

NOTE

THE UNDOCUMENTED WORKERS' DILEMMA: IMPROVING WORKPLACE RIGHTS FOR UNDOCUMENTED WORKERS THROUGH LABOR ARBITRATION AND COLLECTIVE BARGAINING

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Over the past five years, undocumented individuals represented over 8 million of the 123 million workers in the United States.¹ As members of the workforce, undocumented workers historically work for lower wages and in subpar working conditions that do not satisfy our nation’s workplace requirements.² These inequalities stem from mismatched incentives created by judicial interpretations of labor and immigration statutes. These statutes, in turn, create a prisoner’s dilemma³ for the undocumented worker. Undocumented workers may choose to either address their grievances and face employer

1. See Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics, U.S. Department of Labor, <https://www.bls.gov/cps/cpsaat08.htm> (last visited Mar. 1, 2017); see also Jens Manual Krogstad, Jeffery S. Passel, and D’Vera Cohn, *5 Facts About Illegal Immigration*, PEW RESEARCH CENTER (April 27, 2017), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>.

2. Roxana Mondragón, *Injured Undocumented Workers And Their Workplace Rights: Advocating For A Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 448 (2011) (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[F]ear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”); REBECCA SMITH ET AL., *ICED OUT: HOW IMMIGRATION ENFORCEMENT HAS INTERFERED WITH WORKERS’ RIGHTS*, 7 (2009) (“[E]mployers commonly threaten to turn workers into immigration authorities to gain the upper hand in a labor dispute”); AMY M. TRAUB ET AL., *DRUM MAJOR INST. FOR PUB. POLICY, PRINCIPLES FOR AN IMMIGRATION POLICY TO STRENGTHEN AND EXPAND THE AMERICAN MIDDLE CLASS*, 12 (2009) (“Technically, minimum wage and overtime laws and health and safety regulations extend to every worker in the U.S., regardless of immigration status. But in practice, undocumented immigrants face the threat of deportation if they try to exercise any of these rights.”).

3. The prisoner’s dilemma illustrates a conflict between individual and group rationality. A group whose members pursue rational self-interest may all end up worse off than a group whose members act contrary to rational self-interest. A slightly different interpretation takes the game to represent a choice between selfish behavior and socially desirable altruism. The classic example involves a prosecutor who interrogates two accomplices of a crime in separate rooms. The prosecutor states: “You may choose to confess or remain silent. If you confess and your accomplice remains silent I will drop all charges against you and use your testimony to ensure that your accomplice does serious time. Likewise, if your accomplice confesses while you remain silent, he will go free while you do the time. If you both confess, I get two convictions; but, I’ll see to it that you both get early parole. If you both remain silent, I’ll have to settle for token sentences on the charges.” See Steven Kuhn, *Prisoner’s Dilemma*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta, ed., Spring 2017 ed.), available at <https://plato.stanford.edu/archives/spr2017/entries/prisoner-dilemma/>.

retaliation, discharge and even deportation, or continue to work in subpar conditions.⁴ Problematically, undocumented worker's willingness to work in these conditions for little pay directly decreases their documented counterparts' level of pay and workplace treatment.⁵ It is unlikely that the federal judiciary or legislator will address the rights of undocumented workers and the broader effect this issue has on the national workforce.

For the last half-century, collective bargaining agreements between employers and unions have served as the bedrock of workplace rights.⁶ The use of collective bargaining and labor arbitration, a judicially-acknowledged right of undocumented workers,⁷ provides a gateway through which these workers can receive the necessary workplace protections not available to them in America's judicial and legislative frameworks. This Note will argue that labor arbitration and union efforts to implement immigrant-protective provisions in collective bargaining agreements can improve workplace rights for undocumented and documented workers alike. This note further argues that such implementation will lead to better compliance with national immigration policy.

Part I of this note sets forth the current labor arbitration framework in collective bargaining agreements, and explores the effects of that framework on undocumented workers. Part II analyzes the conflicting judicial interpretations between immigration and labor policies. Part III discusses common themes in labor arbitration with respect to immigration concerns. Part IV proposes recommendations on how to work with and improve the current labor arbitration framework to protect workers' rights and properly incentivize compliance with U.S. immigration policies.

I. THE LABOR ARBITRATION FRAMEWORK AND ITS EFFECTS ON UNDOCUMENTED WORKERS

To address the issues and potential solutions available to undocumented workers through labor arbitration, it is useful to understand the processes, scope, and foundation of labor arbitration. The collective bargaining agreement serves as the foundation of labor arbitration as it guides the rights and procedures for the disputes and grievances of both parties.⁸ The Supreme

4. See Smith, *supra* note 2, at 7.

5. *Id.*

6. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

7. See generally Agri Processor Co., Inc. v. NLRB, 514 F.3d 1 (D.C. Cir. 2008); NLRB v. Concrete Form Walls, Inc., 225 Fed. Appx. 837 (11th Cir.2007) (upholding the NLRB's conclusion in Concrete Form Walls, 346 N.L.R.B. No. 80, that undocumented workers remain statutory employees under the NLRA after IRCA); NLRB v. Kolkka, 170 F.3d 937, 941 (9th Cir.1999) (holding that the NLRA continues to define undocumented aliens as employees after IRCA); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1121 (7th Cir.1992) (same); *cf.* Patel v. Quality Inn S., 846 F.2d 700, 704–05 (11th Cir. 1988) (rejecting the claim that IRCA implicitly amended the Fair Labor Standards Act's definition of "employee").

8. *Collective-Bargaining Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Court affirmed this concept in *United Steelworkers v. Enterprise Wheel & Car Corp.* concluding, “[a]n arbitrator’s power is both derived from, and limited by, the collective bargaining agreement. The arbitrator has no general authority to invoke public laws that conflict with the bargaining between parties.”⁹ Moreover, an order to arbitrate will not be denied, unless arbitration of the particular grievance falls outside the collective bargaining agreement’s scope.¹⁰ Under the *Steelworkers* trilogy,¹¹ courts may only question arbitration decisions in cases where the arbitrator ruled on an issue outside the scope of the collective bargaining agreement or where the contract as interpreted would violate an explicit public policy that is well defined and dominant.¹² In labor arbitration, collective bargaining agreements are negotiated by the union on behalf of the employees. Given the fundamentality of these agreements, unions have significant contracting power in the context of employee protection.

Labor arbitration is most valuable when it is successful. In the arbitration context, success is defined as a speedy and inexpensive process wherein both parties benefit from the decision maker’s knowledge of industrial relations and the “common law of the shop.”¹³ For undocumented workers to be protected under this scheme, unions must both recognize and act on their responsibilities to all members of the union. Under the National Labor Relations Act (NLRA), an employer may not engage in any interrogation which interferes with the rights of the employee to organize, to bargain, or to otherwise engage in collective activities for aid or protection.¹⁴ As the members’ designated representative, the union is entrusted not only with negotiating the terms of the collective bargaining agreement, but with representing the workers in any grievances.¹⁵ Section 9(a) of the NLRA further requires that unions represent all their members fairly, including minority members.¹⁶ This protection also involves the right to represent fairly non-English speaking members and to provide properly translated documents and interpreters in all

9. *Enter. Wheel & Car Corp.*, 363 U.S. at 593.

10. *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist., 17, 531 U.S. 57, 121 (2000).

11. *Am. Mfg. Co.*, 363 U.S. at 564; *Warrior & Gulf Navigation Co.*, 363 U.S. at 574; *Enter. Wheel & Car Corp.*, 363 U.S. at 593.

12. *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38, 126 (holding that such a policy must be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests).

13. See Paula A. Barran and Todd A. Hanchett, *Public Policy Challenges To Labor Arbitration Awards: Still A Safe Harbor For Silly Fact Finding?*, 38 WILLAMETTE L. REV. 233 (Spring 2012).

14. William E. Hartsfield, § 12:37. *National Labor Relations Act*, INVESTIGATING EMP. CONDUCT (Nov. 2017).

15. ELKOURI & ELKOURI: HOW ARBITRATION WORKS, 10.1-10.80 (Kenneth May, Patrick M. Sanders, and Michelle T. Sullivan eds., 8th ed. 2016).

16. See 29 U.S.C.A. § 159(a); see also Pamela G. Rubin, *Immigrants As Grievants: Protecting The Rights Of Non- English-Speaking Union Members In Labor Arbitration*, 8 GEO. IMMIGR. L.J. 557 (Fall 1994).

union meetings.¹⁷ These rights, however, do not sufficiently protect undocumented workers.

Undocumented workers face a prisoner's dilemma when deciding whether to address their concerns and grievances because legal precedent empowers employers to demand information about a complainant-worker's immigration status.¹⁸ Furthermore, performing immigration inquiries when individuals express a grievance or begin to organize collectively is standard practice in industries known to employ undocumented workers. Together, legal precedent and standard practice force many undocumented workers to risk deportation if they choose to organize or express grievances.¹⁹

In the face of deportation, undocumented workers are much less likely than documented workers to act on their bargaining power, which incentivizes employers to hire more undocumented workers who will accept sub-standard wages and working conditions and are less likely to file grievances.²⁰ The result is an erosion of workplace rights for all workers, documented and undocumented alike.²¹

II. JUDICIAL INTERPRETATION OF IMMIGRATION AND LABOR STATUTES

Judicial decisions regarding undocumented workers' workplace grievances generally focus on the interaction between the Fair Labor Standards Act (NLRA) and the Immigration Reform and Control Act (IRCA). The NLRA and IRCA have goals that, at times, can be divergent: the NLRA's purpose is to establish basic employment standards, while the IRCA's objective is to prevent the employment of undocumented workers.²² However, courts are not uniform in their treatment of the interaction between these statutes. Although the lack of uniformity has severely restricted remedies and protections available to undocumented workers,²³ it has, in some cases, allowed undocumented workers to be recognized as employees and, importantly,

17. *Id.* However, there is no requirement to translate arbitrations to languages other than English. *See Rubin supra* note 13, at 10. Because the Sixth Amendment right to translation is interpreted to cover only criminal proceedings, producing translations for either party in an arbitration proceeding is neither judicially nor constitutionally required. *See* BILL PIATT, *ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED STATES*, 81 (1990).

18. *See Mondragón, supra* note 2, at 8.

19. Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 *CORNELL INT'L L.J.* 27, 39 (2008).

20. Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, 12 *J. POPULATION ECON.* 91, 91-95 (1999); *see also* Megan A. Reynolds, Comment, *Immigration-Related Discovery After Hoffman Plastic Compounds, Inc. v. NLRB: Examining Defending Employers' Knowledge of Plaintiffs' Immigration Status*, 2005 *MICH. ST. L. REV.* 1261, 1271 (2005) (stating that employers can hedge the savings in cheap work provided by illegal immigrants against the cost of providing raises to legally present workers and risks of fines.).

21. *Id.*

22. *See Hoffman*, 535 U.S. at 137 (discussing the goals and purpose of IRCA); *see also Agri Processor Co.*, 514 F.3d at 1 (discussing the goals and purposes of NLRA.).

23. *See Hoffman*, 535 U.S. at 137.

union members entitled to collective bargain.²⁴

In 2002, the Supreme Court addressed the issue of whether the IRCA foreclosed the National Labor Relations Board (NLRB) from awarding back pay to an undocumented worker in *Hoffman's Plastic v. N.L.R.B.*²⁵ Hoffman's Plastics, hired Jose Castro, who provided documents that appeared to verify his authorization to work in the United States.²⁶ In December 1988, the plastic workers union began an organizing campaign at Petitioner's production plant.²⁷ Castro and several other employees who participated in the campaign were subsequently dismissed from Hoffman Plastics due to their involvement.²⁸ In January 1992, the NLRB found that Hoffman's Plastics unlawfully laid off four employees, including Castro, "in order to rid itself of known union supporters" in violation of § 8(a)(3) of the NLRA.²⁹ The NLRB ordered Hoffman's Plastics, in part, to offer reinstatement and back pay to the four affected employees.³⁰ In a subsequent compliance proceeding, Castro disclosed that he was born in Mexico, that he had never been legally admitted to, nor authorized to work in, the United States, and that he had gained employment by submitting falsified records to Hoffman's Plastics.³¹ The NLRB determined that to further the IRCA's immigration policies, it was necessary to provide the NLRA's protections and remedies to undocumented workers in the same manner as provided to documented employees. The Circuit Court affirmed.³²

In a five-four decision, the Supreme Court ruled that Mr. Castro was neither entitled to back pay nor reinstatement.³³ The majority reasoned that Castro's use of fraudulent documents deprived him of remedies traditionally awarded under the NLRA. Although the majority found that "the employer committed serious violations of the NLRA, [it concluded that] the Board had no discretion to remedy those violations by awarding reinstatement with back pay to employees who themselves had committed serious criminal acts."³⁴ The Court stated that the NLRB exceeded its delegated authority by

24. See *Agri Processor Co.*, 514 F.3d at 1.

25. See *Hoffman*, 535 U.S. at 137.

26. See *id.* at 137.

27. *Id.* at 140.

28. *Id.*

29. *Id.*

30. See *id.* at 138.

31. *Id.*

32. See *id.* at 142.

33. *Id.* at 143-46.

34. *Id.* (Concluding that providing fraudulent documentation is as severe an offense as threatening to kill a supervisor or stealing from an employer); See *NLRB v. Concrete Form Walls, Inc.*, 225 Fed.Appx. 837 (11th Cir. 2007) (upholding the NLRB's conclusion in *Concrete Form Walls*, 346 N.L.R.B. No. 80, that undocumented workers remain statutory employees under the NLRA after IRCA); *NLRB v. Kolkka*, 170 F.3d 937, 941 (9th Cir. 1999) (holding that the NLRA continues to define undocumented aliens as employees after IRCA); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992) (same); cf. *Patel v. Quality Inn S.*, 846 F.2d 700, 704-05 (11th Cir. 1988) (rejecting the claim that IRCA implicitly amended the Fair Labor Standards Act's definition of "employee"). No circuit court has reached a contrary conclusion.

rendering this decision, which could legitimize attempts by undocumented immigrants to commit fraud.³⁵ Moreover, the majority found that the NLRB's order could not be enforced without violating existing federal law³⁶ and deemed the threat of future sanctions against Hoffman's Plastics to be a sufficient deterrent against future violations.³⁷

In dissent, Justice Breyer took the position that the majority's decision offered employers immunity in borderline cases, which encouraged them to take risks. Breyer pointed specifically to hiring "with a wink and a nod those potentially unlawful aliens whose unlawful employment ultimately will lower the cost of labor law violations."³⁸ The dissent then stated that IRCA's specific labor law-related purposes also favored preservation, not elimination, of the NLRB's back pay powers. These powers, Breyer argued, reduce employers' incentives to hire undocumented workers, who are often willing to work in substandard conditions and for substandard pay.³⁹ Justice Breyer then noted that when Congress "wrote the immigration statute, it stated explicitly and unequivocally that [it] does not take from the Board any of its remedial authority."⁴⁰

A. *Hoffman's Application in State Labor Disputes*

However far reaching *Hoffman* might be, its precedential effect is less certain when action is brought under state law, where precedent or statutes do not bar recovery for undocumented workers.⁴¹ The State of New York, for example, has made clear that a worker's status does not affect his or her ability to recover damages or collect wages. In *Maidera v. Affordable Housing Foundation*, an undocumented worker brought suit to recover damages, alleging a violation of New York Scaffolding Laws.⁴² Defendants relied on *Hoffman* to bar the plaintiff from recovering lost earnings, but were denied by the district court.⁴³ The court applied the *Erie* doctrine, reasoning that substantive state law governed the action since the case involved a claim under state law and that the Defendant asserted no federal cause of action.⁴⁴

35. *Hoffman*, 535 U.S. at 150.

36. *Id.*

37. *Id.*

38. *Hoffman*, 535 U.S. at 153 (Breyer, J. dissenting).

39. *See id.*

40. *See id.* at 157.

41. *Madeira v. Affordable Housing Foundation, Inc.*, 315 F.Supp.2d 504, 506 (S.D.N.Y. 2004).

42. N.Y. LAB. LAW § 240 (McKinney).

43. *Madeira*, 315 F.Supp. at 505.

44. *Id.* "Indeed, a post-*Hoffman* Official Opinion the Attorney General of New York concluded that *Hoffman* does not prevent the New York Department of Labor from enforcing the State's wage payment laws on behalf of illegal immigrants as long as no federal Constitutional or statutory right was implicated." (citing Formal Opinion No.2003-F3, N.Y. Op. Atty. Gen. No. F3, 2003 WL 22522840 (N.Y.A.G. October 21, 2003); citing *Balbuena v. IDR Realty, LLC*, N.Y. L.J., May 28, 2003, at 18 (Sup.Ct. N.Y. 2003) (*Hoffman* does not inhibit State court's ability to award lost wages to an illegal immigrant in tort action brought under state common law); *Cano v. Mallory Mgmt.*, 195 Misc.2d 666, 760 N.Y.S.2d 816 (holding under federal law in *Hoffman* does not bar illegal immigrants from using New York State court system to "seek civil redress from alleged tortious conduct.").

Ultimately, the court held that, under New York State labor law, a plaintiff's undocumented status did not prevent him from recovering damages.⁴⁵ Further, *Hoffman* did not prevent the New York Department of Labor from enforcing the state's wage payment laws on behalf of undocumented immigrants as long as such enforcement did not implicate any federal constitutional or statutory right.⁴⁶

California state courts have also recognized that federal law might not preempt state law in labor cases. In *Salas v. Sierra Chemical Co.*, a former employee brought action against his former employer, alleging disability discrimination in violation of the Fair Employment and Housing Act (FEHA) and denial of employment in violation of public policy.⁴⁷ In rejecting the defendant's use of *Hoffman* to preempt the state labor law, the Supreme Court of California held that California labor statutes extend employee protections to all workers "regardless of immigration status," and to those undocumented workers who have used false documents to secure employment.⁴⁸ The Court added that federal law would only preempt state law if an award of back pay was made to an employee for any period of time after an employer discovered the employee's ineligibility to work in the United States.⁴⁹

Several other states⁵⁰ have concluded that undocumented workers may bring workers' compensation suits to recover for work-related injuries on other grounds related to *Hoffman*.⁵¹ These decisions follow three lines of reasoning. Some states argue that *Hoffman* does not apply when the undocumented worker did not submit fraudulent documents. Other states have found that even if fraudulent documents were submitted, there is not enough of a causal link. Still other states have concluded that *Hoffman* should not apply to workplace injuries because of broader public policy concerns.⁵² Additionally, several Circuits restrict the use of *Hoffman* as a mechanism to allow defendants to inquire into an individual immigration status during labor disputes.⁵³

45. *Id.*

46. *Id.* at 507.

47. *Id.*

48. *Id.*

49. *Id.* at 408.

50. States include Arizona, California, Florida, Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas. See Mondragón, *supra* note 2, at 5.

51. See Mondragón, *supra* note 2, at 5.

52. *Id.*

53. See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004); *Flores v. Amigon*, 233 F.Supp. 2d 462 (E.D.N.Y. 2002) (recognizing that that employers cannot use the discovery process to threaten employees away from suits, and that protective orders are justified because the substantial and particularized harm of the discovery—the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights). *But see Cartagena v. Centerpoint Nine, Inc.*, 303 F.R.D. 109 (D.D.C. 2014) (holding that the plaintiff immigration status was central to the credibility of the Defendants claims, which entitled it to discovery on the plaintiff's immigration status). This appears to be a severely limited opinion, which only applies to very specialized circumstances, but the decision leaves clear room for abuse from employers who upon hearing about and employee's intentions to unionize, or file a

B. Hoffman's *Application in Federal Disputes*

Hoffman made clear that the NLRB is barred from awarding back pay to undocumented workers, but left open the question for other forms of damages and orders that may result from arbitration decisions. Several federal opinions have seized on this opening and limited the scope of *Hoffman* in matters where the grievance is not related to back pay.

The D.C. Circuit addressed the conflict between the NLRA's definition of employee and enforcement of the IRCA in *Agri Processor Co., Inc. v. N.L.R.B.*, limiting *Hoffman's* applicability.⁵⁴ In *Agri Processor*, Petitioner, a wholesaler of kosher meat products, refused to bargain after employees voted to join the United Food and Commercial Workers Union.⁵⁵ The union responded by filing an unfair labor practice grievance with the NLRB.⁵⁶ In an NLRB hearing, the company claimed that after the election, the company reviewed all the social security numbers provided by all voting employees and determined that most of the numbers were invalid.⁵⁷ The company argued that most of the workers who had voted for unionization were unauthorized to work in the United States, which made them ineligible for NLRA protections.⁵⁸ The NLRB rejected the company's claim and held instead that the company ignored the NLRA's plain language and Supreme Court precedent.⁵⁹

In affirming the Board's decision, the D.C. Circuit cited the definition of an employee under the NLRA, which states:

The term "employee" shall include any employee. . . , but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act. . . , or by any other person who is not an employer as herein defined.⁶⁰

The court ultimately relied on the Supreme Court decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 (1984), which held that "undocumented aliens are not among the few groups of workers expressly exempted by Congress, [so] they plainly come within the broad statutory definition of

grievance would then initiate an immigration inquiry to quickly make the discovery of the individual's immigration status relevant.

54. *Agri Processor* is unanimously followed amongst the circuits, with Westlaw citing no negative or conflicting treatment. *Agri Processor*, 514 F.3d.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 3 (Citing 29 U.S.C. §152(3)).

‘employee.’”⁶¹ The court applied the *Sure-Tan* holding to the matter, reasoning that nothing in the IRCA’s text altered the NLRA’s definition of employee, and that the NLRA defines employees the same way it did at the time of the *Sure-Tan* decision.⁶² The court then opined that there was no clear indication that Congress intended the IRCA to explicitly or implicitly amend the NLRA definition of an employee. On the contrary, the court pointed to the IRCA’s legislative history, stating:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law.⁶³

In response to Agri Processor’s argument that *Hoffman* controlled, the majority limited *Hoffman* to its facts, stating that it only applied to the NLRB’s offer of back pay to undocumented aliens when employers violated their rights under the NLRA.⁶⁴ Finally, the court held that Agri Processor failed to show that the labor interests of the undocumented workers differed materially from those of the documented workers, which allowed the NLRB to place them in the same bargaining unit.⁶⁵

The *Agri Processor* court understood that leaving workers without the NLRA’s protections would create a subclass of workers with less stake in the collective goals of their documented coworkers, decreasing the potential success of collective bargaining.⁶⁶ The court also understood that “undocumented workers’ fear of detection and termination does not prevent them from sharing a community of interest with their coworkers.”⁶⁷

On the whole, federal circuit courts have upheld the *Agri Processor* decision.⁶⁸ Some circuits have also extended *Agri Processor* by allowing undocumented workers to sue under the NLRA to recover statutory damages for work performed.⁶⁹ These decisions adopt *Agri Processor*’s interpretation of the NLRA and IRCA and focus on the plain language of the NLRA’s definition of employee.⁷⁰ These courts also agree with the *Agri Processor*’s

61. *Id.* at 3 (Citing *Sure-Tan*, 467 U.S. 883 at 104).

62. *Id.* at 4.

63. *Id.*

64. In fact, the court in *Agri Processor* interpreted *Hoffman* to permit the NLRB to order other remedies such as cease and desist orders. *Agri Processor*, 514 F.3d at 7-8.

65. *Agri Processor*, 514 F.3d at 8.

66. *Id.*

67. *Saint-Gobain Indus. Ceramics, Inc. v. NLRB*, 310 F.3d 778, 782-83 (D.C. Cir. 2002).

68. See *Steelworkers*, *supra* note 7.

69. See *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927 (8th Cir. 2013); *Asylum Co. v. D.C. Dep’t of Emp’t Servs.*, 10 A.3d 619 (D.C. 2010).

70. *Asylum Co.*, 10 A.3d at 621.

reasoning that the protection of undocumented workers also protects documented workers by discouraging employers from hiring undocumented workers under the assumption they will not file grievances.⁷¹

III. LABOR ARBITRATION DECISIONS PERTAINING TO IMMIGRATION ISSUES

Where federal, and some state, labor law is at issue, employers understand that they can avoid discussion of damages in arbitration where there is a question of immigration status.⁷² Accordingly, the common trend in arbitration decisions revolves around employer decisions to investigate immigration status and resolve changes in immigration status.⁷³ These inquiries, and their attendant procedures, add to concerns that employers can and will exploit a worker's immigration status to prevent an employee from filing grievances or organizing into a bargaining unit. Despite uniformity in the form of arbitration decisions, the level of protection an undocumented worker receives, and thus the results of each decision, vary greatly depending the structure of the collective bargaining agreement and how the union advocates for its members.

The arbitrations of two similar facts patterns can reach completely different results based on whether the union shaped collective bargaining agreements to afford better levels of protection for undocumented workers. In *SEIU-United Service Workers West and SBM Site Services*, an undocumented worker completed an Employment Eligibility Verification form stating, under penalty of perjury, that she was a lawful permanent resident of the United States when hired in 2011.⁷⁴ Between that time and the time of grievance, her daughter married a U.S. citizen, had become a citizen herself, and sponsored the worker in an effort to obtain work authorization documents.⁷⁵ In November 2012, the worker became a lawful permanent resident⁷⁶ and then applied for a valid social security card, admitting to the Social Security Administration (SSA) that she had been using a fraudulent social security number (SSN) for fourteen years. The worker then attempted to update her information with her employer. When asked if she had used a false SSN on her employment application, the worker admitted that she had done so and was terminated.⁷⁷ The arbitrator ordered that the worker be reinstated with full benefits.⁷⁸

In deciding for the working, the arbitrator relied on the collective bargaining agreement's use of an immigrants' protection provision. The provision provided that "employees shall not be discharged, disciplined or suffer loss

71. See *Lucas*, 721 F.3d at 928.

72. See *supra* Part II.

73. See *infra* note 78, 88, 94.

74. 14-2 ARB ¶6285 (Sep. 5, 2014).

75. *Id.* at 4.

76. *Id.*

77. *Id.*

78. *Id.* at 6.

or seniority or any other benefit or be otherwise adversely affected by a lawful change of name or Social Security number.”⁷⁹ The arbitrator further held that although the previous document was fraudulent, the worker’s change of her fraudulent SSN to a legitimate one fit within the definition of “lawful” since nothing in the collective bargaining agreement required a “lawful to lawful” change.⁸⁰

Conversely, when efforts are not made to implement immigrant protection provisions into the collective bargaining agreement, employers can, and often do, exploit an employee’s undocumented status or newly obtained legal status with the threat of termination. For example, *Von’s Grocery Company and UFCW Local 711* followed an almost identical pattern as the facts in *SEIU*. The only difference between the two arbitrations was the omission of a provision regarding lawful changes in Social Security numbers in the collective bargaining agreement.⁸¹ In holding for the employer, the arbitrator found that:

Even though the employee (1) was a small child when she entered the U.S., (2) was completely honest with her employer after she obtained a valid Social Security card, and (3) had an excellent work record, an employer has the right to expect honesty and integrity from its employees. It also has the right to apply consistently a policy of terminating all employees who falsified their employment application.⁸²

This decision made clear that without collective bargaining agreements with an express immigrant protection clause, employees should fear employer retaliation even if they have taken steps to obtain legal work authorization or full citizenship.

Additionally, union enforcement of the collective bargaining agreement and prevention of adverse procedures and policies by an employer is essential to protecting the rights of undocumented workers. For example, in *Pacific Steel Casting Co.*, a local group of Glass, Molders, Pottery, Plastics & Allied Workers International Union filed an unfair labor practice claim challenging Pacific Steel Casting’s unilateral and voluntary implementation of E-Verify.⁸³ The claim also alleged that the company refused to bargain with the

79. *Id.* at 9.

80. *Id.*

81. 14-2 ARB ¶6261 (Aug. 15, 2014).

82. *Id.*

83. E-Verify is an electronic verification program accessible to employers through the Internet. It is operated by U.S. Citizenship and Immigration Services (USCIS), a bureau within the Department of Homeland Security (DHS), in partnership with the Social Security Administration. To use the program, employers submit basic information about new employees such as the employee’s name, Social Security number (SSN), immigration status, and other information from the I-9 Employment Eligibility Verification form, which employers are required to have all new employees complete within three days of beginning employment. E-Verify compares that information to USCIS and SSA databases before the system provides a response confirming the employee’s work authorization. The Misuse Of E-Verify And Employer Liability For National Origin Discrimination, *What Is E-Verify?*, U.S. Citizenship & Immigr.

union over the program's implementation.⁸⁴ The union argued that implementing the verification process changed the terms and conditions of employment and was analogous to an employer's decision to implement post-hire drug testing.⁸⁵ The employer's decision to implement the program voluntarily further bolstered the union's position.⁸⁶ In settling this case, Pacific Steel Casting agreed to reinstate the and provide full back wages and benefits for those employees terminated because of E-Verify results.⁸⁷ The settlement agreement also required the company to terminate its E-Verify enrollment since it failed to bargain over its use with the union.⁸⁸

When a collective bargaining agreement lacks an explicit standard protocol for investigating potential violations of immigration status, it leaves undocumented workers at risk of employer abuse. In *Tyson Foods, Inc. and Retail, Wholesale And Department Store Union Mid-South Council*, Tyson acquired a company and its workforce along with all personnel records as a part of the acquisition.⁸⁹ Tyson initiated an immigration review of the new employees whose SSN's did not match the SSA's records.⁹⁰ Community members pushed back against Tyson's review. In response, Tyson sought guidance from various federal agencies, which resulted in an extension of the timeline for its requirement that employees produce immigration documents from three days to thirty days.⁹¹ In August 2005, Tyson began using this new, no-match procedure to resolve the 170 mismatches identified, which resulted in the dismissal of approximately 200 employees. The union challenged these dismissals.⁹²

Despite a clause in the collective bargaining agreement that prohibited Tyson from using the no-match notice to take adverse action against the named employees, the arbitrator upheld the employer's decision because requiring an employee to have a legitimate social security number to keep his or her position could not be characterized as an adverse action.⁹³ Had the union bargained for a provision in the collective bargaining agreement for a protective immigration inquiry procedure, the results might have been different.

Before undocumented workers can even begin to face the challenges our system places on them to collect awarded damages, they must first survive constant retaliatory threats of immigration inquiry from employers. These

Servs. (Nov. 1, 2012), <http://www.uscis.gov/portal/site/uscis/> (follow "E-Verify Home page" hyperlink; then follow "What is E-Verify?" hyperlink).

84. See Case No. 32-CA-25763, 2012 WL 6085159 (N.L.R.B.G.C. Feb. 6, 2012).

85. *Id.*

86. *Id.*

87. Case No. 32-CA-25763, 2012 WL 6085159 (N.L.R.B.G.C. Feb. 6, 2012).

88. *Id.*

89. 07-1 ARB [¶3756] (Dec. 8, 2006).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 2.

inquiries discourage unionization and the pursuit of claims, and negatively impact the wages and workplace rights of the entire workforce. The collective bargaining agreement plays a large role in advocating for these rights. Union advocacy in implementing and enforcing the protections needed can help shield workers from the inconsistency and injustice faced in the judicial and legislative systems.

IV. LEVERAGING LABOR ARBITRATION TO PROTECT WORKERS' RIGHTS AND TO INCENTIVIZE COMPLIANCE WITH IMMIGRATION POLICIES

The current political climate has only amplified the threat of immigration inquiry faced by undocumented workers. Such inquiry, and the attendant fear of deportation, prevents these workers from exercising their workplace rights, decreases wages for all workers, and leads to inadequate workplace conditions as a result of misplaced employer incentives. To correct these injustices requires a combination of legislative action, shifts in judicial interpretation, and zealous efforts by labor unions on behalf of their members. Given the current administration's immigration policies and the marginally effective changes expected from the judicial system, the process of labor arbitration and collective bargaining is the most pragmatic and effective option of the three.⁹⁴

A. *Legislative Expansion*

Improvements to portions of both federal and state labor statutes can provide better incentives for compliance and improve workplace rights for all workers. These improvements are likely to affect labor arbitration through the implementation of collective bargaining agreements.⁹⁵

The current administration and Republican-controlled House and Senate are unlikely to introduce legislation that affords more protections to undocumented workers. However, there are specific improvements that can further the administration's agenda—to enforce the United States' immigration policy—while also promoting a better workplace for undocumented and documented workers alike. First, Congress could expand the National Labor Relations Act (“NLRA”) to categorize retaliatory inquiries into immigration status as unfair labor practices.⁹⁶ Currently, the NLRA defines unfair labor practices by an employer as “[interference] with, restraint, or coercion of] employees in the exercise of the rights guaranteed by [the Act]; . . . [or refusal] to bargain collectively with the representatives of his employees.”⁹⁷ Although employers should be permitted to inquire into an individual's immigration status, it would significantly improve the rights of undocumented

94. *Id.*

95. See Maidera, *supra* note 41.

96. 29 U.S.C. §§ 151–169.

97. 29 U.S.C. § 158(a).

workers if the NLRA imposed a per se rule prohibiting retaliatory inquiries that interfere with the exercise of guaranteed rights and the ability to participate in collective bargaining.⁹⁸

The immigration inquiries at the center of *Hoffman* and *Agri Processor* were initiated directly after or before the grievance was filed or the decision was taken to unionize.⁹⁹ Expanding the statute to prevent retaliatory immigration inquiries would provide undocumented workers the protection needed to express their concerns and exercise their workplace rights. This expansion would benefit workers in arbitrations by increasing the aggregate collective bargaining power.¹⁰⁰

State legislative additions also provide a viable and more probable opportunity to improve workplace rights for undocumented workers. Specifically, states can adopt policies, like those embraced in California and New York, that extend state law employee protections to all workers regardless of immigration status.¹⁰¹ Though these changes do not benefit an employee whose collective bargaining agreement requires application of federal law, they foster better workplace rights for all workers and may even shield workers from antagonistic federal law.

Collective bargaining agreements increasingly include provisions that rely on existing statutes for grievance procedures.¹⁰² If such statutes were more expansive in their inclusion of undocumented workers, collective bargaining agreements would likely align and provide better protections for undocumented workers. For example, provisions in the collective bargaining agreement can stipulate choice of law provisions. These provisions could, in turn, be used to require the application of laws that provide better rights to undocumented workers, and ultimately the entire bargaining unit.

B. *Judicial Reinterpretation*

Judicial interpretations are unlikely to shift in favor of undocumented workers, and would at most affect the margins of workplace rights for undocumented workers. But, analysis of the ramifications of decisions both favorable and unfavorable to undocumented workers will further the conversation on their workplace rights and could be incorporated into collective bargaining agreements.

The dissent in *Hoffman* better understood that allowing back pay to undocumented workers results in better compliance with labor laws. When an employer is not required to award back pay to employees, the employer is

98. Not permitting an employer to do so would in fact run afoul of the IRCA. See Mondragón *Supra* Note 3 (Advocating for a per se rule against an employer who performs retaliatory immigration inquiries).

99. See generally *supra* note 21.

100. See *supra* note 19, at 91-95.

101. See West's Ann. Cal. Civ. Code § 3339(a); N.Y. McKinney's Labor Law § 240.

102. See 14-2 ARB ¶6285 (Sep. 5, 2014).

incentivized to take more risk in its treatment of employees.¹⁰³ Even though the grievance filing may act as a deterrent, the employer's expected total liabilities after the grievance will be much lower if there is no reward of back-pay than if the grievant is entitled to back pay.¹⁰⁴ Combined with undocumented workers' willingness to "work in substandard conditions and for subpar wages,"¹⁰⁵ decisions that follow *Hoffman* reduce incentives for employers to provide safer worker environments and to increase wages.¹⁰⁶ *Hoffman* creates a subclass of worker that cost less and have fewer rights, and reduces awards of expensive liabilities under labor laws. This decision leaves only liabilities under immigration statutes.¹⁰⁷

Conversely, the dissent's position would eliminate the discount an employer receives by hiring an undocumented worker. By providing undocumented workers identical rights to their documented counterparts, employers are stripped of the cost savings associated with a decreased labor law liability.¹⁰⁸ If the legal rights for both types of employees are the same, the potential liability becomes much higher for the employer and creates incentives to provide better workplace protections and conditions.¹⁰⁹ Furthermore, when undocumented workers receive workplace rights and pay, employers are unable to leverage undocumented workers' willingness to work for substandard wages, which accordingly increases overall wages.¹¹⁰ In fact, employing an undocumented worker becomes more expensive because the employer now faces potential immigration and labor liabilities, which encourages better adherence to immigration laws.

These benefits directly affect the collective bargaining and arbitration system. *Agri Processor* provided that undocumented workers are "employees" who share a "community of interest," which requires an employer to bargain collectively.¹¹¹ The *Hoffman* dissent encourages more members of the union to advocate for the rights they deserve. The union is empowered by this groundswell of support because it creates cohesion and uniformity in the bargaining process.

C. Leveraging Collective Bargaining Agreements

Labor arbitration is a process wherein an employer and union contract that all disputes and controversies shall be settled outside of the judicial system. Arbitration differs from litigation in three important ways: pre-process and

103. See Reynolds, *supra* note 20, at 156.

104. *Id.*

105. *Id.*

106. *Id.* (The employer's actual costs and potential liabilities are artificially discounted by undocumented workers).

107. See Smith, *supra* note 2, at 7.

108. See Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960).

109. *Cf. Id.*

110. Jeffrey S. Passel, Randy Capps, and Michael Fix, Urban Institute Immigration Studies, *Undocumented Immigrants: Facts and Figures*, 5 (January 2004).

111. See generally *Agri Processor supra* note 21.

process procedure, standards of admissibility of evidence, and the method of rendering and appealing a decision.¹¹² Through the collective bargaining agreement, parties can mold and shape their rights and protections and are only limited by public policy.¹¹³ Arbitration gives employers and employees the opportunity to make progress for undocumented workers without implementing legislative changes and persuading judicial interpretation because it works outside the normal confines of the judicial system. It requires only a firm union understanding of its member base, and zealous advocacy for protective provisions in the collective bargaining agreement.

Specifically, unions can provide better protections to undocumented workers by advocating for provisions that: (1) prevent employer inquiry into immigration status; (2) protect the pursuit to legal citizenship; and (3) provide translators during arbitration proceedings.

1. *Provisions Preventing Employer Inquiry into Immigration Status*

Under Title VII, current workers' rights provisions include retaliation claims, which prevent an employer from "[discharging, or in any other manner discriminating] against any employee because such employee has filed any complaint or instituted."¹¹⁴ Title VII also prevent employers from "[interfering with, restraining, or coercing] employees in the exercise of the rights to unionize or refuse to collectively bargain."¹¹⁵ These protections afford undocumented workers some level of protection. But, bringing these claims requires a significant amount of fact-intensive work and often strains a union's the financial resources. A provision in collective bargaining agreements that restricts an employer from implementing a retaliatory immigration inquiry once a grievance is filed or an attempt to unionize is made would better protect employees. Such protection would flow from a decreased incentive for employers to coerce employees not to file grievances for fear of retribution.

If these provisions are implemented and undocumented employees are made aware of their new protections, they would be more willing to join their documented co-workers in supporting union activity. Undocumented workers' participation can create more cohesion and support among employees, which will result in a more effective union that better advocates for their members. This type of provision also encourages employers to implement a more transparent immigration compliance process, and to conduct more comprehensive screening upon hiring the employee.¹¹⁶ Additionally, a provision

112. See *Teamsters Local 657 v. Stanley Structures*, 735 F.2d at 903.

113. *W.R. Grace and Co. v. Local Union 759, Intl. Union of the United Rubber, Cork, Linoleum & Plastic Workers Of Am.*, 461 U.S. 757, 766 (1983).

114. 29 U.S.C. § 215(a)(3) (2006).

115. *Id.* at §§ 151–169.

116. See *Agri Processor Co., Inc.* 514 F.3d at 3 (Kavanaugh, J. dissenting) (arguing that better workplace protections for undocumented workers would entice employers to conduct better pre-employment screening).

of this nature would help prevent the issue that arose in *Tyson Foods*¹¹⁷ because employers would set forth a structured and fair immigration inquiries protocol. Such a protocol would help employers comply with federal and state immigration law and break the link between labor arbitration and collective bargaining and immigration inquiry.

Including a provision that exempts employers from conducting immigration inquiries when, through no act of their own, they receive actual or constructive knowledge that a worker is undocumented may also help employers comply with immigration law.¹¹⁸ This type of non-affirmative action usually results in a Social Security Administration No-Match Letter, which indicates that a particular social security number used by an employee is potentially invalid.¹¹⁹ In the event of a No-Match Letter, this clause allows the arbitrator to analyze the timing and conditions that resulted in the inquiry to determine whether the employer in fact made no affirmative inquiry. In effect, this clause protects the undocumented worker from employer-motivated inquiry by removing the employer from the equation all together and ensures that undocumented workers do not fear employer retaliation.

Like the above-mentioned provision, a provision restricting the scope of an immigration inquiry during an arbitration proceeding would provide further protection to undocumented workers. This provision would prevent unnecessary inquiries into an individual's immigration status, which is not related to the actual grievance at issue. The provision would also yield many of the same benefits as the previous two provisions discussed. Such benefits include better immigration inquiries at the time of hiring, better immigration verification protocols, and removal of the threat of inquiry when employees file grievances.¹²⁰ Further, this provision is not a radical departure from existing precedent, which upholds protective orders in similar situations. Therefore, this provision would likely be able to withstand any challenge on the grounds of public policy.¹²¹

2. *Provisions Protecting the Pursuit of Legal Citizenship*

The drastic difference in results from *SEIU* to *Vons* demonstrates the benefit of a provision that prevents an employer from discharging, disciplining, or demoting an employee based on a lawful change of name or Social Security number.¹²² Incorporating this provision into a collective bargaining agreement encourages undocumented workers to pursue legal routes to citizenship, and prevents punishment for taking this course of action.

117. See *supra* note 90.

118. See Mondragón, *supra* note 2, at 11.

119. See Gening Liao, *The Misuse Of E-Verify And Employer Liability For National Origin Discrimination*, 28 ABA J. LAB. & EMP. L. 417 (Spring 2013).

120. Cf. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (2004); *Cartagena v. Centerpoint Nine, Inc.*, 303 F.R.D. 109 (2014).

121. See *Rivera*, *supra* note 49.

122. See *supra* note 90 and 84.

When an undocumented worker pursues a legal route to citizenship, that individual should be rewarded for his or her efforts, not punished. By implementing this type of provision into a collective bargaining agreement, unions and employers can encourage undocumented workers, who are currently in violation of federal immigration statutes, to pursue legal routes to citizenship.¹²³

Without this protection, employees that do obtain legal citizenship will be unlikely to update their employer on their status. Fear of reporting a change in legal status may also contribute to an employee's decision not to participate in grievance procedures for fear of discovery.¹²⁴ This environment of fear contributes to an employer's ability to maintain substandard wages and working conditions, which decreases cohesion among a union's bargaining unit. This provision would also benefit employers by decreasing the chance of liability that an employer may face from hiring an undocumented worker if that worker seeks and gains work status or citizenship without fear of retribution.

3. *Provisions Requiring Translators During Arbitration Proceedings*

Federal law requires translators during union proceedings and that union documents be provided in foreign languages. However, there are no such provisions requiring the use of translators during arbitrations.¹²⁵ Translation during arbitration would allow undocumented union members who feel more comfortable transacting in a language other than English can play a more substantive role in the proceedings and better understand and respond to allegations. Such a provision may also increase confidence among undocumented union members in the efficacy of the grievance process and that their concerns will be addressed.

Overall, the collective bargaining agreement provides an opportunity for the union to counterbalance the lack of protection provided to undocumented workers by legislative action and judicial precedent. Immigrant-protective clauses can be effective in the current landscape without the risk of violating public policy. By implementing these provisions, unions can improve the rights of undocumented members and the strength of the entire bargaining unit.

D. *How Unions Can Improve Workplace Rights for Undocumented Workers*

The union plays a vital role in drafting and enforcing collective bargaining agreements. It is the union that sits down at the bargaining table with an

123. *Id.*

124. *See supra* note 128.

125. Pamela G. Rubin, *Immigrants As Grievants: Protecting The Rights Of Non- English-Speaking Union Members In Labor Arbitration*, 8 GEO. IMMIGR. L.J. 557 (Fall, 1994).

employer to negotiate terms and to challenge the introduction of new policies by the employer. Thus, the union must have a comprehensive understanding of its members' concerns and must deploy effective strategies to obtain the most beneficial results possible. Once the agreement is in place, the union must allocate its resources selectively and strategically to push back against employer decisions that violate the agreed upon terms.¹²⁶

Aside from advocating for the aforementioned provisions in collective bargaining agreements, unions can improve better ensure the rights of all their members by representing their undocumented members. These efforts should include: (1) creating and maintaining diversity and inclusion committees; (2) educating members on their rights; and (3) improving the level of representation that they provide and the qualifications of those who represent their members.

First, establishing a robust diversity and inclusion ("DNI") committee can help a union gain a better understanding of the concerns and needs of its undocumented members.¹²⁷ A DNI committee can be especially helpful in proposing provisions for collective bargaining agreements that voice concerns for those members who might not otherwise be heard.¹²⁸ In this capacity, the DNI committee's ultimate value is in providing information to the union on how it can better represent a portion of the membership to improve its overall strength and effectiveness.¹²⁹

Second, unions can help protect the rights of undocumented workers by educating them on their rights. For example, if the collective bargaining agreement includes provisions that protect undocumented workers, these members should be made aware of their rights and how to exercise these rights. This will work toward diminishing fear of retaliation and effective inclusion in a bargaining unit. Even if these provisions are not included in the collective bargaining agreement, educating undocumented workers on their alternative legal rights can encourage confidence in the union process, and facilitate participation in grievance procedures.

Finally, unions can further safeguard the rights of undocumented workers by diversifying union representation during collective bargaining agreement negotiations and in arbitrations. For example, it would likely benefit unions to work with attorneys who are familiar with the protections and options available to protect documented and undocumented workers.¹³⁰ Attorneys who invest in and represent the interests of all union members can help facilitate the type of cohesion required for success in bargaining and arbitration.

126. COOPER, NOLAN, BALES, AND BEFORT, *ADR IN THE WORKPLACE*, Third Edition (West, 2014).

127. DNI Committees can provide insight into areas where the unions can improve their representation of its minority members. See ALFCIO, *Diversity and Inclusion are Critical to the Labor Movements Future*, available at <https://uswlocal3657.files.wordpress.com/2014/08/aficio-diversity-rpt-2014.pdf>.

128. *Id.*

129. *Id.*

130. COOPER, ET. AL., *ADR IN THE WORKPLACE* (West, 3d ed. 2014).

V. CONCLUSION

The legislative and judicial challenges faced by undocumented workers create a prisoner's dilemma wherein the risk of deportation overshadows organizing better workplace rights. Because the federal legislative system shows little hope of development, and the judicial system promises only marginal change, labor arbitration and collective bargaining agreements have the strongest potential to improve the rights of undocumented workers. Improved rights and protections for the undocumented not only improves the rights and protections of their documented counterparts, but bolsters a union's cohesiveness and bargaining power and encourages employers to comply with immigration law.