.Y.U. L. REV. 667, 676-79 (2003).
10. As recent controversies attest, Congress also is deeply interested in immigration reform. None of the proposed bills would alter substantially the proposal here.
11. 535 U.S. 137, 152 (2002) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984)). *Hoffman Plastic* found that an undocumented worker who had violated IRCA, 8 U.S.C. § 1324c (2000), by using false documents to get a job could not claim back pay for an unlawful discharge in retaliation for union activity. Most of the dozens of post-*Hoffman Plastic* decisions have found that the decision does not affect other existing protections and remedies for undocumented workers. E.g., *Balbuena v. IDR Realty LLC*, Nos. 110868/00 & 590104/03, 2006 WL 396944 (N.Y. Feb. 21, 2006). *But see Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1336 (M.D. Fla. 2003).
12. H.R. REP. NO. 99-682, pt. 1, at 45 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5649-50.

for violations.<sup>13</sup> Yet the text of IRCA does not address how these provisions should interact with either federal or state labor laws.<sup>14</sup> IRCA also does not state directly that employers are under a continuing duty to check work papers later if they did not do so when hiring the worker or if they later suspect, but are not sure, that a worker's documents are fraudulent.<sup>15</sup> As described above, this lack of clarity creates broad policy concerns and on-the-ground problems.

The following discussion focuses on the National Labor Relations Board's (NLRB)<sup>16</sup> difficulties when considering claims brought under the National Labor Relations Act (NLRA) alleging that employers retaliated against workers engaged in protected activities by requesting their documents. The current NLRB approach exhibits two main problems. First, judges are generally uncertain about where IRCA ends and where labor law begins in the document-verification context. Second, while the NLRB has established that demands for work authorization and adverse actions based on documentation problems can constitute unfair labor practices during labor disputes, there's a hitch: Under the *Wright Line* causation test, the NLRB General Counsel must prove that the employer took an action that it would not have taken if the worker had not engaged in protected activities.<sup>17</sup> Compliance with IRCA provides employers with a strong, though rebuttable, defense. The following four NLRB cases highlight these problems, beginning with the decision closest in spirit to the proposal here.

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13. 8 U.S.C. § 1324a(a), (b) (2000); *see also* National Employment Law Project & National Immigration Law Center, Basic Information Brief: Reverification (2002), [http://www.nilc.org/immsemplmnt/Info\\_Memos/basic\\_info\\_reverification.htm](http://www.nilc.org/immsemplmnt/Info_Memos/basic_info_reverification.htm).
  14. IRCA's legislative history suggests that Congress did not seek to erase existing protections. *E.g.*, H.R. REP. NO. 99-682, pt. 1, at 58 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5649, 5662 (discussing the intent not to diminish labor protections). *Compare* Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 150 n.4 (2002), *with id.* at 155 (differing in how much weight to grant to this history).
  15. Courts have not resolved this question fully. Some statutory support exists for the idea that employers are under a continuing duty to check workers' papers. *See supra* note 13. Some case law support exists as well. "Constructive knowledge" of workers' undocumented status in violation of IRCA can be imputed to employers when they have strong suspicions, received warning information from immigration authorities, or completed forms improperly or inadequately. This duty is analogous to the IRCA regulatory requirement, 8 C.F.R. § 274a.2(b)(vii) (2005), that employers update the forms when documents expire. *See, e.g.*, *New El Rey Sausage Co. v. INS*, 925 F.2d 1153, 1158 (9th Cir. 1991); *Big Bear Super Market No. 3 v. INS*, 913 F.2d 754, 757 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 566-67 (9th Cir. 1989); *Zamora v. Elite Logistics*, 316 F. Supp. 2d 1107, 1119 (D. Kan. 2004).
  16. The NLRB handles alleged violations of the NLRA. *See* 29 U.S.C. § 153 (2000).
  17. *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981); *see also* *Manno Elec., Inc.*, 321 N.L.R.B. 278, 280 n.12 (1996) (summarizing the *Wright Line* doctrine).

First, the recent *North Hills Office Services, Inc.* decision properly affirmed that an employer's requests from union supporters for work papers and the resulting discharges under the cover of compliance with IRCA were illegal.<sup>18</sup> The court concluded that the employer's "affirmative defense that it was acting pursuant to its obligations under the federal immigration law [was] laughable"<sup>19</sup> and that "the only logical reason for this odd [document] request, at this suspicious time, was to harass" workers because of their union activities.<sup>20</sup> The General Counsel therefore overcame the employer's *Wright Line* defense.

The language in *Regal Recycling, Inc.*, however, points to the hovering uncertainty about IRCA verification requirements. In that case, the employer had discharged employees during a labor organizing campaign after "demanding a mass production of work authorization documents" based on alleged IRCA compliance.<sup>21</sup> The NLRB found that this employer failed the *Wright Line* test. Nevertheless, the Board declared that "the Respondent's attempt at strict compliance with eligibility requirements as to these employees [was] arguably proper under immigration law."<sup>22</sup>

The third decision, *Sara Lee*, exhibits even more tentativeness about the labor-immigration law boundary while revealing the problems arising from the *Wright Line* test. After a successful union organizing campaign, the employer terminated a long-term employee who had monitored elections and had testified before the NLRB about unfair labor practices.<sup>23</sup> When charged with unlawful termination, the employer argued on flimsy evidence that the worker might have used doctored papers to get her job and therefore the employer had "no choice but to terminate"<sup>24</sup> the worker or to let her resign because of this suspicion. In uncertain language, the administrative law judge (ALJ) noted that the employer

offers no authority for this broad assertion, and its legal validity may be questionable. However, given the statutory and case authority

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18. *N. Hills Office Servs., Inc.*, Cases 29-CA-25715 et al., 2005 WL 1672856 (NLRB July 13, 2005); see also *Michael's Painting, Inc.*, 337 N.L.R.B. 860, 868 (2002); *Victor's Cafe 52, Inc.*, 321 N.L.R.B. 504, 514 (1996); *Concrete Form Walls, Inc.*, Cases 10-CA-34483 et al., 2004 WL 2033015, at \*8 (NLRB Div. of Judges Sept. 8, 2004).

19. *N. Hills Office Servs.* at \*30.

20. *Id.* at \*22.

21. *Regal Recycling, Inc.*, 329 N.L.R.B. 355, 356 (1999).

22. *Id.*

23. *Sara Lee*, Cases 21-CA-36154 et al., 2005 WL 2129138 (NLRB Div. of Judges July 29, 2005).

24. *Id.* at \*20.

regarding an employer's burden of compliance under IRCA, I find it was not unreasonable . . . to conclude the company might risk civil and/or criminal liability by retaining an employee who they believed had deceptively obtained work authorization.<sup>25</sup>

The employer therefore survived the *Wright Line* test by having "suspended and thereafter terminated [the employee] because of perceived inaccuracy in her work permit."<sup>26</sup>

Finally, the *Deffenbaugh Disposal Services, Inc.* decision did not even struggle with the IRCA-labor law boundary question.<sup>27</sup> The judge found no NLRA violation when a dispatcher reviewed workers' documents before a union election and made other alleged retaliatory threats about reporting the workers to immigration authorities if they "did try to vote for the union."<sup>28</sup> The ALJ declared that the dispatcher was just following the "IRCA require[ment] that where a question arises about an employee's continued work authorization, an employer again [must] review documents to determine that the employee has maintained his authorization to work legally in this country."<sup>29</sup> The judge did not gesture at any potential timing problem or question the assertion that IRCA required such action.

## II. FREEZING EMPLOYERS' IRCA DUTIES DURING LABOR DISPUTES

Congress should amend IRCA to make clear that employers have no responsibility, or right, to request work authorization in the middle of labor disputes.<sup>30</sup> An additional time buffer around the actual labor dispute could be necessary to effectuate the goals of this amendment, a form of extended reprieve from verification duties so that employers could not just wait until a labor dispute ends to make the same retaliatory move.

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25. *Id.* The ALJ noted that "[w]hether Respondent was required to act upon its suspicion that [the complainant's] documentation (which had passed INS muster) was premised on inaccurate information is not so clear." *Id.* at 19. *Concrete Form Walls, Inc.*, Cases 10-CA-34483 et al., 2004 WL 2033015, at \*8 (NLRB Div. of Judges Sept. 8, 2004), set a much higher evidentiary bar.

26. *Sara Lee*, 2005 WL 2129138, at \*21.

27. *Deffenbaugh Disposal Servs., Inc.*, Cases 17-CA-22625 et al., 2004 WL 1804090 (NLRB Div. of Judges July 30, 2004).

28. *Id.* at \*6 (internal quotation marks omitted). The ALJ assumed "[f]or purposes of this discussion" that the dispatcher had made those comments. *Id.* at \*11 n.15.

29. *Id.* at \*6.

30. If workers apply for jobs during labor disputes, employers must check the workers' papers.

The amendment also would instruct immigration, labor, and employment agencies not to engage in document-enforcement activities during labor disputes. As a result, employers could ignore unwitting agency pressure to respond to document problems, which can come from the Bureau of Immigration and Customs Enforcement (ICE),<sup>31</sup> the Social Security Administration,<sup>32</sup> or a third-party service.<sup>33</sup> Under this proposal, the intent behind employers' requests for documents would not matter.

Clarifying employers' duties and rights would have a host of positive effects. It would prevent retaliatory document requests that chill the enforcement of workplace rights and contravene immigration policy: Workers would face less of a race to the bottom. Employers could depend on a clear rule and not worry about sanctions. Agencies could work together more smoothly and fulfill their enforcement functions more effectively. In the NLRB context, the amendment would remove both the existing uncertainty and the employers' primary *Wright Line* defenses, making it clear that verification actions during labor disputes were not "arguably proper."<sup>34</sup> These effects would strengthen the enforcement goals of immigration law by doing exactly what IRCA calls for: reducing the incentives for employers to hire undocumented workers. The barriers facing low-wage workers, especially immigrants, in the workplace and in courts are so high that any fears about encouraging frivolous lawsuits or labor disputes are likely to remain unsubstantiated. The proposal therefore would satisfy broader policy goals while resolving practical problems.

### III. AGENCY AND JUDICIAL ACTIONS TO SUPPLEMENT THE FREEZE

Enacting a statutory suspension of IRCA's verification requirements during labor disputes would take time. Meanwhile, the problems described above will continue. Even after enactment of a bar on verification efforts, violations would

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31. ICE handles key functions of the former INS. ICE sends employers who violate IRCA a notice of intent to fine. See *United States v. Rupson of Hyde Park, Inc.*, No. 97A00015, 1997 WL 1051441, at \*1 (Dep't of Justice June 5, 1997); see also 8 C.F.R. § 274a.9(b), (d) (2005).
  32. The Social Security Administration notifies employers through so-called No-Match letters that a problem exists with workers' Social Security numbers. See, e.g., PRITA LAL ET AL., SOCIAL SECURITY NO-MATCH INFORMATION AND EMPLOYER SANCTIONS: WHAT ADVOCATES NEED TO KNOW (2004), available at <http://www.nelp.org/document.cfm?documentID=57>.
  33. The services notify employers about Social Security number discrepancies. See *Zamora v. Elite Logistics, Inc.*, 316 F. Supp. 2d 1107, 1111 (D. Kan. 2004).
  34. *Regal Recycling, Inc.*, 329 N.L.R.B. 355, 356 (1999).



occur. Therefore, immigration, labor, and employment agencies should bring their internal policies in line with these recommendations. Courts also should develop supportive doctrines, whether in cases brought under the NLRA, Title VII of the Civil Rights Act of 1964, or other laws. The following recommendations focus on actions to support workers who bring claims against employers. The effects of such actions, though, would spread broadly throughout the workplace.

To begin with, workers need meaningful procedures at the merits stage of a case alleging unlawful documentation requests. At a minimum, the NLRB could remove *Wright Line* defenses from employers who did not check workers' documents at the time of hire.<sup>35</sup> The NLRB could develop a new presumption of unlawfulness that employers must overcome based on the timing of document requests. It could apply a *Wright Line* analysis to complaints arising from adverse employer document requests during the buffer-zone period suggested above. The NLRB, and other agencies and courts, also could protect workers from discovery requests into or inquiries about their immigration status.<sup>36</sup>

Yet workers, especially undocumented ones, who prevail at the merits stage often lose in the long run because no real options are available at the remedies stage.<sup>37</sup> Therefore, prohibitions on inquiries into immigration status at this stage, paralleling such bars in the liability phase, should be strengthened.<sup>38</sup> Future-looking remedies, such as conditional reinstatement and conditional back pay, should be awarded as appropriate.<sup>39</sup> The NLRB also should award

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35. In addressing a back pay question, the NLRB has stated that “[w]here an employer hires an employee with knowledge that he is not legally entitled to work in the United States, it cannot assert that it would have terminated the employee on the basis of his immigration status.” *Met Food*, 337 N.L.R.B. 109, 112 (2001) (citations omitted); *see also* Wishnie, *supra* note 5, at 512 & n.82 (citing equitable estoppel principles in NLRA case law).
36. Such protection has been granted in cases brought under various laws. *E.g.*, *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004); *Flores v. Amigon*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (FLSA); *Topo v. Dhir*, 210 F.R.D. 76 (S.D.N.Y. 2002) (Alien Tort Claims Act); *Tuv Taam Corp.*, 340 N.L.R.B. 756 (2003). *But see* Shahid Haque, *Beyond Hoffman Plastic: Reforming National Labor Relations Policy To Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357, 1377-78 (2004) (arguing that the NLRB should ask about workers' status during investigations).
37. *See* Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 528 (2005) (discussing bifurcation).
38. NLRB GC-02, *supra* note 8.
39. *See Tuv Taam Corp.*, 340 N.L.R.B. at 759; *County Window Cleaning Co.*, 328 N.L.R.B. 190 (1999); *see also* NLRB GC-02, *supra* note 8 (supporting a “conditional reinstatement order against employers who flout both the [NLRA] and IRCA by hiring and firing known

contempt sanctions, broad cease-and-desist orders, union access to workplaces, and notices read to entire workforces.<sup>40</sup>

## CONCLUSION

This proposed amendment would not depart entirely from current law. Rather, it would codify the principles underlying NLRB decisions such as *Regal Recycling* and *North Hills*. It also would support current immigration enforcement practices.<sup>41</sup> IRCA and labor and employment law might be in tension, but they are not incompatible or in direct conflict. This amendment would be consistent with IRCA<sup>42</sup> as well as with long-established workplace standards, while providing firmer ground for all those who stand in the uncertain territory between the two.

ANNIE DECKER

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undocumented workers.”). The NLRB should amend its policy guidelines that bar back pay to undocumented workers even if they did not submit false documents at the time of hire. NLRB GC-02, *supra* note 8. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), did not address this scenario.

40. See *Smithfield v. UFCW Local 204*, Cases 11-CA-15522 et al., 2000 WL 33666937, at \*186-89 (NLRB Div. of Judges Dec. 15, 2000) (awarding such “extraordinary,” or *Fieldcrest Cannon*, remedies).
41. See *supra* note 5 and accompanying text. Immigration authorities will suspend their enforcement actions during labor disputes; therefore, it makes sense to relieve employers temporarily of the paperwork obligation that leads to such enforcement.
42. For example, the amendment would complement IRCA’s existing “good faith compliance” exception for employers who make technical or procedural errors in their verification efforts. 8 U.S.C. § 1324a(b)(6)(A)-(B) (2000). The continuing-duty cases also are generally compatible with an amendment. Most do not involve labor disputes, and most emphasize employer “reasonableness” in complying with IRCA in order to avoid “unjust or capricious” action. *Mester Mfg. Co. v. INS*, 879 F.2d 561, 567 (9th Cir. 1989).



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