Minnesota Journal of Law & Inequality

Volume 41 | Issue 1 Article 7

March 2023

The Applicability of Minnesota's Workers' Compensation Laws to Undocumented Workers

Cedar Weyker
University of Minnesota Law School

Recommended Citation
Cedar Weyker, *The Applicability of Minnesota's Workers' Compensation Laws to Undocumented Workers*, 41(1) LAW & INEQ. 215 (2023), DOI: https://doi.org/10.24926/25730037.659.

Minnesota Journal of Law & Inequality is published by the University of Minnesota Libraries Publishing.

The Applicability of Minnesota's Workers' Compensation Laws to Undocumented Workers

Cedar Weyker†

Introduction

Minnesota has a long history of immigration and has emerged as a leader in some regards. For the majority of the twentieth century, Europeans made up the majority of immigrants to Minnesota, but now more than 90% of immigrants that come to Minnesota come from non-European countries.[1] Today, Minnesota has the highest population of Karen, Somali, and Hmong individuals in the United States.[2] In 2018, Minnesota had the highest number of refugees per capita in the entire country.[3] Although anti-immigrant discrimination and xenophobic rhetoric exists in Minnesota,[4] the facts show that immigrants continue to contribute to the success of the state.[5]

Immigrants bolster Minnesota's economy. In fact, if not for immigrants, Minnesota's population would have begun to decline by

---

†. Cedar Weyker is a third-year law student at the University of Minnesota Law School. Weyker, a Minneapolis native, received her B.A. from Hamilton College, where she majored in Comparative Literature and Hispanic Studies. She graduated *cum laude* in 2017 with departmental honors, and was inducted into Phi Sigma Iota. At Minnesota Law, Weyker participated in the Detainee Rights Clinic and is pursuing a concentration in Immigration Law. She is currently an Articles Editor for the *Minnesota Journal of Law & Inequality*. She would like to thank her friends, family, and fiancé for their constant support during the highs and lows of law school. She would especially like to thank Nancy Allen for her unwavering encouragement.

1. Peter Warren, *What Are the Top Five Immigrant Groups in Minnesota?*, STAR TRIB. (Mar. 26, 2021), https://www.startribune.com/minnesota-immigration-countries-top-five-mexico-somalia-india-laos-vietnam/600032203/ [https://perma.cc/PDP6-L22T].

2. Sheila Mulrooney Eldred & Ibrahim Hirsi, *Looking Back at Minnesota's Refugee History*, MPLS.ST.PAUL MAG. (Dec. 19, 2021), https://mspmag.com/arts-and-culture/looking-back-at-minnesotas-refugee-history/ [https://perma.cc/7E73-HWTY].

3. Amanda Ostuni, *Minnesota Refugee Resettlement*, BORGEN MAG. (Apr. 1, 2020), https://www.borgenmagazine.com/minnesota-refugee-resettlement/ [https://perma.cc/562R-BZZE].

4. *See, e.g.*, *id.* ("[T]here is still significant systemic racial inequity in Minnesota. . . . Tensions have risen in recent years thanks to increased politicization of refugee resettlements[,] . . . [due to] incorrect information . . . [and] misconceptions[.]").

5. *See generally* BILL BLAZAR, RACHEL BORDELON & PAUL DANIELS, MINN. CHAMBER FOUND., THE ECONOMIC CONTRIBUTIONS OF IMMIGRANTS IN MINNESOTA (2021), https://www.mnchamber.com/sites/default/files/The%20Economic%20Contributions%20of%20Immigrants%20in%20Minnesota%203.23.21.pdf [https://perma.cc/RD7W-UV6D] (showing that immigrants contribute to the economy of the United States by being consumers, workers in key industries, taxpayers, and entrepreneurs).

2001.[6] In Minnesota, immigrants contributed more than $12.4 billion in spending power and more than $2 billion in state and local taxes in 2019.[7] African immigrants alone contribute upwards of $200 million in state and local taxes[8]—and wield $1.6 billion in spending power—per year.[9] In fact, foreign-born workers participate in the Minnesota labor force at a higher rate than U.S.-born workers.[10] Entire industries—such as agriculture, food manufacturing, and health care—depend on the labor of foreign-born workers.[11]

Unauthorized immigrants also contribute to Minnesota's economy.[12] In 2016, undocumented immigrants made up 2% of the Minnesota workforce.[13] In 2018, undocumented immigrants paid over $300 million in taxes, with $108.8 million going to Minnesota state and local governments.[14] However, when undocumented immigrants work in Minnesota, they often fill low-wage jobs that other Minnesotans do not want.[15] Consequently, undocumented workers face more hazardous work conditions than their authorized counterparts.[16]

---

6. *Id.* at 2.

7. *Id.* at 7, 9.

8. BRUCE P. CORRIE, THE ECONOMIC POTENTIAL OF AFRICAN IMMIGRANTS IN MINNESOTA 3 (2015).

9. *Id.* at 13.

10. BLAZAR ET AL., *supra* note 5, at 7.

11. *Id.* at 16.

12. This Article will use "unauthorized" and "undocumented" workers interchangeably to refer to noncitizens who live or work in the United States without authorization. This choice was made because no human is "illegal." *See, e.g.*, Lauren Gambino, *'No Human Being is Illegal': Linguists Argue Against Mislabeling of Immigrants*, THE GUARDIAN (Dec. 6, 2015), https://www.theguardian.com/us-news/2015/dec/06/illegal-immigrant-label-offensive-wrong-activists-say [https://perma.cc/RX8F-TMKN]; ACLU IMMIGRANTS' RTS. PROJECT, ISSUE BRIEF: CRIMINALIZING UNDOCUMENTED IMMIGRANTS 1 (Feb. 2010), https://www.aclu.org/sites/default/files/field_document/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf [https://perma.cc/B6FC-4TAP] (explaining that simply being present in the United States in violation of federal immigration law is not criminalized). For a discussion regarding the variety of terms used to describe undocumented immigrants, see Jonathan Kwan, *Words Matter: Illegal Immigrant, Undocumented Immigrant, or Unauthorized Immigrant?*, MARKKULA CTR. FOR APPLIED ETHICS (Feb. 11, 2021), https://www.scu.edu/ethics/focus-areas/immigration-ethics/immigration-ethics-resources/immigration-ethics-blog/words-matter-illegal-immigrant-undocumented-immigrant-or-unauthorized-immigrant/ [https://perma.cc/MWT5-3MQ5].

13. AM. IMMIGR. COUNCIL, IMMIGRANTS IN MINNESOTA (2020), https://www.americanimmigrationcouncil.org/research/immigrants-in-minnesota [https://perma.cc/9SSE-FKRL].

14. BLAZAR ET AL., *supra* note 5, at 9.

15. Dave Beal, *Immigration Reform: Minnesota's Changing Face of Labor*, MINNPOST (Aug. 7, 2013), https://www.minnpost.com/twin-cities-business/2013/08/immigration-reform-minnesotas-changing-face-labor/ [https://perma.cc/WWH9-L4CT].

16. Paul Holdsworth, *America's (Not So) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers*, 48 U. RICH. L. REV. 1369, 1370–71

This Article will explore the ways in which Minnesota's workers' compensation laws have safeguarded the rights of undocumented workers and will also suggest ways in which courts and the legislature can expand protections. First, this Article will explain the background of workers' compensation law in Minnesota, the heightened risk of workplace injury associated with working without authorization, and the federal response to unauthorized labor. Next, it will analyze current Minnesota statutes and case law and suggest ways to extend coverage and broaden protections.

I. Background

A. History of Workers' Compensation in Minnesota

During industrialization, Minnesota workers grappled with increasingly dangerous working conditions. For example, in 1910, the *Duluth News-Tribune* featured an article about the death of a sawmill worker in Hibbing, Minnesota.[17] After his clothing was caught in a pulley, the worker was "wound around" the wheel of a machine and crushed before anyone could turn the machine off.[18] Before the advent of workers' compensation law, injured workers could sue their employers via tort law, ask for assistance from charitable organizations, hope that their employers would pay for their medical bills or recuperation out of the goodness of their heart, or rely on previously purchased private insurance.[19] Employees had the burden of proving that their employers had been negligent,[20] and employers could raise several common law defenses that made litigation difficult for workers.[21] Often, workers had to wait for the outcome of a jury trial and spend much of their award on attorney and court fees.[22]

(2014) ("Even if these individuals successfully make it across the border, they still face the increasingly difficult road to socioeconomic prosperity. That road frequently begins with the harsh reality that the vast majority of available work is in some of the most dangerous professions in the country, with the frighteningly high possibility of death, or at minimum, the high probability of a debilitating workplace injury during employment." (foonotes omitted)).

17. *See* Robert Asher, *The Origins of Workmen's Compensation in Minnesota*, MINN. HIST., Winter 1974, at 142.

18. *Id.*

19. *Id.* at 143.

20. Thomas F. Coleman, *Fundamentals of Workers' Compensation in Minnesota*, 41 WM. MITCHELL L. REV. 1289, 1292 (2015).

21. Asher, *supra* note 17, at 143 n.4 (explaining that employers often used three defenses: first, that another employee was responsible for the injury in some way; second, that the employee had contributed to their injury with their own negligence; and third, that the employee had assumed the risk of injury when they agreed to the job).

22. *Id.* at 143.

Workers' compensation laws are a relatively new development in the history of the United States. State workers' compensation statutes emerged nationwide within a few short years in the 1910s.[23] The emergence of these statutes marked a major milestone in U.S. labor law in that they established a strict liability standard between workers and employers which replaced negligence tort liability for workers' injuries.[24] Interestingly, the new state laws were beneficial to employers and employees alike. Workers received expanded workplace insurance coverage and avoided having to bring their suit to court under negligence law.[25] The security of no-fault liability increased "postaccident payments by between 75 and 200 percent."[26] On the other hand, workers' compensation laws enabled employers to limit their liability through *ex ante* contracting—a practice that many state courts had previously refused to recognize.[27] Workers' compensation laws also allowed employers to avoid going to court in an increasingly hostile legal climate. At the turn of the century, litigation skyrocketed as judges trended towards ruling in favor of injured workers, and employers' liability insurance premiums went through the roof.[28]

By 1909, organized labor unions, employers, and insurance agencies agreed that it was time for a change, and their advocacy resulted in the creation of the non-partisan Minnesota Employees' Compensation Commission.[29] Minnesota adopted its workers' compensation statute in 1913.[30] The goal of the Minnesota's workers' compensation system is to make the process as stable and predictable as possible.[31] It is a strict-liability, no-fault system,[32] which means that most cases are handled administratively, outside of court. The type of relief covered under workers' compensation statutes normally includes medical benefits, lost wage benefits, and vocational rehabilitation.[33] If there is a dispute about benefits, an administrative law judge (ALJ) will hear all parties' arguments, and the employer or worker may appeal the ALJ's holding to

23. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 306 (1998).

24. *Id.* at 305.

25. *Id.* at 314.

26. *Id.* at 309.

27. *Id.* at 312, 314.

28. Asher, *supra* note 17, at 144.

29. *Id.* at 145.

30. Fishback & Kantor, *supra* note 23, at 320 tbl.2.

31. MINN. H.R. RSCH. DEP'T, WORKERS' COMPENSATION INFORMATION BRIEF 2 (1998), https://www.house.leg.state.mn.us/hrd/pubs/workcomp.pdf [https://perma.cc/P4QU-PEK3].

32. *See* Coleman, *supra* note 20, at 1292.

33. *See* Holdsworth, *supra* note 16, at 1375–76.

a state workers' compensation appeals board.[34] Parties may then appeal the board's decision to the state court of appeals.[35]

Most workers' compensation claims are governed by state law and procedures and are thus highly variable.[36] Employers are required to purchase workers' compensation insurance depending on how many people they employ and other statutorily defined factors. The number of employees covered by workers' compensation varies by state. In Minnesota, for example, there is no minimum number of employees that an employer must have before they are required to have insurance.[37] Under section 176.031 of the Minnesota Statutes, employers in Minnesota must obtain insurance to compensate injured workers and their dependents or self-insure.[38] If employers fail to insure, injured employees may pursue an outside action for damages, as the uninsured employer has essentially failed to opt in to the no-fault workers' compensation system.[39] In Texas, however, employers can choose whether to get workers' compensation coverage.[40] Above all, "[i]t is the 'police powers of the state' under which workers' compensation laws are authorized, and they will not be preempted by federal law 'except by the clear and manifest intent of Congress.'"[41]

B. The Risk of Working Without Authorization

All workers are better off if undocumented immigrants are covered by state workers' compensation policies. According to the National Employment Law Project, poor coverage of undocumented immigrants under workers' compensation laws may actually encourage the

34. *Id.* at 1376.

35. *Id.*

36. Brooke Sikora Purcell, *Undocumented and Working: Reconciling the Disconnect Between U.S. Immigration Policy and Employment Benefits Available to Undocumented Workers*, 43 U.S.F. L. REV. 197, 205 (2008).

37. MINN. DEP'T LAB. & INDUS., *Work Comp: Who Needs Workers' Compensation Coverage?*, https://www.dli.mn.gov/business/workers-compensation/work-comp-who-needs-workers-compensation-coverage [https://perma.cc/9TJ4-P3MD]; MINN. STAT. § 176.181, subd. 2 (2022) ("Every employer . . . liable under this chapter to pay compensation shall insure payment of compensation with some insurance carrier authorized to insure workers' compensation liability in this state . . . .").

38. MINN. STAT. § 176.031 (2022).

39. *See id.* ("If an employer . . . fails to insure or self-insure liability for compensation to injured employees and their dependents, an injured employee, or legal representatives or, if death results from the injury, any dependent may elect to claim compensation under this chapter or to maintain an action in the courts for damages on account of such injury or death.").

40. TEX. DEP'T OF INS., *Employer Resources*, https://www.tdi.texas.gov/wc/employer/index.html [https://perma.cc/K859-NZQM].

41. David B. Torrey, Lawrence D. McIntyre & Justin D. Beck, *Recent Developments in Workers' Compensation and Employers' Liability Law*, 56 TORT TRIAL & INS. PRAC. L.J. 515, 521 (2021) (footnotes omitted).

employment of unauthorized workers.[42] If employers know that they will not have to pay out when an undocumented worker gets injured, they have an incentive to hire unauthorized workers to save money. Subsequently, employers may "become lax in workplace safety, knowing [they] would suffer no consequences if [their] employees were injured at work."[43] This outcome will inevitably worsen workplace safety for all employees in the United States.[44]

However, despite the possibility of a universal decline in workplace safety, empirical evidence supports the idea that undocumented workers suffer from more hazardous workplaces than other workers.[45] Many studies that report on the occupational hazards of unauthorized workers focus on the largest subset of undocumented workers: Latin American immigrants. A 2015 article in the American Journal of Industrial Medicine references a 2009 study that notes that more than 75% of unauthorized workers in the United States are Latin American.[46] In their study for the Center for Migration Studies of New York, Matthew Hall and Emily Greenman focus exclusively on the workplace safety of Mexican and Central American undocumented immigrants after noting that Mexican and Central American noncitizens alone comprise approximately two-thirds of undocumented immigrants in the United States.[47] However, it is difficult to find or impute national data on the fatality rates of undocumented workers in general.[48] As a result, much of the literature on undocumented immigrants' working conditions centers the experiences of Latin American immigrants.

In a 2008 Center for Disease Control and Prevention report, researchers found that foreign-born Latin American immigrants were fatally injured at work at two to three times the rate of U.S.-born employees.[49] Undocumented Mexican and Central Americans (MCAs)

---

42. DEBORAH BERKOWITZ, NAT'L EMP. L. PROJECT, UNINTENDED CONSEQUENCES OF LIMITING WORKERS' COMP BENEFITS FOR UNDOCUMENTED WORKERS 2 (2017), https://www.nelp.org/publication/unintended-consequences-limiting-workers-comp-benefits-undocumented-workers/ [https://perma.cc/B7Z8-5E5C].

43. Rajeh v. Steel City Corp., 813 N.E.2d 697, 703 (Ohio. Ct. App. 2004).

44. BERKOWITZ, *supra* note 42, at 3 ("Employers who expose undocumented workers to risks of injuries on the job also expose their co-workers to such risks.").

45. Matthew Hall & Emily Greenman, *The Occupational Cost of Being Illegal in the United States: Legal Status, Job Hazards, and Compensating Differentials*, 49 INT'L MIGRATION REV. 406, 406 (2015) (noting that, due to data limitations, empirical evidence on the status of undocumented workers is sparse).

46. Michael A. Flynn, Donald E. Eggerth & C. Jeffrey Jacobson, Jr., *Undocumented Status as a Social Determinant of Occupational Safety and Health: The Workers' Perspective*, 58 AM. J. INDUS. MED. 1127, 1128 (2015).

47. Hall & Greenman, *supra* note 45, at 408.

48. Flynn et al., *supra* note 46, at 1128.

49. *Id.*

have the highest occupational fatality and hazard rate—10.68%—among less-skilled male workers based on race and legal status.[50] Specifically, undocumented MCAs "have the highest levels of occupational hazard on five of the seven measured dimensions."[51] The five categories in which undocumented MCAs had the highest risk are: "occupational fatality, greater exposure to physical strain, greater exposure to environmental conditions and to heights, and higher levels of repetitive motions (i.e., recurring hand movements)."[52] Among female workers, female undocumented MCAs have the highest levels of physical strain and environmental exposure.[53]

Some of this increased risk is likely due to the fact that undocumented immigrants are more concentrated in the food preparation, agriculture, construction, and cleaning industries, which are generally more dangerous than the average white-collar job.[54] The reasons for this overrepresentation are manifold. In a 2009 study, undocumented workers were noted to be more willing to perform riskier job duties because they fear losing their job and have less options available to them.[55] Without work authorization, employment opportunities are limited, and the inability to speak or understand English further restricts available options.[56]

As of 2019, the Migration Policy Institute estimated that there were 81,000 undocumented noncitizens in Minnesota.[57] The number of undocumented immigrants in Minnesota has increased exponentially since 1990, when it was estimated that there were only 15,000 undocumented immigrants in the state.[58] Of the approximately 81,000 undocumented noncitizens in Minnesota, it is estimated that 53,000 were employed in the following industries: 19% in accommodation and food services, 16% in manufacturing, 13% in "professional, scientific,

50. Hall & Greenman, *supra* note 45, at 421 tbl.2 (finding that the occupational fatality and hazard rate among less-skilled workers is 10.529% for documented MCAs, 8.271% for U.S.-born Latinos, 9.023% for U.S.-born non-Latino whites, and 8.049% for U.S.-born non-Latino Blacks).

51. *Id.* at 421.

52. *Id.* at 421–22.

53. *Id.* at 422.

54. Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs*?, 46 DEMOGRAPHY 535, 536 (2009).

55. *Id.* at 536.

56. *Id.* at 544 ("The regression results indicate that workers with worse English ability tend to be in riskier jobs.").

57. *Profile of the Unauthorized Population: Minnesota*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/MN [https://perma.cc/R9W9-P228].

58. *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/ [https://perma.cc/7REV-CNM4].

management, administrative, and waste management services," 10% in construction, and 9% in "health services and social assistance."[59] Of this unauthorized immigrant population, 58% are from Mexico and Central America, 15% are from Asia, 14% are from Africa, 8% are from South America, and 5% are from Europe.[60] It is incumbent upon Minnesota to safeguard its workplaces to ensure the health of every resident, regardless of work authorization or nationality. Unfortunately, federal legislators and those in charge of national immigration consistently refuse to extend certain workplace protections to undocumented workers.

C. Federal Regulation of Undocumented Workers—Hoffman *at the Intersection of Immigration and Labor Law*

The Immigration Reform and Control Act of 1986 (IRCA) is the pioneering national legislation at the intersection of employment and immigration law. Before IRCA, federal immigration law did not prohibit the employment of undocumented workers.[61] However, the economic recessions of the 1970s and 80s created uncertainty for the American worker.[62] Directly before IRCA's enactment, "American sentiment reflected an anti-immigrant attitude that was grounded in the assumption that the undocumented immigrant population extant in the United States adversely impacted the 'economic, social, and political well-being of the nation.'"[63] Several different interest groups began to pressure legislators to respond through legislation establishing employer sanctions.[64] After several years of failed bills and heated negotiations, Congress passed IRCA—amending the Immigration and Nationality Act—as part of a more comprehensive immigration reform package.[65]

---

59. MIGRATION POL'Y INST., *supra* note 57.

60. *Id.*

61. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 198 (2007).

62. Adam L. Lounsbury, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415, 419 (2008).

63. *Id.* (quoting HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 32 (2001)); *see also* H.R. REP. NO. 99-682, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650 ("Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.").

64. *See* Wishnie, *supra* note 61, at 200 (discussing the viewpoints of various interest groups including labor groups, business groups, civil rights groups, and environmental groups regarding the benefits and dangers of prohibiting employers from hiring unauthorized workers).

65. *Id.* at 202.

Under IRCA, *employers* face criminal and civil sanctions for failing to comply with federal immigration law.[66] IRCA requires that most employers examine employee identification and employment authorization to ensure that employees are eligible to work in the United States.[67] To encourage employers to participate in the recordkeeping and verification requirements, IRCA establishes that "good faith compliance" with recordkeeping requirements is an affirmative defense for employers accused of violating the legislation.[68] "[T]he system can be viewed as a stepwise progression of civil penalties aimed at achieving compliance with IRCA, while reserving criminal penalties for employers who are flagrant and persistent violators of the Act."[69] Like many federal acts, IRCA includes a clause that explicitly preempts state and local law.[70] Although many employers used this preemption clause to argue that undocumented workers were not covered under workers' compensation laws, in the years following the passage of IRCA most states found that preemption did not apply to workers' compensation laws and undocumented workers were covered under the state workers' protection statutes.[71]

The Supreme Court's *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* opinion reignited the debate regarding whether or not unauthorized workers are entitled to compensation under both federal and state statutes.[72] Despite the fact that the case does not directly address workers' compensation, the ruling has had an immense effect on the applicability of compensation laws to undocumented workers.[73] Hoffman Plastic hired Jose Castro, an undocumented worker, in 1988

66. *See* 8 U.S.C. § 1324a (making it illegal to knowingly hire, recruit, or refer for employment an individual unauthorized to work in a certain field due to their immigration status).

67. *See* 8 U.S.C. § 1324a(b)(1).

68. *See* 8 U.S.C. § 1324a(b)(6); *see also* H.R. REP. NO. 99-682, at 57 ("The Committee intends that the act of establishing 'good faith' compliance could be shown by proof of the employer's, referrer's or recruiter's review of the documents specified in the legislation and retention of the verification forms, inclusive of the employee's attestation.").

69. Lounsbury, *supra* note 62, at 422–23.

70. 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

71. Gregory T. Presmanes & Seth Eisenberg, *Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits*, 43 TORT TRIAL & INS. PRAC. L.J. 247, 251 (2008).

72. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

73. *See generally* Oliver T. Beatty, *Workers' Compensation and Hoffman Plastic: Pandora's Undocumented Box*, 55 ST. LOUIS U. L.J. 1211 (2011) (describing how *Hoffman Plastic*'s finding—that federal immigration laws supersede labor laws—is used as an affirmative defense by employers in state workers' compensation cases involving undocumented workers).

after Castro presented false paperwork.[74] After Hoffman illegally fired Castro for union organizing, the National Labor Relations Board (NLRB) ordered Hoffman to give Castro backpay.[75] In a close 5-4 decision, the Court held that Castro could not receive backpay because his undocumented status meant that he was never entitled to wages in the first place.[76] Justice Rehnquist wrote for the majority:

> We therefore conclude that allowing the Board to award backpay 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. However broad the Board's discretion to fashion remedies when dealing only with the [National Labor Relations Act], it is not so unbounded as to authorize this sort of an award.[77]

In his dissent, Justice Breyer wrote that, on the contrary, the award of backpay for an undocumented worker does *not* conflict with national immigration policy.[78] Instead, it "reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent" by removing incentives to hire unauthorized workers (in order to avoid paying for workers' compensation).[79] Immigration law does not conflict with labor law, he urged; instead, the labor market benefits from coverage of undocumented workers.[80]

However, employers used the *Hoffman* ruling to claim that IRCA expressly or implicitly preempted awarding benefits to *all* undocumented workers.[81] Fortunately, most state case law has established that the *Hoffman* ruling does not preclude workers' compensation benefits for undocumented workers.[82] Nevertheless, varying applications and interpretations of workers' compensation laws often leave undocumented workers with more questions than answers. Some states,

---

74. *Hoffman Plastic*, 535 U.S. at 140–41.

75. *Id.*

76. *Id.* at 148–49.

77. *Id.* at 151–52.

78. *Id.* at 153 (Breyer, J., dissenting).

79. *Id.*

80. *See id.* at 153–56 (highlighting that the majority's ruling on implied preemption reduces employer liability and creates a perverse incentive for employers to violate labor laws and hire more undocumented workers, undermining the objectives of both immigration and labor laws).

81. *See, e.g.*, Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J.L & PUB. POLY 659, 673 (2012) (finding that *Hoffman* has been used to justify and incentivze employer misconduct).

82. *See, e.g.*, Beatty, *supra* note 73, at 1236–37 (writing that New York case law draws from Breyer's dissent in *Hoffman* to find that "there is no conflict between labor and immigration policies, and even if there were, properly effectuated labor laws are the solution to immigration problems").

for example, disqualify undocumented workers from compensation if they have used fraudulent documentation to obtain employment.[83] Other states specify that undocumented workers do not meet the definition of "employee" under state workers' compensation statutes, making them ineligible for coverage.[84] The varying degrees of coverage for undocumented workers in different jurisdictions means that workers must navigate a minefield of confusing case law and statutory definitions to determine whether they are even able to collect different kinds of workers' compensation benefits.

On June 27, 2013, the United States Senate passed S. 744, a bill with holistic immigration reform provisions.[85] If passed into law, S. 744 could have broadened workers' compensation protections to include undocumented workers. The bill would have amended the Immigration and Nationality Act's section pertaining to the "Unlawful Employment of Aliens" to read: "all rights and remedies provided under any Federal, State, or local law relating to workplace rights, including but not limited to back pay, are available to an employee despite—(i) the employee's status as an unauthorized alien during or after the period of employment."[86] Such a bill would have supported enhanced workplace rights for undocumented immigrants, especially the right to "recover in full for a workplace injury."[87] Unfortunately, the House refused to consider S. 744, and the bill died.[88]

---

83. *See, e.g.*, Doe v. Kansas Dep't of Hum. Res., 90 P.3d 940 (Kan. 2004) (finding that an undocumented worker who had lied about her identity to gain employment was not entitled to workers' compensation benefits because she made a false and misleading statement in violation of state law); Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510, 512 (Mich. Ct. App. 2003) (reversing an award of weekly wage-loss benefits to an undocumented worker because presenting fraudulent identification constituted the "commission of a crime" that absolved the employer of the duty to pay).

84. *See, e.g.*, IDAHO CODE § 72-1366(19)(a) (2021) (noting that "aliens" cannot collect workers' compensation benefits unless they are "lawfully admitted"); WYO. STAT. ANN. § 27-14-102(a)(vii) (2022) (including only authorized "aliens" in its list of covered employees).

85. Holdsworth, *supra* note 16, at 1381; *see* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3101 (2013).

86. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3101(a)(8)(A) (2013).

87. Holdsworth, *supra* note 16, at 1382.

88. Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS, (June 24, 2015), https://www.americanprogress.org/article/2-years-later-immigrants-are-still-waiting-on-immigration-reform/ [https://perma.cc/8P55-9RFD].

II. Legal Analysis

A. Minnesota Should Change its Statutory Definition of Employee to Explicitly Include Undocumented Workers

Undocumented workers are not excluded from workers' compensation coverage under Minnesota statute, but they are not explicitly included under the definition of employee either.[89] Nevertheless, in *Gonzalez v. Midwest Staffing Group, Inc.*, the Workers' Compensation Court of Appeals (WCCA) interpreted Minnesota's statutory language to be inclusive of undocumented workers.[90] Minnesota's workers' compensation statute states that "'[e]mployee' means any person who performs services for another for hire including the following," and then enumerates twenty-five different kinds of employees covered by the Act.[91] The WCCA explained that "the language 'including the following' as used in this statute means 'for example' and should not be construed to exclude classifications not itemized."[92] To bolster this interpretation, the WCCA noted that another section in the same statutory chapter provides that "except as excluded by this chapter all employers and employees are subject to the provisions of this chapter."[93] The statute explicitly excludes farmers and "members of their family who exchange work with other farmers in the same community."[94]

The WCCA declined to exclude "undocumented aliens" from the category of covered workers so as not to usurp the legislature's statutory power.[95] Using this interpretation of the statute, the court found that Gonzalez, an undocumented worker, was an employee for the purposes of workers' compensation.[96] At this time, no WCCA decisions have contradicted this interpretation. In fact, the Minnesota Supreme Court affirmed this interpretation in *Correa v. Weymouth Farm, Inc.*, in 2003.[97]

In his *Correa* majority opinion, Justice Page cited section 645.16 of the Minnesota Statutes, which states that "when the words of a law are clear and free from all ambiguity, the letter of the law shall not be

89. *See* MINN. STAT. § 176.011, subd. 9 (2022) (including "alien" in the definition of "employee" but not specifying whether an "alien" means a person authorized to work in the United States).

90. *See* Gonzalez v. Midwest Staffing Grp., Inc., 59 W.C.D. 207, 1999 WL 297157, at *2 (Minn. Work. Comp. Ct. App. Apr. 6, 1999).

91. MINN. STAT. § 176.011, subd. 9 (2022).

92. *Gonzalez*, 1999 WL 297157, at *2.

93. *Id.* at *3 (citing MINN. STAT. § 176.021, subd. 1 (2022)).

94. MINN. STAT. § 176.011, subd. 9(b) (2022).

95. *Gonzalez*, 1999 WL 297157, at *3.

96. *Id.*

97. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329 (Minn. 2003).

disregarded under the pretext of pursing its spirit."[98] In other words, by not explicitly excluding undocumented workers from its definition of "employee," the Minnesota legislature unambiguously includes undocumented workers in its list of covered employees. Other states share this interpretation that "alien" includes both documented and undocumented immigrants.[99]

However, a judicial interpretation of vague statutory language provides little permanent certainty and falls short of the language used in other states' statutes. The Minnesota legislature should formalize *Gonzalez*'s and *Correa*'s interpretation of section 176.011 to preclude any argument that the statute's use of "alien" implicitly excludes unauthorized aliens. Does the word "alien" refer to authorized aliens only or to both authorized and unauthorized immigrants? The federal definition of "alien" in the Immigration and Nationality Act is "any person not a citizen or national of the United States."[100] This definition is broad and includes both those with and without authorized legal status.[101] Minnesota should make it explicitly clear that undocumented workers are covered by the workers' compensation statute.

Other states expressly include undocumented workers in their statutory definitions of "employee." The Utah workers' compensation statute, for example, expressly includes "aliens and minors, whether legally or illegally working for hire" in its definition of covered employees.[102] In Florida, the statute states that "'[e]mployee' means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment . . . whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors."[103]

Minnesota can avoid the uncertainty of whether the word "alien" includes undocumented workers altogether by removing this word in all of its statutes. In recent years, lawmakers and legal scholars have moved away from using the term because of its potentially offensive connotation. In the fall of 2021, California Governor Gavin Newsom signed a law that

98. *Id.* (citing MINN. STAT. § 645.16 (2002)).

99. *See, e.g.*, Moyera v. Quality Pork Int'l, 825 N.W.2d 409, 416 (Neb. 2013) (finding that the definition of "alien" includes both documented and undocumented immigrants).

100. 8 U.S.C. § 1101(a)(3).

101. *Cf.* ACLU IMMIGRANTS' RTS. PROJECT, *supra* note 12 (explaining that simply being present in the United States in violation of federal immigration law is not criminalized, although entering without inspection or reentering the United States after a prior removal can carry criminal sanctions).

102. UTAH CODE ANN. § 34A-2-104(1)(b)(ii) (West 2019).

103. FLA. STAT. § 440.02(15)(a) (2022).

removes "alien" from all state statutes.[104] The word is considered degrading, and Assemblywoman Liz Rivas stated that the word is often "used in place of explicitly racial slurs to dehumanize immigrants."[105] In April of 2021, the Biden Administration published memoranda ordering United States immigration enforcement agencies to replace the term "illegal alien" with "undocumented noncitizen."[106] As Tae Johnson, the acting director of the United States Immigration and Customs Enforcement (ICE), indicated, it is time to adopt language that "respect[s] the humanity and dignity" of immigrants.[107]

B. Minnesota Must Provide Explicit Guidance Regarding How Undocumented Workers Can Comply with Employment Requirements for Wage Loss Benefits

Minnesota has four principal wage replacement programs that serve to assist workers who have reduced income due to a workplace injury.[108] Three of the four programs require recipients to return to work at some point in time, a requirement that may prove difficult for undocumented workers who technically cannot find legal employment under IRCA.[109]

The first of Minnesota's wage replacement programs, *Temporary Total Disability* (TTD), is available to injured workers who are temporarily unable to work due to a work-related injury.[110] Benefits end when the worker returns to work, is cleared to return to work but turns down gainful employment, fails to undertake a diligent job search, or does not cooperate with the rehabilitation programs.[111] Unlike those who receive TTD benefits, recipients of *Temporary Partial Disability* (TPD) benefits can still work with their injury.[112] An employee may qualify for TPD if they are employed but earning less than what they were earning

104. Adam Beam, *California to Replace the Word 'Alien' from Its Laws*, ASSOCIATED PRESS (Sept. 24, 2021), https://apnews.com/article/immigration-california-race-and-ethnicity-racial-injustice-gavin-newsom-c216fbc31c14829fa86a0c46e4b9e0fd [https://perma.cc/TR3C-2JGM].

105. *Id.*

106. Joel Rose, *Immigration Agencies Ordered Not to Use Term 'Illegal Alien' Under New Biden Policy*, NPR (Apr. 19, 2021), https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-polic [https://perma.cc/XA4Y-H476].

107. *Id.*

108. MINN. H.R. RSCH. DEP'T, *supra* note 31, at 4–7.

109. *Id.*

110. *See* MINN. STAT. § 176.101, subd. 1 (2022).

111. MINN. H.R. RSCH. DEP'T, *supra* note 31, at 7–8; *see* MINN. STAT. § 176.101, subd. 1 (2022) (listing a complete set of circumstances in which TTD benefits shall cease under the statute).

112. *See* MINN. STAT. § 176.101, subd. 2 (2022).

at the time of the injury.[113] Recipients can only collect TPD benefits for a limited amount of time.[114]

Permanent Partial Disability (PPD) benefits compensate injured workers for the permanent loss of function of certain body parts.[115] Individuals are assigned an "impairment rating" that assigns a percentage of disability to the worker depending on how much of the worker's bodily function is impaired.[116] These benefits replace TTD benefits after the 130-week TTD maximum is reached.[117]

Finally, there are two types of *Permanent Total Disability* (PTD) in Minnesota.[118] First, workers can receive PTD benefits if they are permanently injured to such a degree that they are unable to return to regular work.[119] Injuries must fall within certain categories outlined in section 176.101 of the Minnesota Statutes, such as the loss of both eyes.[120] The second type of PTD is available to workers who are totally and permanently incapacitated to a certain extent but who can still secure "sporadic employment resulting in an insubstantial income."[121] Information regarding undocumented workers' access to wage replacement benefits is scarce in Minnesota due to the lack of published WCCA decisions. There are no published cases that address an undocumented worker's right to permanent total or partial disability benefits.[122]

Minnesota's most important case regarding wage replacement benefits is *Correa v. Waymouth Farms, Inc*.[123] In *Correa*, the Minnesota Supreme Court's holding responded directly to *Hoffman*.[124] Fernando Correa was an undocumented worker who injured his back while

113. MINN. STAT. § 176.101, subd. 2(b) (2022).

114. *Id.* (stating that the maximum amount of time that TPD benefits can be received is 275 weeks—or approximately five years and three months—and that TPD benefits cannot be collected more than 475 weeks after the injury).

115. *See* MINN. STAT. § 176.101, subd. 2a (2022) (establishing a compensation schedule for permanently injured workers and setting conditions for payment).

116. MINN. STAT. § 176.101, subd. 2a(a) (2022).

117. MINN. STAT. § 176.101, subd. 2a(b) (2022); *see also* MINN. DEP'T LAB. & INDUS., AN EMPLOYEE'S GUIDE TO THE MINNESOTA WORKERS' COMPENSATION SYSTEM 3 (2020), https://www.dli.mn.gov/sites/default/files/pdf/eeguide2wc.pdf [https://perma.cc/M3WH-4J8S] (stating that an individual cannot receive more than 130 weeks of TTD benefits unless they are in a work retraining program).

118. Thomas M. Domer & Michael R. Johnson, *A Comparison of Wisconsin and Minnesota Workers' Compensation Claims*, 41 WM. MITCHELL L. REV. 1350, 1387–88 (2015).

119. MINN. DEP'T LAB. & INDUS., *supra* note 117, at 4.

120. MINN. STAT. § 176.101, subd. 5(1) (2022).

121. *Id.* at subd. 5(2).

122. Charles M. Cochrane, *Undocumented Aliens and Workers Compensation*, *in* 20TH ANNUAL WORKERS' COMPENSATION INSTITUTE 11–12 (2005).

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

124. *See id.* at 330–31.

employed at Waymouth Farms.[125] He was subsequently terminated after the employer learned that he was not authorized to work in the United States.[126] He received TTD benefits for a time but had a hard time finding new work with such a severe injury.[127] Waymouth Farms moved to terminate his TTD benefits because, as they saw it, Correa was "medically released to work but could not, as an unauthorized alien, legally work in the United States."[128] Waymouth also asserted that Correa's undocumented status prevented him from conducting a reasonably diligent job search as a matter of law under section 176.101 of the Minnesota Statutes.[129]

The Minnesota Supreme Court disagreed and held that Correa was entitled to coverage under the plain language of the Minnesota Workers' Compensation Act.[130] In his majority opinion, Justice Page held that the Minnesota Workers' Compensation Act was not preempted by IRCA because IRCA does not prohibit undocumented workers from seeking or accepting employment.[131] In so finding, the court rejected Waymouth's assertion that federal immigration policy prohibits states from awarding workers' compensation to undocumented workers.[132] Instead, Justice Page highlighted Justice Breyer's dissent in *Hoffman* that denying compensation to undocumented individuals runs counter to federal immigration policy, as it gives employers an incentive to hire unauthorized workers.[133] In short, the court concluded that "unauthorized aliens are entitled to receive temporary total disability benefits conditioned on a diligent job search."[134]

Correa is an oft-cited, seminal decision that rejects the notion that *Hoffman* preempts the applicability of state compensation statutes to undocumented workers.[135] Unfortunately, it leaves several questions unanswered. First, Justice Page declined to consider the policy question that Waymouth Farms raised: does IRCA policy prevent undocumented

125. *Id.* at 326–28.
126. *Id.* at 326.
127. *Id.*
128. *Id.* at 327.
129. *Id.*; *see* MINN. STAT. §176.101, subd. 1(g) (2022).
130. *Correa*, 664 N.W.2d at 330.
131. *Id.* at 329.
132. *Id.* at 330.
133. *Id.* at 331.
134. *Id.*
135. *See, e.g.*, Bollinger Shipyards, Inc. v. Dir. of Off. of Worker's Comp. Programs, 604 F.3d 864, 872 (5th Cir. 2010) (citing *Correa* and concluding that "aliens" are employees under the Longshore and Harbor Workers' Compensation Act); Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 DRAKE J. AGRIC. L. 263, 283 (2008) ("Minnesota is the only [midwestern] state that has ruled in favor of unauthorized workers' compensation coverage.").

workers from performing a diligent job search?[136] As discussed above, TTD benefits end if a worker fails to make a diligent job search.[137] Does this requirement automatically bar undocumented workers—who cannot legally accept any job—from ever collecting TTD benefits? Justice Page avoided the question, opining that because IRCA does not preclude state workers' compensation and because undocumented workers are covered under the state statute, the court need not specifically address whether undocumented individuals could conduct a diligent job search.[138] Second, even if the court eventually holds that undocumented immigrants *can* conduct diligent job searches, the *Correa* decision still does not provide any guidance as to how undocumented workers can *prove* they have conducted a diligent job search.

The lack of clarity on employment requirements has led to decisions that run contrary to the idea that undocumented workers can receive compensation. In *Rivas v. Car Wash Partners*, Minnesota's WCCA denied TTD benefits to Jerson Rivas.[139] Rivas was injured prior to the first pay period, and his employer had not yet verified his work authorization.[140] After being released from the hospital, the employer extended him a job offer consistent with the new accommodations Rivas needed, but he conditioned the offer upon authorization to work in the United States.[141] Rivas never responded to the offer. Because Rivas had technically refused the offer for employment, the WWCA found that Rivas was disqualified from receiving TTD benefits from his previous employer:

> [A]s we see it, the issue on appeal is whether an unauthorized alien is eligible for temporary total disability benefits when he refuses an offer of gainful employment because of his immigration status. That issue was not considered or addressed in Correa, and, after review of the record and the applicable statute, we conclude that the compensation judge properly denied the claimed benefits.[142]

In dissent, Judge David A. Stofferahn, noted that "the result of the majority's decision will be to effectively bar many injured aliens from the receipt of temporary total disability benefits. . . . Despite Correa, the result here is to conclude that illegal aliens are not entitled to temporary total disability benefits . . . ."[143] This decision left Rivas without a remedy for

---

136. *Correa*, 664 N.W.2d at 331. *But cf.* Cochrane, *supra* note 122, at 10 (explaining that several jurisdictions have found that undocumented workers are unable to perform a diligent work search when they lack authorized status).

137. MINN. STAT. § 176.101, subd. 1(g) (2022).

138. *Correa*, 664 N.W.2d at 331.

139. Rivas v. Car Wash Partners, 2004 WL 1444564, at *3 (Minn. Work. Comp. Ct. App. June 4, 2004).

140. *Id.* at *1.

141. *Id.*

142. *Id.* at *2.

143. *Id.* at *5.

his injuries. If Rivas cannot provide valid work authorization to continue employment—a requirement to receive TPD[144]—but his injuries are not serious enough to constitute temporary *total* disability, what recourse does he have?

Other states have grappled with the question of how job search requirements should apply to undocumented workers. In *Reinforced Earth Co. v. Workers' Compensation Appeal Board*, for example, the Supreme Court of Pennsylvania found that, although the claimant, Astudillo, was technically entitled to receive total disability benefits under Pennsylvania's workers' compensation statute, employers are automatically entitled to suspend those benefits if the claimant is undocumented.[145] The court reasoned that if the worker is undocumented, the loss of their earning potential is ultimately due to their immigration status, not their injury.[146] *Reinforced Earth* influenced another Pennsylvania case, *Mora v. Compensation Appeal Board*.[147] In *Mora*, the court suspended the undocumented claimant's TPD benefits using the logic in *Reinforced Earth* that "loss of earning power need not be shown because it is going to be presumed that Claimant cannot work in this country and there can be no way to measure his/her earning power."[148]

In *Martines v. Worley & Sons Construction*, the Georgia Court of Appeals affirmed the denial of TTD benefits for Merced Martines.[149] After Martines was injured on the job, Worley & Sons transferred him to a delivery driver position but soon discovered that he did not have a valid driver's license because he was undocumented.[150] The superior court found that Martines's "refusal of work" was unjustified and reversed his award of benefits.[151] The court of appeals found that, instead of a physical limitation, "[h]is inability to perform the job stems rather from his legal inability to acquire the necessary Georgia driver's license."[152] Nevertheless, the court of appeals affirmed the ruling because Martines

144. MINN. STAT. § 176.101, subd. 2(b) (2022) ("Temporary partial compensation may be paid only while the employee is employed . . . .").

145. Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Asudillo), 810 A.2d 99, 108 (Pa. 2002) (finding that the employer does not need to show that the employee refused valid jobs or failed to conduct a job search to terminate their benefits—the employer only has to show that the employee is undocumented).

146. *Id.*

147. *See* Mora v. Workers' Comp. Appeal Bd. (DDP Contracting Co.), 845 A.2d 950 (Pa. Commw. Ct. 2004).

148. *Id.* at 954.

149. Martines v. Worley & Sons Constr., 1628 S.E.2d 113, 114 (Ga. Ct. App. 2006).

150. *Id.* at 114.

151. *Id.*

152. *Id.* at 117.

failed to present evidence that his employer's failure to verify his work status meant that his refusal of work as a delivery driver was justified.[153]

In the Pennsylvania and Georgia cases mentioned above, undocumented workers were ultimately denied benefits because their undocumented status prevented them from meeting certain statutory employment requirements. In each case, the court reached this conclusion despite finding that undocumented individuals were generally covered under the state compensation statute. Does *Rivas v. Car Wash Partners* suggest that the same logic is acceptable in Minnesota? Although *Correa* held that undocumented workers are covered under the statute, *Rivas* nonetheless found that Rivas's inability to accept legal work due to his undocumented status could prevent him from receiving TTD benefits.[154] How should Minnesota reconcile general coverage of undocumented individuals with the practical improbability of performing a diligent job search or finding modified work without legal status?

Oregon case law provides a compelling answer. In *Alanis v. Barrett Business Services*, the Oregon Court of Appeals said that undocumented workers are entitled to TPD benefits "based on the difference, if any, between the pre-injury wage and the wage of the physician-approved modified job."[155] This benefit is provided "whether or not the job is offered and available and irrespective of the inability to work due to the undocumented status."[156] Minnesota should apply its wage replacement statute to undocumented workers in a similar way. Instead of calculating temporary disability for injured undocumented immigrants based on actual wages—wages that they may or may not be able to receive after it comes to light that they lack work authorization—employers should pay undocumented workers based on the reduction in income they *would have* received *but for* their undocumented status.[157] That way, workers still receive compensation and employers are still held responsible for workplace injuries, a policy that benefits all Minnesota workers.

C. Minnesota Should Ban Retaliatory Discovery Requests Concerning Immigration Status

The vast majority of states prohibit retaliation against injured workers for filing compensation claims.[158] This prohibition is a public

153. *Id.* at 116–17.

154. Rivas v. Car Wash Partners, 2004 WL 1444564, at *2 (Minn. Work. Comp. Ct. App. June 4, 2004).

155. Alanis v. Barrett Bus. Servs., 39 P.3d 880, 881 (Or. Ct. App. 2002).

156. *Id.*

157. Hernandez v. SAIF Corp., 35 P.3d 1099, 1101 (Or. Ct. App. 2001).

158. Donald J. Campbell, *Retaliatory Discharge of Injured Workers: Relief Is Available for*

policy exception to the general principle of at-will employment, which allows employers to terminate employees for any reason.[159] As the Deputy Assistant Secretary for the Occupation Safety and Health Administration wrote in his March 2012 Memorandum: "[i]f employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk."[160] In Minnesota, an employee can recover for retaliation if an employer discharges, threatens to discharge, or intentionally obstructs an employee seeking workers' compensation benefits.[161] Minnesota has emerged as a leader in undocumented retaliation protections in some ways, but more is needed to encourage workers to report unsafe workplaces.

Retaliation is a major concern for undocumented workers, as they are in a particularly vulnerable position. Many undocumented workers procure fake identification in order to obtain employment, and several states have criminal statutes prohibiting the use of false information in workers' compensation claims.[162] The Southern Poverty Law Center reports that it receives frequent calls from workers who were fired after sustaining workplace injuries.[163] Under the Trump administration, employers and insurers increasingly reported undocumented employees for false identification in order to avoid paying for workers' compensation.[164] For example, after Florida passed a law making it a crime to use false information in a workers' compensation claim, insurers began reporting undocumented workers who filed claims with false identification.[165] A quarter of those individuals arrested were then detained by ICE or deported.[166]

Employees Who Are Fired for Exercising Their Legal Rights, 35 TRIAL 26, 28 (1999), https://www.thefreelibrary.com/Retaliatory+discharge+of+injured+workers.-a056909658 [https://perma.cc/47R8-YHCQ].

159. *Id.* at 27.

160. RICHARD E. FAIRFAX, OCCUPATIONAL SAFETY & HEALTH ADMIN., EMPLOYER SAFETY INCENTIVE AND DISINCENTIVE POLICIES AND PRACTICES (2012), https://www.osha.gov/laws-regs/standardinterpretations/2012-03-12-0 [https://perma.cc/72AG-5HAS].

161. MINN. STAT. § 176.82, subd. 1 (2022).

162. *See* RONALD W. MORTENSEN, CTR. FOR IMMIGR. STUD., ILLEGAL, BUT NOT UNDOCUMENTED: IDENTITY THEFT, DOCUMENT FRAUD, AND ILLEGAL EMPLOYMENT (2009), https://cis.org/Report/Illegal-Not-Undocumented [https://perma.cc/MXD8-RJYZ].

163. MARY BAUER, S. POVERTY L. CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 14 (2009), https://www.splcenter.org/20090331/under-siege-life-low-income-latinos-south [https://perma.cc/VD64-VE3M].

164. Deborah Berkowitz, Laura Huizar & Rebecca Smith, *Protecting Injured Immigrant Workers from Retaliation*, NAT'L EMP. L. PROJECT (Oct. 3, 2017), https://www.nelp.org/publication/protecting-injured-immigrant-workers-from-retaliation/ [https://perma.cc/Z7JM-MKSX].

165. Michael Grabell, *They Got Hurt at Work—Then They Got Deported*, NPR (Aug. 16, 2017), https://www.npr.org/2017/08/16/543650270/they-got-hurt-at-work-then-they-got-deported [https://perma.cc/GK26-J44F].

166. *Id.*

The Florida statute makes it illegal to "knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter."[167] Minnesota's compensation fraud statute, on the other hand, contains two important pieces of statutory language that seem to preclude the interpretation given to Florida's statute. First, the statute requires the intent to defraud: "[a]ny person who, with intent to defraud, receives workers' compensation benefits to which the person is not entitled by knowingly misrepresenting, misstating, or failing to disclose any material fact is guilty of theft."[168] Although undocumented workers often present false documentation, there is no evidence to suggest that they do so with the purpose of fraudulently obtaining workers' compensation. Rather, the purpose of the false documents is to obtain employment. Second, the statute only applies if the individual providing false documentation "is not entitled" to workers' compensation.[169] Thus, undocumented workers will not be in violation of the statute unless they attempt to collect on a false claim of injury.

In 2017, Minnesota issued an opinion that was heralded as "a victory for undocumented workers."[170] In *Sanchez v. Dahlke Trailer Sales, Inc.*, an undocumented worker was placed on an indefinite leave of absence after he injured himself while operating a sandblaster.[171] The Minnesota Supreme Court was tasked with determining whether the forced leave of absence constituted a "discharge" under section 176.82 of the Minnesota Statutes, since the term is not defined in the statute.[172] The court held that the determinative factor was "whether [the supervisor] intended the leave to be permanent."[173] Since there was no way for Sanchez to return to work while he remained undocumented, and it was doubtful that Dahlke would rehire Sanchez even if his work status changed, a factfinder could determine that the effect of the layoff was to permanently bar Sanchez from returning.[174] The court affirmed the denial

167. FLA. STAT. § 440.105(4)(b)(1) (2022).

168. MINN. STAT. § 176.178, subd. 1 (2022).

169. *Id.*

170. Emma R. Denny, *Undocumented Workers Gain Minnesota Supreme Court Victory in Decision for Compensation Benefits Rights*, HALUNEN L. (Sept. 25, 2017), https://www.halunenlaw.com/undocumented-workers-gain-minnesota-supreme-court-victory-in-decision-for-compensation-benefits-rights/ [https://perma.cc/6X8A-L73N].

171. Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267, 271 (Minn. 2017).

172. *Id.* at 273 ("The question here is whether Dahlke discharged Sanchez. Dahlke argues that placing Sanchez on unpaid leave until he can provide legitimate work documents does not qualify as a discharge. The workers' compensation statute does not define 'discharge' or 'discharging.'").

173. *Id.* at 275.

174. *Id.* at 274–75.

of Dahlke's motion for summary judgment.[175] Some have claimed that this decision will make retaliation claims more transparent and easier to litigate.[176]

Importantly, the court held that IRCA did not preempt Minnesota's anti-retaliation statute.[177] Dahlke protested that IRCA prohibits the continued employment of an "alien" once an employer has discovered that the "alien" lacks work authorization.[178] Justice Chutich, however, writing for the majority, insisted that it was possible to comply with both IRCA and the retaliation statute—if Sanchez had been discharged because of his undocumented status instead of his workplace injury, Dahlke would not have been in violation of either statute.[179]

The District Court of Tennessee, Eastern Division came to a similar conclusion as *Sanchez* regarding anti-retaliation preemption.[180] The district court found that the defendant violated Tennessee's anti-retaliation law by firing an undocumented worker after he made a workers' compensation claim.[181] The court noted that it was "not physically impossible" to comply with both IRCA and workers' compensation statutes.[182] The district court found that "[a]n employer in Tennessee is fully able to both comply with IRCA and refrain from discharging employees in retaliation for filing a workers' compensation claim."[183]

Despite the strong legal precedent that Minnesota has set, the state continues to struggle with retaliation issues. In 2018, Ricardo Batres, a contracting operator, was charged with several labor-related felonies.[184]

---

175. *Id.* at 278.

176. *See* Denny, *supra* note 170 ("Following the Sanchez decision, it will now be easier for employees in Minnesota to show that they were discharged for seeking workers' compensation benefits. It will also be more difficult for employers to get away with firing an employee by labeling a termination as an 'indefinite, unpaid' suspension."); Brandon Wheeler, *MN Supreme Court Recognizes Workers' Comp Retaliation Suit Filed by Undocumented Worker*, 27 NO. 6 MINN. EMP. L. LETTER 4 ("While employers do not have an affirmative duty to employ undocumented workers, companies seeking to discharge an unauthorized worker must make clear that their intent to do so is based solely on the worker's unauthorized status, not a retaliatory reason.").

177. Wheeler, *supra* note 176.

178. 8 U.S.C. § 1324a(a)(2).

179. Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267, 276 (Minn. 2017).

180. *See* Torres v. Precision Indus., Inc., 437 F. Supp. 3d 623 (W.D. Tenn. 2020), *aff'd as modified*, 995 F.3d 485 (6th Cir. 2021).

181. *Id.*

182. *Id.* at 642.

183. *Id.* at 643.

184. Paul Walsh, *Charges: Twin Cities Contractor Threatened to Report His Undocumented Workers if They Complained*, STAR TRIB. (Sept. 28, 2018), https://www.startribune.com/charges-twin-citis-contractor-threatened-to-report-his-undocumented-workers-if-they-complained/494386221/?refresh=true [https://perma.cc/8RU5-J2WD].

Batres forced his workers, many of whom were undocumented, to work in unsafe conditions and threatened to have them deported if they went to the hospital.[185] The threat of using a worker's immigration status as a defense to compensation claims leaves undocumented workers in a precarious position.

Some scholars claim that the discovery process in workers' compensation cases stands as an obstacle to anti-retaliation efforts.[186] After *Hoffman Plastic Compounds, Inc. v. NLRB*, employers began to use the discovery process to implicitly threaten undocumented workers and retaliate against them for their claims.[187] During workers' compensation proceedings, some employers request documentation of a worker's authorization to work in the United States in order to use their employee's undocumented status as a defense to liability.[188] State retaliation statutes make it illegal for employers to call ICE on employees who report workplace injuries but cannot protect immigrants from having their status questioned in court proceedings.[189] The result of these discovery requests is that undocumented immigrants often "opt-out" of pursuing compensation claims.[190] Since IRCA requires employers to verify employees' work authorization at the time of hiring,[191] these discovery requests cannot be justified. Federal courts recognize that, when information requested in discovery would injure a party, the requesting party must show that the harm it will suffer without the information outweighs the injury it will cause the opposing party.[192]

In contrast, in state workers' compensation adjudications, employers "now pose status-based questions to immigrant employees as a matter of course."[193] Minnesota should ban such discovery requests during workers' compensation claims in order to safeguard the rights

185. *Id.* (quoting charges filed against Batres in Hennepin County District Court, "[w]hen workers were injured, [Batres] told his employees that they would lose their jobs and be deported if they sought medical attention").

186. *See, e.g.*, Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 46–47 (2008).

187. *Id.* at 42; *see* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

188. *See* Flores v. Albertsons, Inc., No. CV-0100515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) ("Defendant argues that documents related to Plaintiffs' immigration status are relevant to this action because such information may limit Defendant's liability for back pay."); Rivera v. NIBCO, Inc., No. CVF-99-6443-AWI-SMS, 2001 WL 1688880, at *2 (E.D. Cal. Dec. 21, 2001), *aff'd and remanded*, 364 F.3d 1057 (9th Cir. 2004) (stating that the defendant's discovery request concerning the plaintiff's work status was properly denied by the magistrate judge).

189. Cunningham-Parmeter, *supra* note 186, at 47.

190. *Id.* at 45.

191. *See* 8 U.S.C. § 1324a(b)(1).

192. *See, e.g.*, Flynn v. Goldman, Sachs & Co., No. 91 Civ. 0035, 1993 WL 362380, at *1 (S.D.N.Y. Sept. 16, 1993).

193. Cunningham-Parmeter, *supra* note 186, at 43.

reaffirmed in *Sanchez*.[194] One potential solution is a retaliation *per se* rule that would prohibit employers from inquiring into a worker's immigration status at any point after the employee files a workers' compensation claim.[195] This idea is supported by the fact that many courts have held that immigration status has no relevance to liability for workplace injuries.[196]

Such a rule would align with Minnesota's public policy under the Minnesota Human Rights Act (the Act).[197] The Act states that "[i]t is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in employment."[198] The Act also notes that it is an unfair employment practice to discriminate against an individual with respect to compensation and employment conditions.[199] Notably, in section 363A.08, subd. 4 of the Act, it says that it is an unfair practice for employers to "seek and obtain for purposes of making a job decision, information from any source that pertains to the person's race, color, creed, religion, national origin, sex," and marital status, among other categories.[200] In order to safeguard the principles espoused by the Act, workers' compensation law should also include a provision that makes it illegal to "seek and obtain" information regarding immigration status.

Once an employer offers someone a job, they must verify the individual's work authorization status by filing an Employment Eligibility Verification (I-9) form with United States Citizenship and Immigration Services.[201] All employers are required to comply regardless of the number of people they employ.[202] During this process, employers must examine the employee's identification documents and are permitted to copy these documents for their records.[203] Therefore, there is no logical reason why undocumented workers should provide their immigration status during discovery.

Ultimately, an anti-retaliation statute means nothing if employers can use another mechanism (namely, a phone call to ICE) to threaten and intimidate workers. In reality, some employers may not even consider

194. *See* Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267 (Minn. 2017).

195. Roxana Mondragón, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 475 (2011).

196. *Id.* at 477.

197. MINN. STAT. § 363A (2022).

198. MINN. STAT. § 363A.02, subd. 1(a)(1) (2022).

199. MINN. STAT. § 363A.08, subd. 2(3) (2022).

200. MINN. STAT. § 363A.08, subd. 4(a)(2) (2022).

201. MINN. DEP'T EMP. & ECON. DEV. & BALLARD SPAHR L.L.P., AN EMPLOYER'S GUIDE TO EMPLOYMENT LAW ISSUES IN MINNESOTA 16 (14th ed. 2018), https://mn.gov/deed/assets/an-employers-guide-to-employment-law-issues-in-minnesota-14th-ed-2018_ACC_tcm1045-133700.pdf [https://perma.cc/Z25T-ZW86].

202. *Id.*

203. *Id.* at 18–19.

anti-retaliation sanctions such as fines to be much of a deterrent.[204] If ICE works faster than state prosecutors, the employer may never have to pay.

D. Minnesota Should Ensure that Undocumented Workers are Eligible for Vocational Rehabilitation

Vocational rehabilitation is another element of workers' compensation available to injured employees under state statute. In Minnesota, the goal of these programs is to "restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability."[205]

In Minnesota, an injured worker may be eligible for vocational rehabilitation if they need help returning to work after a workplace injury and their previous employer is unable to offer appropriate employment given the employee's new work restrictions.[206] Workers may request vocational rehabilitation from their employer's insurer, who must then notify the employee of their right to request a rehabilitation consultation.[207] The employer must then provide a qualified rehabilitation consultant, who will determine if rehabilitation is warranted.[208] Afterward, a rehabilitation plan is created under subd. 4 of section 176.102.[209] Plans may require "modifying job duties . . . finding work with a different employer . . . or training for a new job."[210] Retraining is one element of vocational rehabilitation which involves "a formal course of study through a school program designed to assist an injured worker's return to suitable gainful employment."[211]

Some jurisdictions have held that, due to the goal of vocational rehabilitation being the return of workers to employment, vocational rehabilitation benefits are unavailable to those who lack work

204. *See* Tom Spiggle, *Why Workplace Abuse Plagues Undocumented Workers*, FORBES (Aug. 22, 2019), https://www.forbes.com/sites/tomspiggle/2019/08/22/why-workplace-abuse-plagues-undocumented-workers/?sh=2d05cd9d49b2 [https://perma.cc/4XVJ-NU7B] ("An employer may be willing to risk a comparatively small fine to help send a message to anyone else who might be thinking complaining [sic] about a violation of employment laws.").

205. MINN. STAT. § 176.102, subd. 1(b) (2022).

206. MINN. DEP'T LAB. & INDUS., *supra* note 117, at 5–6.

207. MINN. STAT. § 176.102, subd. 4 (2022).

208. *Id.*

209. MINN. STAT. § 176.102, subd. 4 (2022).

210. MINN. DEP'T LAB. & INDUS., *Claim Process -- Rehabilitation Benefits*, https://www.dli.mn.gov/business/workers-compensation/claim-process-rehabilitation-benefits [https://perma.cc/5KUH-TR7E].

211. MINN. DEP'T LAB. & INDUS., *supra* note 117, at 6.

authorization.[212] In *Tarango v. State Industrial Insurance System*, for example, the Supreme Court of Nevada held that the State Industrial Insurance System (SIIS), a state agency, "is precluded from providing vocational training pursuant to state law."[213] The court noted that there were no alternative options; under the Nevada state policy for vocational rehabilitation, SIIS would be required to rehabilitate Tarango, so he could return to his old role or a similar one, "thereby caus[ing] an employer to violate IRCA by hiring Tarango."[214]

Similarly, in *Del Taco v. Workers' Compensation Appeals Board*, the California Second District Court of Appeals held that "an injured employee is not entitled to vocational rehabilitation benefits where the employee is unable to return to work solely because of immigration status."[215] The court of appeals noted that because the injured worker was violating federal law while remaining in the United States, "Del Taco should not be penalized for obeying the law and [the] worker should not be rewarded for disobeying the law."[216] Additionally, many states explicitly prohibit undocumented noncitizens from accessing vocational rehabilitation by statute or regulation.[217]

Limited case law expressly authorizes vocational rehabilitation for undocumented noncitizens if they would be eligible "but for" their undocumented status. In *Rodriguez v. Integrity Contracting*, the Louisiana Third Circuit Court of Appeal affirmed a workers' compensation judge's award of vocational rehabilitation as long as the jobs would be available to the worker "***but for** his illegal status*."[218] Similarly, in *Gayton v. Gage Carolina Metals Inc.*, the North Carolina Court of Appeals found that, insofar as the use of vocational rehabilitation conflicts with federal employment law, it should not be provided for undocumented

212. *See* PRAC. L. LAB. & EMP., EMPLOYMENT PROTECTIONS AND REMEDIES FOR UNDOCUMENTED WORKERS 7 ("Most states agree that undocumented workers are not eligible for vocational rehabilitation services that may be available under a state's workers' compensation law."); *see also* 8 U.S.C. § 1324a (stating that it is illegal to employ unauthorized "aliens").

213. Tarango v. State Indus. Ins. Sys., 25 P.3d 175, 179 (Nev. 2001).

214. *Id.* at 180.

215. Del Taco v. Workers' Comp. Appeals Bd., 94 Cal. Rptr. 2d 825, 827 (2000).

216. *Id.* at 1442.

217. *See, e.g.*, OKLA. ADMIN. CODE § 612:10-7-24.1(g) (2022) (stating that vocational rehabilitation is only available to citizens and authorized immigrants); HAW. CODE R. § 17-401.1-7(h)(3)(C) (LexisNexis 2022) (requiring documentation that indicates that an "alien" is permitted to work before providing vocational rehabilitation services because "the individual cannot benefit from VR services in terms of an employment outcome so long as the individual is not permitted to work"); 172.00.13 CODE ARK. R. § 007 (LexisNexis 2019) (stating unequivocally that "[i]llegal [i]mmigrants . . . are not eligible for VR services").

218. Rodriguez v. Integrity Contracting, 38 So.3d 511, 521 (La. Ct. App. 2010).

workers.[219] However, the court noted that "several vocational rehabilitation practices are available to defendants which would not violate federal law."[220] Vocational rehabilitation encompasses a wide variety of services, including "counseling, job analysis, analysis of transferable skills, job-seeking skills training, or vocational exploration."[221] The court suggested that a vocational counselor might help the plaintiff search for jobs that he would qualify for "but for" his unauthorized status.[222] The employer's burden is to return "the employee to a state where 'but for' the illegal status, the employee could obtain employment."[223]

Another possibility—allowing undocumented workers to participate in rehabilitation programs that focus on retraining for a different job market—may effectively avoid conflicts with IRCA.[224] For example, the Arkansas Workers' Compensation Commission noted that "other states have indicated that vocational retraining is appropriate where intended to return the injured employee to work in a country where he can work legally."[225] The Nebraska Supreme Court noted that the reason for its denial of vocational rehabilitation in *Ortiz v. Cement Products, Inc.*, was that the claimant "testified that he will not be returning to Mexico, but, rather, intended to remain in this country."[226] In other words, if Ortiz had expressed interest in returning to Mexico—where he could legally apply skills learned in a vocational rehabilitation program—the court may have ruled the other way. Unfortunately, in *Moyera v. Quality Pork International*, the Nebraska Supreme Court clarified its position post-*Ortiz*, writing that it is "irrelevant" whether the employee plans to return to their country of origin or remain in the United States.[227]

---

219. Gayton v. Gage Carolina Metals Inc., 560 S.E.2d 870, 873 (N.C. Ct. App. 2002); *see also* Robert I. Correales, *Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENVER L. REV. 347, 375 (2003) ("California and North Carolina have been able to navigate the conflicts between vocational rehabilitation and IRCA by carefully separating the components of vocational rehabilitation into job placement programs and training programs.").

220. *Gayton*, 560 S.E.2d at 873.

221. *Id.*

222. *Id.*

223. *Id.* at 874.

224. *See* Correales, *supra* note 219, at 375 (contending that job retraining in the context of vocational rehabilitation does not conflict with IRCA).

225. Anastacio Alvarez v. Hall Mfg. Inc., No. F701790, 2009 WL 4993041, at *8 (Ark. Work. Comp. Comm'n Dec. 22, 2009).

226. Ortiz v. Cement Prod., Inc., 708 N.W.2d 610, 613 (Neb. 2005).

227. Moyera v. Quality Pork Int'l, 825 N.W.2d 409, 418 (Neb. 2013).

Either way, the unauthorized worker is precluded from receiving retraining under vocational rehabilitation.[228]

In contrast, other jurisdictions have found that retraining-based vocational rehabilitation programs are valid as long as the noncitizen intends to return to a country where they may work legally.[229] In *Economy Packing Co. v. Illinois Workers' Compensation Commission*, the Illinois First District Appellate Court affirmed the arbitrator's finding that the claimant was not eligible for vocational rehabilitation.[230] However, this decision was due to the claimant's extreme disability not her undocumented status.[231] In fact, the Commission held that "a [claimant] is entitled to rehabilitation services that are needed to provide [the claimant] with the physical and occupational skills necessary to enable her to resume working in any country where she would be legally entitled to work."[232] Similarly, in *Foodmaker, Inc. v. Workers' Compensation Appeals Board*, the Second District Court of Appeals of California wrote in a footnote that "the Board has held that rehabilitation services for an immigrant may be tailored to the job market in her native country."[233]

In Minnesota, "[t]here is no case that holds that an employer and insurer are obligated to provide vocational rehabilitation services or retraining to an illegal alien employee, at least if the employee continues to reside in the United States."[234] Nor is there a Minnesota statute or regulation that expressly forbids vocational rehabilitation for undocumented workers. Subpart 9 of the Minnesota Administrative Rules' definitions provision states that "'[e]ligible individual' means a person who is eligible for vocational rehabilitation services as provided by Code of Federal Regulations, title 34, section 361.42(a)."[235]

Section 361.42 of the Code of Federal Regulations does not explicitly refer to alienage or the eligibility of noncitizens.[236] It dictates that states must "conduct an assessment for determining eligibility and priority for services"[237] in accordance with the basic requirements, which are: a determination of a physical or mental impairment, a determination that

228. *Id.*

229. *See* NEB. REV. STAT. § 48-162.01(3)(a) (2022) (listing priorities involved in creating a vocational rehabilitation plan—the highest priority being to "[r]eturn to the previous job with the same employer").

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

231. *Id.* at 919.

232. *Id.*

233. Foodmaker, Inc. v. Workers' Comp. Appeals Bd., 78 Cal. Rptr. 2d 767, 779 n.13 (1998) (citation omitted).

234. Coleman, *supra* note 20, at 1297.

235. MINN. R. 3300.5010, subp. 9 (2015).

236. 34 C.F.R. § 361.42(a) (2023).

237. *Id.* § 361.42.

the impairment constitutes a significant impediment to employment, and a determination by a vocational counselor that vocational rehabilitation is required to "prepare for, secure, retain, advance in, or regain employment."[238] The achievement-of-employment-outcome requirement only specifies that individuals "must intend to achieve an employment outcome that is consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice," and, importantly, does not require that the individual intend to be employed in the United States.[239]

The Minnesota Department of Labor should create specific regulations that dictate the protocol for providing undocumented workers with vocational rehabilitation benefits. Unauthorized employment status does not negate the fact that an employee deserves to be made whole after a workplace injury. As Deborah Berkowitz—the Director of the National Employment Law Project's Worker Safety and Health Program—noted, "[w]orkers' compensation is an insurance system that works best if all workers are covered."[240] By tailoring retraining programs to job conditions in an injured employee's country of origin, employers and insurance companies can ensure that they comply with both federal and state law.

Eventually, Minnesota must choose whether or not it will join the minority of states that are willing to flexibly administer vocational rehabilitation programs to those who may not be able to legally return to work in this country.[241] If Minnesota was to side with the states that broadly disallow vocational rehabilitation benefits, it would unnecessarily complicate workers' compensation claims for undocumented noncitizens and signify a step away from the holding in *Correa*.[242] As previously discussed, the *Correa* court held that "the statutory provision governing temporary total disability does not exclude unauthorized aliens from receiving temporary total disability benefits conditioned on a diligent job search."[243] Under Minnesota statute, TTD benefits end if the total disability ends and the worker does not diligently begin looking for work.[244] Thus, just like vocational rehabilitation, TTD functions to return the injured worker to employment. *Correa* holds that undocumented noncitizens are eligible for TTD benefits even if they

238. *Id.* § 361.42(a)(1)(i)–(iii).

239. *Id.* § 361.42(a)(4).

240. BERKOWITZ, *supra* note 42, at 2.

241. *See, e.g.*, Rodriguez v. Integrity Contracting, 38 So. 3d 511, 521 (La. Ct. App. 2010); Gayton v. Gage Carolina Metals Inc., 560 S.E.2d 870, 873 (N.C. Ct. App. 2002).

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

243. *Id.* at 330.

244. MINN. STAT. § 176.101(g) (2022).

cannot legally be employed, reasoning that "[t]he focus of the IRCA is on preventing employers from hiring unauthorized aliens. . . . [T]he IRCA does not prohibit unauthorized aliens from seeking or accepting employment in the United States."[245] It follows that IRCA does not preempt workers from retraining in preparation for future employment through vocational rehabilitation programs. Minnesota should extend the same reasoning found in *Correa* to vocational rehabilitation for consistency.

Conclusion

In the absence of clear federal guidance, it is up to the states to implement strong workers' compensation laws that cover every worker. Minnesota has a relatively small undocumented population compared to other states,[246] but that has not stopped it from joining the conversation regarding labor laws' applicability to unauthorized workers. In landmark cases such as *Correa v. Waymouth Farms* and *Sanchez v. Dahlke*, the Minnesota Supreme Court has championed the rights of undocumented Minnesotans in the pursuit of safer workplaces for all.

Minnesota has emerged as a leader in some areas, but more work needs to be done to protect undocumented workers from exploitation by the workers' compensation system. Minnesota must change its use of the word "alien" in its statutory definition of "employee" to prevent confusion and avoid offense. Minnesota must clarify the application of wage replacement benefits to undocumented workers who cannot legally find modified employment or continue working. Minnesota must actively prevent retaliation by disallowing discovery requests regarding a claimant's immigration status, and it must expand the applicability of vocational rehabilitation to individuals without work authorization.

245. *Correa*, 664 N.W.2d at 329.

246. BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STAT., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, at 5 (Jan. 2021), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf [https://perma.cc/J5GJ-2YZN] (reporting that California has more than 2,600,000 unauthorized immigrants; Texas has more than 1,900,000; and Florida has 660,000).