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Undocumented, underreported, and undervalued

LITIGATING RETALIATION AND DAMAGES FOR IMMIGRANT WORKERS IN CALIFORNIA

Representing undocumented workers in California presents a distinct and often misunderstood set of challenges. Although undocumented individuals, by definition, do not meet federal requirements for lawful employment, they remain an indispensable part of the state's labor force. Recent estimates indicate that nearly eight percent of California's workforce is undocumented, a reality that underscores both their economic significance and their vulnerability to workplace exploitation.

That vulnerability is not theoretical. Undocumented workers are disproportionately subjected to wage theft, misclassification, discrimination, harassment, retaliation, and wrongful termination. Yet, California law has long rejected the notion that immigration status renders a worker rightless.

To the contrary, the Fair Employment and Housing Act ("FEHA"), the California Family Rights Act ("CFRA"), numerous provisions of the Labor Code, and case law extend workplace protections regardless of immigration status. (Lab. Code, §§ 1019 and 1171.5; Gov. Code, §§ 12940 and 12945.2; see *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 424-425.) These statutory schemes reflect a deliberate policy choice: Employers may not exploit immigration status to evade accountability.

Despite these protections, many undocumented workers never pursue their claims. Fear of retaliation, termination, exposure, and immigration consequences remains a powerful deterrent. For many, the risk of asserting their rights appears to outweigh the promise of legal protection.

For those who do come forward, their cases often carry a deeper narrative. As the daughter of formerly undocumented immigrants, I have seen firsthand the quiet calculus these workers perform every day – balancing survival, dignity, and risk. By the time a claim reaches litigation, it is rarely the product of a single unlawful

act. More often, it is the culmination of years – sometimes decades – of tolerated abuse, punctuated by a final violation that becomes "the last straw."

In representing the undocumented clients, it is a mistake to conflate limited English proficiency or formal education with a lack of sophistication. Clients who have navigated multiple borders, secured employment in an unfamiliar country, and built stable lives under precarious conditions possess a level of resilience that should not be underestimated. With thoughtful communication, they are fully capable of understanding – and meaningfully participating in – their cases.

Language in a cultural context

Critical to that participation and effective representation is language access. Employment cases frequently turn on credibility, and credibility is shaped in large part by testimony. Where testimony is filtered through an interpreter, subtle shifts in language can materially alter meaning. In depositions, where the record is fixed and later weaponized, even minor translation errors can erode the strength of a claim. Counsel must therefore prepare clients in their native language, clarify key terminology, and remain vigilant during testimony.

Beyond literal translation, effective advocacy requires a nuanced understanding of cultural context. In many Spanish-speaking communities, humor and innuendo are embedded in everyday speech. Expressions such as *albureo* – a form of wordplay involving double meanings, often sexual in nature – may appear benign to the uninitiated but carry unmistakable implications in context. Failure to recognize these nuances risks understating the severity of harassment and, in turn, undervaluing the case.

The factual patterns underlying these claims are strikingly consistent. Retaliation often follows closely on the heels of protected activity: reporting a workplace

injury, complaining of harassment, or raising wage-and-hour violations. Employers, in turn, frequently assert that the adverse action was based not on the protected activity but on a "recent discovery" of the employee's undocumented status.

This explanation, while superficially legitimate, is often pretextual. California law prohibits employers from engaging in "unfair immigration-related practices" against any person for the purpose of retaliating against that person for exercising rights under the Labor Code or local ordinances related to employees. (Lab. Code, § 1019.)

An unfair immigration practice means any of the following practices: requiring more or different documents than required by federal immigration law, refusing to accept documents that reasonably appear to be genuine on their face, using the federal E-verify system to check the work authorization status of a person in a manner not required by federal immigration law, filing or threatening to file a false report with a state or federal agency, or contacting or threatening to contact immigration authorities.

Similarly, Labor Code section 244 provides that reporting or threatening to report the suspected or actual immigration status of an employee, former employee, or prospective employee who has exercised a right under the Labor Code, Government Code, or Civil Code to any government agency constitutes an adverse action. (Lab. Code, § 244.)

Damages: Defense limit damages due to undocumented status

Notwithstanding, with termination claims, employers will attempt to limit damages by invoking federal authority restricting recovery for undocumented workers. In *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, the Supreme Court held that certain forms of backpay were unavailable under federal labor law. However, California courts have

declined to extend *Hoffman* to bar relief under state employment statutes. In *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 428-431, the California Supreme Court held that undocumented status does not preclude liability under FEHA, though it may limit the scope of recoverable damages after the employer discovers the employee's unauthorized status.

The *Salas* Court did not address “a situation in which an employer has *knowingly* hired or continued to employ an unauthorized alien in violation of federal immigration law (see 8 U.S.C. § 1324a (a)(1)–(2)).” (*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 424, fn. 3.) Where an employer knew of the employee's status during the course of employment and nevertheless continued to employ the worker, the rationale for cutting off damages is significantly undermined.

In such circumstances, the employer cannot credibly assert that it would have terminated the employee upon discovery, having already elected to retain them. Allowing the employer to invoke immigration status as a shield under these facts would permit it to benefit from its own misconduct – an outcome inconsistent with both the remedial purpose of FEHA and the broad protections afforded under Labor Code section 1171.5.

Where claims do not depend on lost wages, counsel should act aggressively to exclude immigration-related evidence. Evidence Code section 351.2 renders such evidence inadmissible in most civil actions, recognizing its prejudicial impact and limited probative value. Motions in limine and protective orders are essential tools to prevent the defense from injecting immigration status into the case as a means of intimidation or distraction.

Damages: Reframing value in the face of systemic undervaluation

If liability is the battleground, damages are where these cases are too often lost. One of the most persistent challenges in representing undocumented, and more broadly, low-wage workers, is the systematic undervaluation of their claims. This undervaluation is rarely explicit. Defense counsel do not argue, at least not overtly, that a plaintiff's life is worth less

because of their income or immigration status. Instead, the argument is reframed through numbers: low wages are used as an anchor, and from that anchor, the defense attempts to construct an artificially constrained damages model.

The logic is familiar. A plaintiff earning near-minimum wage is presumed to have suffered correspondingly modest harm. Settlement discussions are framed in terms of economic loss, with emotional distress treated as a derivative, secondary component, often calculated as a multiple of lost wages. This approach is not only analytically flawed; it is legally indefensible.

Under FEHA, emotional-distress damages are not tethered to a plaintiff's income. They are intended to compensate for the actual harm suffered; harm that is inherently personal and cannot be reduced to a wage-based formula. (CACI No. 3905A.) California courts have long recognized that emotional-distress damages may constitute a substantial component of recovery, particularly in cases involving discrimination, harassment, and retaliation.

The task is not merely to reject the defense's framing, but to replace it with a compelling alternative narrative, one that centers the plaintiff's lived experience rather than their wage history.

Breaking the wage anchor

The first step is to dismantle the implicit premise that income correlates with suffering. Jurors understand, intuitively, that emotional harm is not indexed to salary. A wrongful termination may be devastating to a high-earning executive, but it can be existential for a low-wage worker supporting a family with limited alternatives.

Counsel should resist any attempt, whether in mediation briefs, settlement discussions, or trial, to frame damages as a function of earnings. Instead, redirect the analysis to the nature, severity, and duration of the harm (e.g., What did the plaintiff experience? How did the defendant's conduct alter the trajectory of their life?) These are the questions that drive valuation under FEHA.

Humanizing the harm

In cases involving undocumented or immigrant plaintiffs, the emotional impact of unlawful conduct is often amplified by factors that are not immediately visible on paper. Financial precarity, limited employment mobility, and familial obligations can transform a termination or retaliatory act into a crisis with cascading effects.

For many plaintiffs, the loss of employment is not simply a loss of income – it is a loss of stability. Rent becomes uncertain. Food security is threatened. Children's needs are jeopardized. These consequences are not speculative; they are real, immediate, and deeply felt.

At trial, these realities must be brought to the forefront. This does not require reference to immigration status. It requires careful storytelling: testimony that situates the plaintiff within their family and community, and that illustrates the tangible impact of the defendant's conduct. Jurors do not need to know a plaintiff's legal status to understand vulnerability, responsibility, and harm.

Leveraging retaliation as a damages multiplier

Retaliation cases, in particular, present an opportunity to amplify damages. The law recognizes retaliation as a distinct and serious violation because it punishes employees for asserting their rights. When an employer responds to a complaint, whether about safety, harassment, or wages, by terminating or otherwise penalizing the employee, the harm is compounded.

From a damages perspective, retaliation carries a unique emotional weight. It sends a message not only to the plaintiff, but to the workforce at large: Speak up, and you will suffer consequences. This dynamic can and should be emphasized at trial. It underscores the need for deterrence and supports a more substantial award of emotional distress damages.

Neutralizing defense themes

Defense counsel will often attempt to reintroduce immigration-related themes under the guise of damages. Arguments about “limited future earnings” or

“reduced employability” may be used to suggest that the plaintiff’s losses are inherently constrained. These arguments must be carefully scrutinized and, where appropriate, excluded.

Courts have recognized the prejudicial nature of immigration status evidence, and counsel should rely on Evidence Code section 351.2 to prevent its admission. Where such evidence is excluded, the defense is left with a narrower and more appropriate damages framework focused on the harm actually caused by the unlawful conduct.

Mediation and settlement strategy

The same principles apply in mediation. Too often, cases involving undocumented or low-wage workers are discounted before meaningful negotiations even begin. Selecting a mediator who understands the legal framework – and who is willing to challenge wage-based anchoring – is critical.

In mediation briefs and oral presentations, counsel should emphasize:

- The strength of liability, particularly in retaliation cases;
- The availability of emotional distress damages independent of wage loss;
- The risk to the defense of presenting an unsympathetic narrative to a jury.

When properly framed, these cases carry substantial risk for employers. The goal is to ensure that the defense understands that risk – not in the abstract, but in concrete, trial-ready terms.

Knowing your judge and venue: Turning geography into leverage

In employment litigation, particularly cases involving immigrant or low-wage workers, the likely jury pool and the tendencies of the assigned judge can materially impact both valuation and settlement posture.

California is not monolithic. Juror attitudes toward workplace rights, retaliation, and vulnerable plaintiffs vary significantly across counties and even within divisions of the same county. In more plaintiff-friendly or politically progres-

sive jurisdictions, jurors are often more receptive to narratives involving power imbalances, workplace exploitation, and retaliation against marginalized workers. These jurors are also more likely to award substantial emotional distress damages when presented with credible testimony and a coherent narrative of harm.

By contrast, in more conservative venues, jurors may be more skeptical of non-economic damages, more inclined to scrutinize credibility, and less receptive to arguments that do not tie directly to economic loss. These differences do not alter the law, but they undeniably shape outcomes.

The assigned judge likewise plays a critical role. Some courts strictly enforce the protections embodied in Evidence Code section 351.2, readily excluding immigration-related evidence and limiting defense attempts to introduce prejudicial material. Others may take a more permissive approach, allowing broader inquiry that can subtly influence how a case is perceived. Similarly, judicial attitudes toward motions in limine, evidentiary objections, and trial management can affect how cleanly a case is presented to the jury.

For plaintiff’s counsel, this is not an abstract consideration – it is leverage. In mediation and settlement discussions, counsel should not hesitate to incorporate venue analysis into their valuation. Where the case is venued in a jurisdiction with a history of substantial plaintiff verdicts, that risk must be clearly articulated. Employers, and more importantly, their insurers, are acutely aware of verdict trends and jury tendencies. Framing the case within that context shifts the conversation from theoretical exposure to practical risk.

For example, a retaliation case involving a low-wage, immigrant worker may be undervalued at the outset based on wage history alone. However, when placed before a jury pool that is likely to identify with the plaintiff’s financial vulnerability, family obligations, and lived experience, the potential for a significant emotional distress award increases dramatically. That delta between defense expectation and trial risk is where mean-

ingful settlements are reached.

Conversely, where venue presents challenges, counsel must adjust strategy accordingly – placing greater emphasis on liability strength, corroborating evidence, and credibility to overcome potential juror skepticism. Even in less favorable forums, a well-developed record and disciplined trial strategy can mitigate risk and preserve value.

Ultimately, understanding the interplay between venue, judicial tendencies, and jury perception allows counsel to negotiate from a position of informed strength. It transforms what might otherwise be an undervalued case into one that reflects its true exposure at trial.

Conclusion

The protections afforded to undocumented workers under California law are neither symbolic nor conditional. They reflect a clear legislative mandate: Workplace rights do not depend on immigration status. Yet, the practical enforcement of those rights remains uneven.

For plaintiff’s counsel, the challenge is twofold. It requires not only a firm grasp of the legal framework, but also a willingness to confront the subtle ways in which bias – economic, cultural, and linguistic – can shape the course of litigation. Nowhere is this more evident than in the valuation of damages.

By reframing the narrative, centering the plaintiff’s lived experience, and resisting artificial constraints on recovery, attorneys can ensure that these cases are evaluated on their merits. In doing so, they do more than secure just outcomes for individual clients – they reinforce the principle that the law protects all workers, and that those protections carry real, enforceable value.



Silvia Luna is a first-generation attorney and the founder of Luna Legal Firm P.C., specializing in plaintiff-side employment law and personal injury. Her practice advocates for workers in cases involving discrimination, sexual harassment, retaliation, and wrongful termination.