Making rights real: Effectively representing immigrants

Protecting the rights of immigrant clients in employment and personal injury cases

By Jennifer A. Reisch

A colleague refers a potential client to you named Ms. R. Ms. R. is a Mexican national who was employed as a server in a chain restaurant. During her employment, Ms. R's supervisor repeatedly made humiliating and sexually explicit comments to her and asked her for sexual favors, which she refused. Eventually, he cornered her in a supply closet and touched her against her will. After she complained to management, they promised they would look into the matter; but no action was taken. In fact, Ms. R. felt like the situation only got worse. Then, a few weeks after she complained, Ms. R. slipped and fell in the kitchen, which did not have any rubber mats, while taking some dishes to be washed. She hurt her back, and had to seek medical attention. Within days of her accident, Ms. R's hours were reduced; she went from working five to only two shifts per week. Eventually, Ms. R. resigned because of the intolerable working conditions. Ms. R. is a native Spanish-speaker; she can understand some spoken English, but cannot read it very well.

Being the trained issue-spotters that we are, many of us will have certain predictable reactions to the story of Ms. R. For example, we will begin, almost automatically, to identify and catalog her potential legal claims. Then we will start to mentally generate the list of questions that we would ask at the next (or first) interview, such as: How long was she employed? How much did she make? How long ago did she quit? Are restaurant kitchens legally required to have rubber mats? And then we remember that Ms. R. is a "Mexican national." So she is an immigrant.This realization may spark a new round of internal inquiries, such as: What if she is undocumented [1] – does that matter for her case? How will the issue of her immigration status play out during litigation and at trial? If it turns out that she is undocumented, am I prepared to protect Ms.

R. from retaliation and invasive discovery? If you lack clear answers to any of these questions, then this article is for you.

I am not an immigration attorney, but since my firm specializes in representing immigrant workers in wage and hour, discrimination, and other employment-related civil rights matters, sometimes people – especially non-lawyers – mistake me for one. Given this state's cultural and racial diversity – nearly 27 percent of California's population was born outside of the United States[2]– and the high levels of labor market participation among the immigrant adults who live here,[3] you would think that plenty of us would be representing immigrants in employment and personal injury cases, and that having such clients would no longer be considered a "niche" practice in the world of plaintiff-side litigation. However, that is not the case.

Immigrants' lack of access to information about their rights, their lack of access to means of enforcing those rights, their linguistic, cultural, or geographical isolation, and their fear of jeopardizing their (or their family members') immigration status or of being reported to Immigration and Customs Enforcement (ICE) if they are undocumented often cause their rights to go unenforced, and their injuries to go without redress. Moreover, even when immigrants perceive that they have been legally wronged, they often do not know that attorneys like us exist; let alone where to find us.

On top of those obstacles, there is little doubt that over the last few years, we have seen an upswing in anti-immigrant sentiment. Given the heated and often misleading rhetoric that has characterized much of the public debate about immigrants and immigration policy, it is not surprising that plaintiff attorneys may shy away from – or at least, may not actively cultivate relationships with – immigrant clients. But the need is tremendous,[4] and thankfully, in most cases, the law is on our clients' side.[5]

This article aims to dispel some of the myths and misperceptions about the rights and remedies available to immigrants in employment and personal injury matters in California, and address some of the ways in which a client's immigration status may (or may not) have an impact on her legal claims. I also will provide some practical tips on how to anticipate, avoid, and address the other primary obstacle to enforcement of immigrant clients' rights: defendants aggressively seeking to use discovery in order to obtain information about plaintiffs' immigration status during litigation in order to intimidate plaintiffs into dropping their claims altogether or accepting less than a fair settlement. They also may seek to use the information to chill participation in the lawsuit by the plaintiff's co-workers or other witnesses, or to stoke potential jury animus against immigrants at trial. However, as discussed below, California law gives us strong grounds to argue that such information has no place in discovery, or at trial, in the vast majority of cases.

Universal coverage and immigrants

As a preliminary matter, it is important to understand the legal backdrop against which battles about the relevance and impact of plaintiffs' immigration status in employment and personal injury cases are taking place.

In 1986, Congress passed the Immigration Reform and Control Act of 1986 (IRCA), which made it unlawful for an employer to knowingly hire a worker who is not authorized to work in this country and provided for employer sanctions against those who did.[6] Then, in a 2002 decision, *Hoffman Plastic Compounds v. NLRB*,[7] ("*Hoffman*") the U.S. Supreme Court held that the National Labor Relations Board (NLRB) lacked the authority to award an admittedly undocumented worker back pay as a remedy when his employer unlawfully fired him in retaliation for exercising his rights under the National Labor Relations Act (NLRA). The Court reasoned that, "awarding back pay to illegal aliens runs counter to policies underlying IRCA."[8] Following this case, employers' attorneys began urging other courts to apply this reasoning to limit the rights and/or remedies of undocumented immigrant workers under other labor and employment laws and eventually, in personal injury cases as well.

In the same year that IRCA became law, the California Court of Appeal answered the question of whether a plaintiff who is not legally entitled to work in the United States is entitled to recover future lost wages when he prevails in a personal injury action in the affirmative. *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145. In *Rodriguez*, the Court held that future wage loss claims may be limited to future earnings in the plaintiff's country of origin at trial, *if* the defendant can adduce proof (at a preliminary hearing to be held before the judge, not the jury) that the plaintiff was undocumented at the time of the incident which led to his injury, and the plaintiff *cannot* prove that he has "taken steps" to correct his unauthorized status which "might" result in suspension of deportation or removal proceedings.[9]

The California legislature responded to the *Hoffman* decision by enacting statutes that codified the irrelevance of immigration status to the rights and remedies available to workers under state employment and other civil laws. These laws declare that:

> All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all

individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.

(Civ.Code, § 3339(a); Gov.Code § 7285(a); Lab. Code § 1171.5(a))

Thus, in California, immigrant workers, regardless of their status, are covered by the same civil, labor, and employment laws that apply to the other 73 percent of the population. As explained in *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, "These statutes leave no room to doubt about the state's public policy with regard to the irrelevance of immigration status in the enforcement of state labor, employment, civil rights and employee housing laws." *Id.* at 460. Additional authority for this proposition can be found in the following key cases:

• *Farmer Bros. Coffee v. Workers Comp. Appeals Board* (2005) 133 Cal.App.4th 533 (holding that immigration status irrelevant to liability and damages in workers' compensation cases)

• *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604 (holding immigration status irrelevant to claims for unpaid prevailing wages under Labor Code and that California statutes listed above are not preempted by IRCA)

• *Incalza v. Fendi North America, Inc.* (9th Cir. 2007) 479 F.3d 1005 (holding that "employer sanctions" provision of IRCA does not preempt California's wrongful termination law, and that IRCA does not bar employers from granting workers unpaid leave to resolve employment authorization problems)

Laying the foundation for effective advocacy

Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights.

FIVE CITES TO HAVE IN YOUR POCKET (to protect your immigrant clients)

Labor Code § 1171.5, Civil Code § 3339, Government Code § 7285 (statutes passed in 2002 clarifying that immigration status is irrelevant to rights and remedies under California labor, employment, and other civil laws, and barring discovery absent showing of clear and convincing evidence that the inquiry is necessary to comply with federal immigration law)

Farmer Bros. v. WCAB, 133 Cal.App.4th 533 (2005) (immigration status irrelevant to workers' compensation damages)

Reyes v. Van Elk Ltd., Co., 148 Cal.App.4th 604 (2007) (immigration status is irrelevant to prevailing wage claims under California Labor Code and 2002 statutes are not preempted by Immigration and Reform Control Act of 1986)

Hernandez v. Paicius, 109 Cal.App.4th 452 (2003) (abuse of discretion for the trial court to allow evidence of immigration status where plaintiff had waived economic damages)

Rivera v. NIBCO, Inc., 364 F.3d 1057 (9th Cir. 2004) (finding immigration status irrelevant to liability under Title VII and affirming protective order)

Therefore, employers have a *perverse incentive* to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain.

(*Rivera v. Nibco* (9th Cir. 2004) 364 F.3d 1057, 1072 (emphasis added).)

Despite the laws outlined above, plaintiffs' attorneys should *not* turn a blind eye to their clients' immigration status based on the hope or expectation that it will never be an issue in the course of litigation. I have heard one prominent plaintiff 's attorney state that, to demonstrate to defendants how confident he is that plaintiffs' immigration status is a non-issue, his firm has a practice of deliberately *not asking* clients about their immigration status. This attorney explained that by not knowing it himself, he feels that much more justified and sincere in arguing that his clients' immigration status is irrelevant and should not be subject to discovery.

While I agree that we should push just as hard for application of the public policy about the irrelevance of plaintiffs' immigration status when our clients are legally authorized as we do when they are not (otherwise, our vociferous advocacy merely signals to defendants that our client has something to hide), I would not recommend adopting this attorney's "don't ask, don't tell" approach for a couple of reasons:

First, it is very important for attorneys to have some basic but vital information about their clients' immigration status in order to anticipate the types of issues that may arise in each case and protect clients from potential harms, including immigration-related retaliation. This information not only will enable you to better advise immigrant clients about their legal rights, but also to evaluate and discuss with them the potential ramifications of deciding to pursue certain types of relief – such as rein-

statement, front pay, or future wage loss.

Additionally, understanding your client's immigration status will help you determine how to strategize, prepare, and plead her case while fulfilling the ethical duty to ensure that you do not inadvertently create negative consequences for your client by how you litigate her claims. These potential negative consequences include placing the client (or members of the client's family) at risk of being detained or deported, or of impairing the client's ability to regularize her status in the future, by allowing information relating to her immigration status to be disclosed or made part of the public record. It is important to remember that all noncitizens – whether they are here lawfully or unlawfully – can still be subjected to removal or deportation proceedings if they violate certain criminal laws, fail to maintain their immigration status, engage in marriage fraud, or engage in document fraud.[10]

So, how should you go about obtaining information about your client's immigration status? And what information should you be asking for, anyway?

To begin with, as with any attorney-client relationship, there will be a period during which your relationship with immigrant clients must be developed and strengthened, with particular attention being paid to mediating any differences in race, class, power, language, or culture. In order to build a solid foundation in this respect, it is critical that you use **qualified interpreters** in cases where you and your client are not proficient in the same language, or wherever you are unsure whether a client's limited English proficiency, although sufficient for everyday purposes, comfortably encompasses legal terms or concepts. Using qualified interpreters not only will make your communications with clients mutually comprehensible and accurate, it will make more accessible and demystify the legal process so that your client can feel enabled and participatory in helping to move her claims forward.

Unless it is unavoidable, do not use your client's family members, friends, or co-workers as interpreters. Aside from a lack of familiarity with their interpretation skills, your client also may be reluctant to speak freely about certain aspects of her treatment at work with family or friends present. And of course, by using third parties as "interpreters," you risk breaching the confidentiality of your discussions in a way that could negatively impact your client's case. Likewise, using an outside interpreter will help to ensure that your client's account of the facts will not become commingled with those of potential witnesses or co-plaintiffs, due to the possibility that they may try to "fill in" or otherwise explain her account with facts within their own knowledge. Remember also to ask your client if she feels comfortable with the interpreter. This not only will help to make her feel more respected generally, but also can help prevent or alleviate any communication problems between the client and interpreter due to differences in their linguistic or cultural backgrounds (e.g., between the Spanish of Argentina and that of Mexico.)

All agreements between you and your client – including the retainer agreement – should be translated by a competent translator into the language, if any, in which your client is literate. Because of the complexity of these documents, you should sit down with your client (with an interpreter as needed), read through the entire document, and make sure she understands all of its provisions before signing.

If it is not possible to obtain a fully translated version of the document, or your client is not literate in either her primary language or in English, an alternative would be to append the following paragraphs to the document, along with date and signature lines:

[to be signed by the client]: *I have had the foregoing document interpreted for me into [language], which is my primary language. I understand the contents of this document and agree to them.*

[to be signed by the interpreter]: *I am an interpreter bilingual and biliterate in [client's language] and English. I interpreted the above document for [client], as well as any questions the client had for [attorney] regarding it, and s/he indicated to me thereafter that she understood and agreed to its contents.*

It is also important to ensure your client understands your role in relation to the legal system. In some cases, in the initial stages of representation, clients may believe that you are associated with a governmental agency, law enforcement entity, or have some role other than exclusively serving as their advocate. This is, of course, of special importance in creating a trust relationship with undocumented immigrant clients, for who much may be stake aside from their legal claims per se.

Finally, the very question of whether your client is undocumented is one that must be raised in a sensitive manner. Some attorneys make the mistake of asking the question directly and very early in an initial meeting. Although some undocumented immigrants may be very forthcoming about their lack of status, many others will, quite rationally, approach the subject with a greater degree of apprehension. In the majority of cases, therefore, it is better to approach the topic indirectly, and after your client has had an opportunity to at least preliminarily build a rapport with you and to become comfortable disclosing the details of her case. This should be accompanied with the prior assurance that you are bound by the attorney-client privilege to keep all of your discussions confidential, and that you will not disclose any lack of status to the government or to adverse parties absent your client's agreement.

So, what are the immigration-related questions that you should ask before filing any legal claims on behalf of an immigrant client? A basic, non-exhaustive list of questions could include:

• What is your *current* immigration status? (Or, put another way, do you *currently* have papers/a visa authorizing you to work in the U.S.?)

Remember that your client's status may be different now than it was at the time the events giving rise to her claims occurred.

• What was your immigration status at the time that you were employed (or injured)?

• Was your employer aware of your status? How do you know that?

• Were you asked to complete, and did you actually fill out or sign, any documents relating to your immigration status (such as an I-9 form from the employer) at the time of the events in question?

• Did you ever use or provide a different name during your employment?[11]

How did you obtain that name? Was it provided to you by the employer? (Yes, this sometimes happens; we have had cases where employers pay people under different names to avoid paying them overtime by "splitting" their hours.)

• What documentation, if any, of identity, lawful presence, work authorization, and/or citizenship, did you provide to your employer?

How did you obtain that documentation?

• Did you ever provide a Social Security Number (SSN)?

How did you obtain that number?

• Do you have a California driver's license or other state-issued identification?

• Does the defendant know your current home address or place of work?

Knowing your client's immigration status allows you to make better-informed choices about how to plead her allegations and causes of action. In drafting the complaint, it is important to:

• ***Avoid references to your client's immigration status or to immigration-related issues.*** Although this may seem so obvious as to go without saying, plead only the minimum set of facts necessary to state each claim. Do not insert needless references to your client's ethnicity, country of origin, entry into or travel outside the United States, prior employers, tax filings, or public benefits received, as discovery into those matters could prove highly prejudicial if it revealed deportability or any prior immigration violations.

• ***Weigh the pros and cons of seeking back pay, front pay, and future lost wages.*** If your client's claims for back pay – that is, wages that would have been earned but for the unlawful termination or non-work-related injury – are minimal in nature, discuss with her the possibility of choosing not to include them. If your client's *non*-back pay claims predominate, the potential benefits of dropping back pay allegations and thereby removing one likely argument for immigration-related discovery may outweigh the prospect of an insubstantial back pay recovery. Likewise, defendants can be expected to argue that seeking front pay and future lost earnings "opens the door" to immigration-related discovery inasmuch as these remedies are deemed to be predicated on a prospective entitlement to work in the United States.[12] Thus, you may wish to weigh the relative benefits of seeking such remedies should they be of lesser importance to your client's goals overall.

• ***Pleading anonymously, or as a collective action.*** There is authority for the position that Doe pleading is proper when doing so is necessary to shield the identities of plaintiffs who are vulnerable to employer reprisal, including the threat of deportation. See *Does I thru XXIII v. Advanced Textile Corp*. (9th Cir. 2000) 214 F.3d 1058, 1067-71 ("complaining employees are more effectively protected from retaliation by concealing their identities than by relying on the deterrent effect of *post hoc* remedies."). Doe pleading, therefore, may be an option in a larger action where the identities of the plaintiffs cannot readily be surmised by the employer. Similarly, by pleading the existence of a class, it may be possible to deter, or at least defer, scrutiny into the immigration status of putative (i.e., unnamed) class members.

After you have laid the foundation for effectively representing your immigrant client through establishing solid communication and drafting a well-thought out complaint, you will need to look ahead and try to anticipate – and prevent, wherever possible – the ways in which the defendant may try to use her status as an immigrant during discovery or at trial to devalue or defeat her meritorious claims.

[Ed Note: We will explore strategies to avoid and resist these efforts in Part II.


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See endnotes on next page

[1] Some people use the term "illegal" to refer to immigrants who lack the documents or authorization to live and/or work here. I do not use that term for two reasons: it is dehumanizing and it is imprecise. I encourage other plaintiffs' attorneys to eschew this label – at least in their pleadings, if not in their daily conversations.

[2] See Statistical Profile of the Foreign-Born Population in the United States, 2008. Washington D.C.: Pew Hispanic Center (January 21, 2010), available at http://pewhispanic.org/files/factsheets/foreignborn2008/Table%2011.pdf, Table 11 ("Foreign Born, by State: 2008"). The vast majority of foreign-born people living in the U.S. (72%) are "authorized" immigrants, meaning they are either naturalized U.S. citizens, legal permanent residents, or have some form of temporary lawful immigration status that allows them to work. See Jeffrey S. Passel and D'Vera Cohn, U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade. Washington, D.C.: Pew Hispanic Center (September 1, 2010) (hereinafter, "Unauthorized Immigration Flows"), available at http://pewhispanic.org/files/reports/126.pdf, Table 3 ("Foreign-born Population by Legal Status, 2009"). Although the portion of the foreign-born population in the United States that is "unauthorized" (a.k.a. undocumented) actually fell between 2007 and 2009, California has continued to house the greatest number of the nation's unauthorized immigrants – 1.8 million, or nearly a quarter (23%) of the unauthorized immigrants living in the country. See id., Table A1 ("Estimates of Unauthorized Immigrant Population by State"). Undocumented immigrants comprise an estimated 6.9% of California's population, and as of March 2009, they made up a larger share of the overall labor force here (9.3%) than in any other state except Nevada (9.4%). Id., Table A2 ("Number and Share of Unauthorized Immigrants for Labor Force and Total Population, by State, 2009").

[3] Immigrants are actually more likely to be active in the labor market than the U.S.-born. See Unauthorized Immigration Flows, supra note 1, Table 6 ("Share in Labor Force for Ages 18-64, by Gender and Status, 2009").

[4] Immigrant workers – especially Latinos, who make up the majority of foreign-born residents and workers in California – face higher levels of wage theft and are more likely to be injured or killed by dangerous working conditions than their U.S.-born counterparts. See Annette Bernhardt, et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (Center for Urban Economic Development at UIC, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009), available at http://www.unprotectedworkers.org/index.php/broken_laws/index (analyzing the incidence and impact of wage theft among low wage workers); U.S. Department of Health and Human Services Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, NIOSH Science Blog, "Immigrant Worker Safety and Health" (October 27, 2008), available at http://www.cdc.gov/niosh/blog/nsb102708_immigrant.html; see also AFL-CIO, Immigrant Workers at Risk: The Urgent Need for Improved Workplace Safety and Health Policies and Programs (August 2005), available at http://www.aflcio.org/aboutus/laborday/upload/immigrant_risk.pdf.

[5] For more on plaintiff's immigration status in non-employment litigation, see "Your Client's Immigration Status Is *Not* an Issue – Don't Let the Defense Make It One," by Jeremy Pasternak and Anthony Oceguera, CAOC Forum (May/June 2008), available at http://www.pasternaklaw.com/pdf/immigration%20status.pdf. For another perspective, see Christian Pereira's article in the New Lawyers Bulletin for the Consumer Attorneys Association of Los Angeles (March 2009), available at http://www.caala.org/index.cfm?pg=NLCMarch-Bulletin.

[6] Immigration and Nationality Act, Pub. L. No. 99-603, 8 U.S.C. § 1101, et seq. (amended 2006).

[7] 535 U.S. 137 (2002).

[8] *Hoffman*, *supra* note 8, 535 U.S. at 149.

[9] For an interesting discussion and practical guidance on how to win a pretrial motion under *Rodriguez v. Kline* and how to prepare for trial should you lose such a motion, see "Damages in Dollars: Presenting an Undocumented Plaintiff's Loss of Future Earning Capacity in Dollars and Not Pesos," by Jonathan E. Davis, available at http://www.arnslaw.com/Articles/Jed's%20articles/Immigration.pdf. Remember that determining a plaintiff's "immigration status" is not always easy. As one expert has put it: Immigration law has been called the second most complex area of law. There are over 25 kinds of temporary immigration status. Each has its own requirements and length of time. Moreover, a person who has permanent resident status (also called a green card) can have that status taken away if he or she does something wrong, such as committing a crime.
Stephen Yale-Loehr, "Handling Immigration Issues in Personal Injury Cases" (October 2006), available at http://www.millermayer.com/NewsandArticles/ImmigrationIssuesinPersonalInjury/tabid/288/Default.aspx. You should consult with an immigration attorney to explore all of your client's potential options and the likelihood he would succeed in obtaining relief from a hypothetical removal (deportation) order if you are faced with litigating a pre-trial *Rodriguez* motion. For a list of the most common categories of work authorization available to immigrants, see National Immigration Law Center, "Classes of Immigrants Authorized to Work in the United States" (April 2009), available at http://www.nilc.org/immsemplymnt/IWR_Material/Attorney/Classes_of_Immigrants.pdf.

[10] For example, knowingly using another person's identification documents, 18 U.S.C. § 1546(b) (2002); failure to depart the U.S. within 90 days of an order of removal, 8 U.S.C. § 1253 (1996); unlawful entry or attempted entry into the country, 8 U.S.C. § 1325(a) (1991); unlawful reentry after being deported or denied admission, 8 U.S.C. § 1326 (1996); and false representation of self as a U.S. citizen, 18 U.S.C. § 911 (1994) are all crimes under federal law.

[11] Practitioners should be aware that in Mexico and many Latin American countries, it is common for people to have two last names – from their father's and their mother's side. People may use one or the other, or both names, depending on the context. To avoid confusion, it is best to ask Spanish-speaking clients up front for *both* of their last names (in Spanish, *apellidos*) and make sure their full name appears in the pleading.

[12] As has been discussed elsewhere, California courts have not specifically decided whether or how a plaintiff's immigration status should be considered in determining the proper measure or amount of future lost wages damages since the enactment of the 2002 statutes described above. Thus, the question of whether an undocumented plaintiff who prevails on her claims should be limited to recovering these damages based on wages she would hypothetically earn in her "country of origin," or should instead be entitled to recover the wages she would have earned here is unresolved. For practical guidance on how to push for the latter, see Jonathan E. Davis' article cited above, *supra* note 10 (http://www.arnslaw.com/Articles/Jed's%20articles/Immigration.pdf.)

[13] For example, in *EEOC and Bethancourt v. City of Joliet*, 239 F.R.D. 490 (N.D. Ill. 2006), the district court issued a protective order barring the employer from requiring the employees to fill out I-9 forms when the employer had been in operation for over 17 years but had only distributed these forms after the EEOC filed a Title VII lawsuit on behalf of the workers and the discovery deadline was approaching. The court found that: [A]llowing the defendant's action will have the effect not of enhancing compliance with immigration employment laws, but of undermining the enforcement of and compliance with such laws. It is well known and understood that one of the main motivations for the hiring of undocumented workers is the reality that such workers are unlikely to complain if discriminated against, underpaid, overworked or subjected to abusive work environments because they fear deportation…
239 F.R.D. at 492. (emphasis added) The court also barred communications between the employer and the employees related to I-9 compliance, stating: Although the court hesitates to intervene in the communication between an employer and its employees, it is clear that plaintiffs and class members must be protected from intimidation which will deter them from asserting their rights under Title VII…. Absent such protection, there is a significant possibility that the lawsuit will be fatally undermined long before any determination on the merits. *Id.* For discussion of this and other similar cases, see William R. Tamayo, "Immigration Status, Threats to Deport and Employment Discrimination: the EEOC's Approach in Litigation," available at http://www.wcsap.org/events/workshop2009/Immigration%20Status,%20Threats%20to%20Deport%20and%20Employment%20EEOC%20Approach%20Feb2009.pdf.

[14] See e.g., *Singh v. Jutla*, 214 F.Supp. 2d 1056 (N.D. Cal. 2002) and *Contreras v. Corinthian Vigor Ins. Co.*, 25 F.Supp. 2d 1053 (N.D. Cal. 1998) (both holding that reporting plaintiffs to immigration authorities in retaliation for filing wage claims could give rise to claims for unlawful retaliation under the Fair Labor Standards Act (FLSA)). Like the FLSA, California's Fair Employment and Housing Act and Labor Code wage provisions are remedial statutes whose effectiveness depends on employees' ability to bring claims thereunder with impunity. Thus, the same basic analysis should apply to retaliation claims under these statutes. See generally, *Robinson v. Shell Oil, Co.* (1997) 519 U.S. 337, 346 ("A primary purpose of antiretaliation provisions [is] [m]aintaining unfettered access to statutory remedial mechanisms.").

[15] *See, e.g., Centeno-Burney v. Perry*, 302 F. Supp. 2d 128 (W.D.N.Y. 2003) (granting preliminary injunction prohibiting employer from contacting local, state, and government agencies where employer had evidenced intention to contact those authorities to deport workers in retaliation for their assertion of claims under the FLSA and other labor statutes). Under California law, in determining whether a plaintiff is entitled to preliminary injunctive relief, courts will weigh the following: (1) the likelihood that plaintiff will prevail on the merits of the claim and (2) the balance of harms that will result from the issuance or nonissuance of the injunction. *Butt v. State of California* (1998) 4 Cal. 4th 668, 678; *IT Corp. v. County of Imperial* (1983) 35 Cal. 3d 63, 69-70.

[16] See Pasternak and Oceguera, "Your Client's Immigration Status Is *Not* an Issue – Don't Let the Defense Make It One," *supra* note 6.

[17] This is because reinstatement would presumably require the employer to obtain immigration status information from the plaintiff to comply with the requirements of IRCA, and thus would fall under the exception to irrelevance under subsection (a) of these statutes.

[18] While an exhaustive list of such cases would be far too long to cite here, see, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), cert. denied, *NIBCO, Inc. v. Rivera*, 544 U.S. 905 (2005) (affirming protective order that

barred discovery of plaintiff-employees' immigration status in Title VII litigation); *EEOC v. First Wireless Group, Inc.*, 225 F.R.D. 404 (E.D.N.Y. 2004) (following *Rivera* and denying discovery of charging parties' immigration status in Title VII case); *Flores v. Albertsons Inc.*, 2002 U.S. Dist. LEXIS 6171, 2002 WL 1163623, *6 (C.D. Cal. Apr. 9, 2002) (finding immigration status irrelevant to claims for unpaid minimum wages and overtime, denying defendants' motion to compel production of immigration status-related documents).

[19] See *supra* note 11 for a non-exhaustive list of some of the immigration-related conduct that could make someone subject to criminal prosecution under federal law.

[20] See *Garner v. United States*, 424 U.S. 648, 652 (1976).

[21] See, e.g., *Andrade, et al. v. Madra's Café Corp*., *et al*., 2005 WL 2430195 (E.D. Mich. 2005); *Pontes v. New England Power Company,* 2004 WL 2075458, at *1-2 (Mass. Super., Aug 17, 2004).

[22] See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460 (rejecting defendant's contention that plaintiff's "immigration status and other suggested 'bad acts' are somehow admissible to attack plaintiff's credibility" under Evidence Code section 787); *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 345 (following the reasoning of *Rodriguez v. Kline* in affirming trial court's order excluding evidence of plaintiff doctor's prior licensing violations on grounds that such evidence could not support defendant's "unclean hands" defense; noting that, "The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties.")

[23] See *Rivera v. Nibco, Inc.*, 364 F.3d 1057 (9th Cir. 2004) and its progeny for the legal authority for such protective orders. Sample pleadings and briefs in state and federal court can be obtained from the author of this article.

[24] See, e.g., *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452 (holding that trial court abused its discretion in, among other things, denying plaintiff's motion in limine regarding his immigration status and alienage).