

## **Federal Court Holds That Liquidated Damages Are Available Under Federal Labor Law Even If Recipients Are Unauthorized Aliens**

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In NLRB v. C&C Roofing Supply, Inc., the Ninth Circuit Court of Appeals, which has jurisdiction over Washington state, enforced a settlement agreement involving liquidated damages for unauthorized workers. In doing so, the Court provided a helpful road map when the National Labor Relations Act and the Immigration Reform and Control Act collide.

In 2005, the Roofers' Union won an election to represent C&C Roofing Supply's employees. The Company refused to bargain with the Union and terminated several employees. The Union filed an unfair labor practice charge and in 2007, the parties reached a formal settlement stipulation calling for reinstatement of the terminated employees and payment of specified amounts to each worker. Unfortunately for the employer, the payment was characterized as liquidated damages rather than back pay. C&C later refused to comply with the settlement agreement claiming that it possessed evidence that many of the fired employees were unauthorized aliens and that rehiring them would violate immigration laws. The Company relied on the 2002 U.S. Supreme Court decision of Hoffman Plastic Compounds, Inc. v. NLRB in which the Court held that the National Labor Relations Board was precluded from ordering back pay for unauthorized aliens.

Despite the Hoffman decision, the Ninth Circuit enforced the payment portion of the settlement since the liquidated sums did not necessarily represent back pay. Indeed, the employer had argued that many of the terminated employees were not available for work but agreed to liquidated damages in order to avoid further litigation.

The Court did agree that the reinstatement portion of the settlement agreement need not be adhered to if the Company follows Board procedures which comply with the Hoffman Plastic Compounds holding. This procedure requires the employer to provide proper proof of the employee's unauthorized status and, upon receipt of adequate proof, the Board will not require reinstatement of the person in question.

Based on this decision, employers who suspect that Board discriminatees may be unauthorized aliens, can and should raise this issue at the remedy stage—if the remedy includes potential back pay and reinstatement. However, employers should neither waive this defense nor argue that unauthorized aliens have no right to relief under the National Labor Relations Act. According to the Court and the Board, neither federal labor laws nor immigration laws trump one another but may be construed in a manner which allows both to operate – thus the Board may not order reimbursement, but may provide monetary relief, for unauthorized workers.