

Case No. S196568

SUPREME COURT

IN THE SUPREME COURT OF CALIFORNIA

VICENTE SALAS,
Petitioner and Appellant,
v.
SIERRA CHEMICAL CO.,
Defendant and Respondent.

SUPREME COURT

CLERK

OCT 21 2011

Frederick K. Chinn Clerk

MOTION FOR JUDICIAL NOTICE

Property

Appeal from the Court of Appeal
Third Appellate District, Case No. C064627
Superior Court of California, County of San Joaquin
Superior Court Case No. CV033425

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VICENTE SALAS

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Attorneys for Petitioner
VICENTE SALAS

Pursuant to Rule 8.252(a) of the California Rules of Court, Petitioner Vicente Salas respectfully requests that the Court take judicial notice of the matters appended hereto as Attachments A, B, and C, which relate to the issues raised on this appeal.

Attachments A and B, both of which are referenced in the Petition for Review and in the Reply To Answer to Petition for Review, are portions of the legislative history of SB 1818, which was enacted into law in 2002. Attachment A is a true and correct copy of the bill analysis of SB 1818 of the Senate Committee Labor and Industrial Relations.¹ Attachment B is a true and correct copy of the third reading analysis of SB 1818.² They are relevant to this appeal in that questions of the Legislature's intent in enacting SB 1818 are material to its construction and interpretation in this matter. They were judicially noticed by the Court of Appeal, and do not relate to proceedings occurring after the order of judgment herein.

Attachment C, which was referenced in the Reply To Answer to Petition for Review, is a true and correct copy of an article that appeared in the New York Times on April 5, 2005 entitled "Illegal Immigrants Are Bolstering Social Security With Billions." This newspaper article is relevant to this appeal in that it reports, *inter alia*, "Since 1986, when the Immigration Reform and Control Act set penalties for employers who knowingly hire illegal immigrants, most such workers have been forced to buy fake ID's to get a job." As described in the Reply To Answer To

¹ This Court has looked to committee analyses as an aid to discerning the Legislature's intent in enacting legislation. *See, e.g., In re J.W.* (2002) 29 Cal.4th 200, 211-12.

² This Court has looked to third reading analyses as an aid to discerning the Legislature's intent in enacting legislation. *See, e.g., Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 459.

Petition For Review, this factual proposition is probative of the Legislature's intent in enacting SB 1818. Judicial notice of this article was not sought from the lower courts in this case, and it does not relate to proceedings occurring after the order of judgment herein.

A proposed order granting judicial notice of the above matters is filed concurrently herewith.

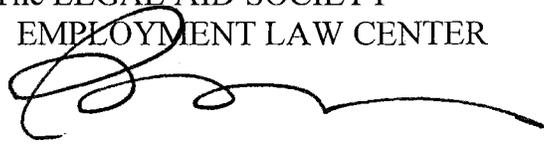
Dated: October 21, 2011

Respectfully submitted,

David C. Rancaño
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By:



CHRISTOPHER HO

Attorneys for Petitioner
VICENTE SALAS

Senate Committee on Labor and Industrial Relations
Richard Alarcon, Chair

Date of Hearing: May 14, 2002
Consultant: Patrick W. Henning

2001-2002 Regular Session
Fiscal: Yes
Urgency: Yes

Bill No: SB 1818
Author: Romero
Amended: May 9, 2002

Subject:

Undocumented Workers: back pay remedies.

Purpose:

To limit the potential effects of a recent U.S. Supreme Court decision on the state's labor and civil rights laws by establishing a separate civil penalty against employers that violate the laws.

Analysis:

Existing law provides a framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations. Various state agencies have the authority to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law. Among the many remedies, the state may issue reinstatement and back pay awards for monies due the employee in order to make them whole.

In March 2002, the United States Supreme Court ruled that the federal Immigration Reform and Control Act of 1986 (IRCA) precluded back pay awards to undocumented workers, even though they might be victims of unfair labor practices, because the workers were never legally authorized to work in the United States (Hoffman Plastic Compounds, Inc. v. NLRB [00-1595]).

This Bill, an urgency measure, limits the potential effects of Hoffman by establishing a separate civil penalty equal to the amount of a back pay remedy issued by the state in order to create a disincentive to unlawful practices and enhance compliance, and structures a process by which an employee may collect that civil penalty. It would amend the following California Codes: Labor, Government, Health and Safety, Civil, and Civil Procedure. Specifically, it:

-finds and declares that all applicants for employment, current or former employees, are covered by all the rights, remedies, and protections, regardless of immigration status, except any right to reinstatement or employment which is barred by federal law; such

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findings would be declarative of existing law. Also, that it is consistent with the exercise of the police powers of the state to ensure that employers who violate labor and civil rights laws do not gain competitive advantage over law-abiding businesses, and that remedies be provided workers who have suffered financial harm in the exercise of their rights.

-establishes a civil penalty against an employer who violates an existing law that provides for a back pay remedy, if a court or administrative agency has determined that a person is ineligible for the award because he or she is unauthorized to work under federal immigration laws. The amount of the civil penalty would be not less than the back pay award.

-permits the affected employee to recover the civil penalty levied against the employer through court action or administrative agencies. If that right is found in conflict with federal immigration law, the penalty would be deposited in a special fund where the individual would be able to draw from it only when the initiating state agency finds that it would further the purposes and enhance compliance with labor and civil rights laws.

-prohibits an inquiry into a person's immigration status until a court or administrative agency considers a remedy which includes reinstatement or employment, and that such inquiry is clearly compelled by other law.

-declares that provisions of the measure are severable. Invalidity by a court of one provision shall not affect the validity of others.

Comments:

1. The author, source of this measure, and the sponsors argue that the Hoffman decision has the potential effect of undercutting state remedies for illegal labor practices, and that this measure is needed to keep our state's labor and civil rights' remedies intact, and enhance compliance. Supporters state that it is in conformity with the Hoffman decision, while at the same time properly enforcing state law.

The Los Angeles Times reported on April 22nd that some firms are trying to use the Hoffman decision as basis for avoiding claims over workplace violations, seeking to use the ruling to avoid minimum wage and workers' compensation awards, even asking for the documents of a worker who complained of sexual harassment, according to advocates for low-wage workers.

The Time's story also stated that in Los Angeles, a U.S. District Court judge decided the immigrant status of supermarket janitors was not relevant in a class-action suit that seeks to collect minimum wages for years of work. And a San Diego Superior Court judge decided a fast food employee who was paid \$2 an hour for seven years was entitled to \$32,000 for missing minimum wage. In both cases, employers had unsuccessfully cited the Supreme Court decision.



2. Federal Government Enforcement. Although spokespersons for the U.S. Department of Labor argue that the agency will continue vigorous enforcement of labor laws, regardless of immigration status, the U.S. State Department issued information that government officials were studying the impact of Hoffman:

“The U.S. Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC) and other government offices believe the Supreme Court ruling will affect a variety of programs and policies, not only concerning pay and job reinstatement but also remedies for victims of sexual, age, racial or other forms of discrimination.

“Traditionally the EEOC has included undocumented workers among those protected by discrimination laws and has issued updated reminders to employers. DOL enforces minimum wage and overtime standards and other wage requirements under both the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Workers Protection Act.”

3. The Hoffman Decision. In the U.S. Supreme Court case, Hoffman Plastics Compounds hired an employee who presented seemingly valid documents verifying his authorization to work in the United States. Hoffman later fired the worker and other employees for engaging in union-organizing activities. The National Labor Relations Board (NLRB) determined that these terminations violated federal labor law, and, to remedy the situation, the NLRB issued a cease and desist order to the employer and required Hoffman to offer reinstatement and back pay to the terminated employees. When the amount of back pay was being calculated, the employee admitted that he was an undocumented worker and had given false identification documents to the employer. Despite this admission, the NLRB awarded the employee back pay from the date of his termination until the date he admitted being in the United States illegally. The NLRB justified its decision by claiming that the best way to accommodate and further federal immigration policies was to provide labor law protection and remedies to undocumented workers in the same manner as other employees. The federal appeals court agreed with the NLRB.

The Supreme Court, in a 5-4 decision, found that the back pay award to an undocumented worker who has never been legally authorized to work in the United States contravened federal immigration policy and thus, was impermissible. Although recognizing that the NLRB has broad discretion in fashioning remedies, the Court stated that awards of reinstatement and back pay are routinely set aside when employees have committed serious illegal conduct in connection with their employment. Here, the federal immigration law directly prohibited employment. Thus, the NLRB's back pay award to the worker gave him payment for wages that could not have been lawfully earned in a job that was obtained by criminal fraud.

Dissenting justices argued that the ruling may encourage employers to hire illegal immigrants and disregard labor laws without fear of penalty.



4. Recent Amendments. The introduced version of this measure related to a different subject matter.

Support:

California Labor Federation, AFL-CIO (Sponsor)
Lieutenant Governor Cruz M. Bustamante (Co-Sponsor)
Asian Law Caucus (Co-sponsor)
California Applicants' Attorneys Association
California Catholic Conference of Bishops
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists (Co-sponsor)
California Immigrant Welfare Collaborative
California Rural Legal Assistance Foundation (Co-sponsor)
California State Council of Laborers
California Teamsters Public Affairs Council
Coalition for Humane Immigrant Rights of Los Angeles (Co-sponsor)
El Centro Del Pueblo
Engineers and Scientists of California
Garment Workers Center (Co-sponsor)
Hotel Employees and Restaurant Employees International Union (Co-sponsor)
Jockeys' Guild (Co-sponsor)
La Raza Centro Legal, Inc.
Legal Aid Society- Employment Law Center
Maintenance Cooperation Trust Fund (Co-sponsor)
Mexican American Legal Defense and Educational Fund (Co-sponsor)
National Council of La Raza (Co-sponsor)
Region 8 States Council, United Food and Commercial Workers Union (Co-sponsor)
Service Employees International Union (Co-sponsor)
State Building and Construction Trades Council of California (Co-sponsor)
Sweatshop Watch (Co-sponsor)
Teamsters Public Affairs Council (Co-sponsor)
United Farm Workers of America, AFL-CIO (Co-sponsor)
18 individual letters

Opposition:

California Manufacturers and Technology Association (CMTA)

* * *



SENATE THIRD READING

SB 1818 (Romero)

As Amended August 22, 2002

Majority vote

SENATE VOTE: 23-14LABOR AND EMPLOYMENT 6-1

Ayes: Koretz, Negrete McLeod, Chu,
Havice, Migden, Shelley

Nays: Wyland

SUMMARY: Amends the Civil, Government, Health and Safety and Labor Codes to include legislative findings and declarations regarding the protections, rights and remedies of employees, regardless of immigration status, under state law. Specifically, this bill:

- 1) States legislative findings that:
 - a) All protections, rights and remedies available under state law are available to all individuals who have applied for employment, or who are or who have been employed, in this state, regardless of immigration status. (Excludes reinstatement remedies prohibited by federal law from this protection.)
 - b) For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability.
 - c) In proceedings or discovery undertaken to enforce state laws no inquiry shall be permitted into a person's immigration status except where there is clear and convincing evidence that such inquiry is necessary in order to comply with federal immigration law.
 - d) The provisions of this bill are declaratory of existing law.
 - e) The provisions of this bill are severable and that invalidity of one provision will not affect other provisions.

EXISTING LAW provides:

- 1) A framework for the enforcement of minimum labor standards relating to employment, civil rights, and special labor relations.
- 2) Authority to various state agencies to remedy specific violations where an employee has suffered denial of wages due, proven discrimination, unlawful termination, suspension, or transfer, for the exercise of their rights under the law.
- 3) For remedies such as reinstatement and back pay awards for monies due the employee in order to make them whole.



FISCAL EFFECT: None

COMMENTS: In March 2002, the United States Supreme Court ruled, in a 5 - 4 decision, that the federal Immigration Reform and Control Act of 1986 (IRCA) precluded back pay awards to undocumented workers, even though they might be victims of unfair labor practices, because the workers were never legally authorized to work in the United States [Hoffman Plastic Compounds, Inc. v. NLRB 122 S. Ct. 1275 (2002)].

On July 19, 2002, the National Labor Relations Board (NLRB) released a memorandum from the Office of the General Counsel, which sets forth guidance as to procedures and remedies concerning employees who may be undocumented aliens in light of the Supreme Court's decision. The memorandum notes that the decision has left intact several basic principles as set forth in prior court and NLRB decisions, and that the Supreme Court decision reaffirmed the Court's prior holding that undocumented aliens are employees under the National Labor Relations Act (NLRA), and thereby enjoy protections from unfair labor practices.

The memorandum advises that while conditional reinstatement remains appropriate to remedy the unlawful discharge of undocumented employees whom an employer knowingly hires, where a respondent as in Hoffman, established that it would not have hired or retained the employee, had it known of his undocumented status, reinstatement is not appropriate.

Conversely, the memorandum asserts that even though Supreme Court decision was limited to precluding back pay for employees, where the employer did not have knowledge of the employee's immigration status, back pay is also inappropriate where the employer knew of the employee's immigration status.

Additionally, the memorandum contends that as the Supreme Court did not preclude back pay for undocumented workers for work previously performed under unlawfully imposed terms and conditions, but rather precluded back pay for "work not performed," that back pay in situations such as a unilateral change of pay or benefits is appropriate.

The author and proponents argue that the Hoffman decision has the potential effect of undercutting state remedies for illegal labor practices, and that this measure is needed to keep our state's labor and civil rights' remedies intact, and enhance compliance. Proponents, contend that the Supreme Court's recent decision in Hoffman promotes and rewards the unscrupulous practice of hiring and then retaliating against undocumented workers. They also assert that by allowing employers to use undocumented workers as strikebreakers, the Supreme Court has undermined the rights of all union members. Additionally, employers who fear unionized workers who are fighting for better wages and working conditions now have an added incentive to hire undocumented workers, knowing that they will not have to compensate the workers they fire for otherwise unlawful union activities.

Analysis Prepared by: Liberty Sanchez / L. & E. / (916) 319-2091

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April 5, 2005

Illegal Immigrants Are Bolstering Social Security With Billions

By EDUARDO PORTER

STOCKTON, Calif. - Since illegally crossing the Mexican border into the United States six years ago, Ángel Martínez has done backbreaking work, harvesting asparagus, pruning grapevines and picking the ripe fruit. More recently, he has also washed trucks, often working as much as 70 hours a week, earning \$8.50 to \$12.75 an hour.

Not surprisingly, Mr. Martínez, 28, has not given much thought to Social Security's long-term financial problems. But Mr. Martínez - who comes from the state of Oaxaca in southern Mexico and hiked for two days through the desert to enter the United States near Tecate, some 20 miles east of Tijuana - contributes more than most Americans to the solvency of the nation's public retirement system.

Last year, Mr. Martínez paid about \$2,000 toward Social Security and \$450 for Medicare through payroll taxes withheld from his wages. Yet unlike most Americans, who will receive some form of a public pension in retirement and will be eligible for Medicare as soon as they turn 65, Mr. Martínez is not entitled to benefits.

He belongs to a big club. As the debate over Social Security heats up, the estimated seven million or so illegal immigrant workers in the United States are now providing the system with a subsidy of as much as \$7 billion a year.

While it has been evident for years that illegal immigrants pay a variety of taxes, the extent of their contributions to Social Security is striking: the money added up to about 10 percent of last year's surplus - the difference between what the system currently receives in payroll taxes and what it doles out in pension benefits. Moreover, the money paid by illegal workers and their employers is factored into all the Social Security Administration's projections.

Illegal immigration, Marcelo Suárez-Orozco, co-director of immigration studies at New York University, noted sardonically, could provide "the fastest way to shore up the long-term finances of Social Security."

It is impossible to know exactly how many illegal immigrant workers pay taxes. But according to specialists, most of them do. Since 1986, when the Immigration Reform and Control Act set penalties for employers who knowingly hire illegal immigrants, most such workers have been forced to buy fake ID's to get a job.

Currently available for about \$150 on street corners in just about any immigrant neighborhood in California, a typical fake ID package includes a green card and a Social Security card. It provides cover for employers, who, if asked, can plausibly assert that they believe all their workers are legal. It also means that workers must be paid by the book - with payroll tax deductions.

IRCA, as the immigration act is known, did little to deter employers from hiring illegal immigrants or to discourage them from working. But for Social Security's finances, it was a great piece of legislation.

Starting in the late 1980's, the Social Security Administration received a flood of W-2 earnings reports with incorrect - sometimes simply fictitious - Social Security numbers. It stashed them in what it calls the "earnings suspense file" in the hope that someday it would figure out whom they belonged to.

The file has been mushrooming ever since: \$189 billion worth of wages ended up recorded in the suspense file over the 1990's, two and a half times the amount of the 1980's.

In the current decade, the file is growing, on average, by more than \$50 billion a year, generating \$6 billion to \$7 billion in Social Security tax revenue and about \$1.5 billion in Medicare taxes.

In 2002 alone, the last year with figures released by the Social Security Administration, nine million W-2's with incorrect Social Security numbers landed in the suspense file, accounting for \$56 billion in earnings, or about 1.5 percent of total reported wages.

Social Security officials do not know what fraction of the suspense file corresponds to the earnings of illegal immigrants. But they suspect that the portion is significant.

"Our assumption is that about three-quarters of other-than-legal immigrants pay payroll taxes," said Stephen C. Goss, Social Security's chief actuary, using the agency's term for illegal immigration.

Other researchers say illegal immigrants are the main contributors to the suspense file. "Illegal immigrants account for the vast majority of the suspense file," said Nick Theodore, the director of the Center for Urban Economic Development at the University of Illinois at Chicago. "Especially its growth over the 1990's, as more and more undocumented immigrants entered the work force."

Using data from the Census Bureau's current population survey, Steven Camarota, director of research at the Center for Immigration Studies, an advocacy group in Washington that favors more limits on immigration, estimated that 3.8 million households headed by illegal immigrants generated \$6.4 billion in Social Security taxes in 2002.

A comparative handful of former illegal immigrant workers who have obtained legal residence have been able to accredit their previous earnings to their new legal Social Security numbers. Mr. Camarota is among those opposed to granting a broad amnesty to illegal immigrants, arguing that, among other things, they might claim Social Security benefits and put further financial stress on the system.

The mismatched W-2's fit like a glove on illegal immigrants' known geographic distribution and the patchwork of jobs they typically hold. An audit found that more than half of the 100 employers filing the most earnings reports with false Social Security numbers from 1997 through 2001 came from just three states: California, Texas and Illinois. According to an analysis by the Government Accountability Office, about 17 percent of the businesses with inaccurate W-2's were restaurants, 10 percent were construction companies and 7 percent were farm operations.

Most immigration helps Social Security's finances, because new immigrants tend to be of working age and contribute more than they take from the system. A simulation by Social Security's actuaries found that if net immigration ran at 1.3 million a year instead of the 900,000 in their central assumption, the system's 75-year funding gap would narrow to 1.67 percent of total payroll, from 1.92 percent - savings that come out to half a trillion dollars, valued in today's money.

Illegal immigrants help even more because they will never collect benefits. According to Mr. Goss, without the flow of payroll taxes from wages in the suspense file, the system's long-term funding hole over 75 years would be 10 percent deeper.