Golden Gate University Law Review

Volume 30
Issue 1 *Ninth Circuit Survey*

Article 6

January 2000

Undocumented Workers Are Entitled to Vote in Union Elections - But Are They "Employees" Under the Law?

Beth Wolf Mora

NOTE

UNDOCUMENTED WORKERS ARE ENTITLED TO VOTE IN UNION ELECTIONS – BUT ARE THEY "EMPLOYEES" UNDER THE LAW?

I. INTRODUCTION

The Ninth Circuit Court of Appeals held in *National Labor Relations Board v. Kolkka*,[1] (*"Kolkka"*) that an employer may not refuse to bargain with certified representatives of its employees simply because some of the voting employees are undocumented workers.[2] This note discusses *Kolkka's* impact on whether undocumented workers are "employees" in the American work force and their protection under American labor and employment laws.

The debate on whether undocumented workers' have the right to vote in union elections raises issues concerning to whom the federal government grants rights and benefits of employment.[3] In addition, an informed reader must know whether undocumented workers are treated as members of the American labor market.[4] These issues must be resolved in light of the history of immigration in the United States, its

---

[1] National Labor Relations Board v. Kolkka, 170 F.3d 937 (9th Cir. 1999) [hereinafter *Kolkka*].

[2] *See id.* at 939.

[3] *See* VERNON M. BRIGGS, JR., MASS IMMIGRATION AND THE NATIONAL INTEREST 31 (M.E. Sharpe ed., 1996).

[4] *See id.*

current status, and the present political climate surrounding undocumented workers and their rights to fair employment.[5]

The United States has grown through immigration from Europe, Asia, Africa, Central and South America, which has resulted in a multi-national and multi-ethnic country.[6] The United States is presently in the midst of a wave of "nationalism" particularly within the second and third generation descendants of these immigrants.[7] "Nationalism," amongst Americans today manifests itself as a "great hate" of immigrants; it is based on myths, lies, and unfounded biases about the population of immigrants and the effects on the economy.[8] This "nationalism" significantly influences the way Americans allow employers to abuse the rights of undocumented workers.[9]

A United States Department of Labor study of the future workforce of America predicted that approximately 820,000 immigrants are projected to arrive annually in the United States.[10] California has the largest population of undocu-

---

[5] *See id.* at 31 – 39. "In the United States, both citizenship and naturalization have in the past been subjects of extensive controversy. [r]enewed interest in both issues... have become subjects of political debate once again." *Id.*

[6] *See* Paul Johnston, *A New Citizenship* (visited October 1999) <http://members.cruzo.com/johnston/newcitart.htm>.

[7] *See* JOHN F. PEREA, IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 1 (New York University Press ed., 1997). Nationalism or nativism is an "[I]ntense opposition to an internal minority on the grounds of its foreign connections... The word nativism also suggests some part of its meaning a preference for those deemed natives; simultaneous and intense opposition to those deemed strangers, foreigners."

[8] *See* Doug Brugge, *The Anti-Immigrant Backlash,* THE PUBLIC EYE MAGAZINE, Summer 1995 (visited November 15, 1999) <www.publiceye.org/magazine/immigran.html>. "Many persons who have spoken and written in favor of restriction of immigration, have laid great stress upon the evils to society arising from immigration. They have claimed that disease, pauperism, crime and vice have been greatly increased through the incoming of the immigrants. Perhaps no other phase of the question has aroused so keen feeling, and yet perhaps on no other phase of the question has there been so little accurate information." *Id.*

[9] *See id.*

[10] *See* United States Labor Department, *Future Trends and Challenges for Work in the 21st Century* (visited October 6, 1999).

mented immigrants.[11] Approximately 2 million, or 40 percent of the state's residents are undocumented immigrants.[12] As a result of the highly publicized influx of immigration, there is a renewed backlash against immigrants.[13] However, the large number of immigrants to the United States is less dramatic than portrayed in the Labor Department report.[14] Indeed, undocumented immigrants constitute only one percent of the population of the United States.[15]

Further, common political myths drive harsh immigration laws denying employment rights to undocumented workers.[16] Recently, debates surrounding California's Proposition 187 and other legislation reveal the anti-immigrant sentiment in this country.[17] Some of the statements from those debates include: "[i]mmigrants take jobs away from Americans;"[18] "America is

---

<U.S.http://www.dol.gov/dol/asp/public/futurework/report.chapter1.main.htm>. "Two-thirds of the projected U.S. population increase will be due to net immigration." *Id.*

[11] *See id.*

[12] *See* Immigration and Naturalization Services, *Illegal Alien Resident Population,* (visited October 6, 1999) <http://www.ins.usdoj.gov/graphics/.../statistics/illegalalien/index.htm>. The seven states with the largest estimated numbers of undocumented immigrants – California with 2 million, Texas with 700,000, New York with 540,00. Florida with 350,00, Illinois with 290,000, New Jersey with135,000, and Arizona with 115,000 – account for 83% of the total population in October 1996. *See id.*

[13] *See* The American Immigration Lawyers Association, *America is Immigration* <http://www.nonline.com/procon/topics/1998/October/23Oct-01.asp> (visited October 6, 1999)

[14] *See* United States Labor Department, *Future Trends and Challenges for Work in the 21st Century* <U.S.http://www.dol.gov/dol/asp/public/futurework/report.chapter1.main.htm> (visited October 6, 1999).

[15] *See* The American Immigration Lawyers Association, *America is Immigration* <U.S.http://www.dol.gov/dol/asp/public/futurework/report.chapter1.main.htm> (visited October 6, 1999)

[16] *See id.*

[17] *See* JOHN ISBISTER, THE IMMIGRANT DEBATE, REMAKING AMERICA 26 (Kuarain Press ed., 1996).

[18] The American Immigration Lawyers Association, *America is Immigration* <http://www.nonline.com/procon/topics/1998/October/23Oct-01.asp> (visited October 6, 1999) Studies have shown that quite the opposite is true: Immigrants create jobs. For example, immigrants are more likely to be self-employed and start a new business.

being overrun by immigrants;"[19] "[m]ost immigrants are a drain on the U.S. economy;"[20] "[i]mmigrants aren't really interested in becoming a part of American society;"[21] and "[i]mmigrants contribute little to American society."[22] As a result of these anti-immigrant statements, there is a backlash against undocumented workers, and how they have to seek protections in the courts.[23] Accordingly, there has been an increase of case law dealing with undocumented workers and

---

Small businesses, 18% of which are start by immigrants, account for up to 80% of the new jobs available in the United States each year. *See also Immigrants Steal Jobs? What a Lie,* WORKERS WORLD NEWSPAPER, March 7, 1996 (visited November 15, 1999) <www.workers.org/immigrants/immig.html>. In response to the assertion that immigrants take jobs away from U.S. workers, "[I]n a 1994 study, the Urban Institute in Washington reported its conclusions based on an analysis of U.S. Census Bureau figures. The institute reported that immigration actually increases the labor market opportunities of low-skilled, native workers. This study and many other indicated that immigrants create more jobs than take them away."

[19] The American Immigration Lawyers Association, *America is Immigration* (visited October 6, 1999) <http://www.nonline.com/procon/topics/1998/October/23Oct-01.asp> There is no denying that the numbers of immigrants living in the United States is larger than ever before, but these numbers are relatively small percent of the population. Less than 1.5% of the world's refugee population can be found in the United States. *See also Immigrants Steal Jobs? What a Lie,* WORKERS WORLD NEWSPAPER, March 7, 1996 (visited November 15, 1999) <www.workers.org/immigrants/immig.html>. In response to the claim that immigration, legal or otherwise is at an all-time high and out of control, "[A] little over 1 million immigrants enter the United States every year. This is about the same as the last historical peak earlier in this century."

[20] *See id.* Immigrants collectively earn $240 billion a year and pay $90 billion a year in taxes, and non-refugee immigrants of working age are less prone to welfare than natives. *See also Immigrants Steal Jobs? What a Lie,* WORKERS WORLD NEWSPAPER, March 7, 1996 (visited November 15, 1999) <www.workers.org/immigrants/immig.html>. In response to the claim that immigrants drain state and social services, "[T]he rate of public assistance for immigrants is 2.3%, compared to 3.3% for the native-born populations. In addition, immigrants pay over $70 billion in taxes annually and use only $5.7 billion in public aid.

[21] *See* The American Immigration Lawyers Association, *America is Immigration* (visited October 6, 1999) <http://www.nonline.com/procon/topics/1998/October/23Oct-01.asp> Immigrants want to learn and speak English, after 15 years in America, 75% of Spanish-speaking immigrants speak English. In addition, immigrants and refugees intermarry outside of their group at a rate of 1 in 3. *See id.*

[22] *See id.* In addition to their significant economic contributions, immigrants continually have helped shape and mold the fabric of our society. Immigrants are firm believers in the family unit, they recognize the value of education and the respect the laws as much, if not more, than native born Americans. *See id.*

[23] *See id.*

their rights to protection under employment and labor laws.[24] The Ninth Circuit's analysis in *Kolkka* reflects this evolving case law and its present status.[25]

Part II of this note discusses the facts and procedural history of *Kolkka*. Part III provides a detailed legal and historical analysis of the applicable statutes, case law, and debates surrounding undocumented workers rights. Part IV describes the Ninth Circuit's analysis in *Kolkka*. Part V critiques the Ninth Circuit's holding in *Kolkka* asserting that undocumented workers have the right to vote in union elections. Finally, Part VI concludes that judicial decisions supporting undocumented workers rights as an "employees," outweighs the political opposition to rights for undocumented workers. Therefore, to protect undocumented workers, statutory language should *expressly* state that they are "employees."

II. FACTS AND PROCEDURAL HISTORY

John Kolkka ("Kolkka"), a small business owner, experienced labor problems among the employees working in his furniture manufacturing business, Kolkka Table and Finnish American Saunas ("KTFAS").[26] As a result of this growing dissatisfaction, the employees at KTFAS engaged in a two-day walkout to protest their perceived unfair wages.[27] Immediately thereafter, the employees sought representation by the Carpenters Union Local 2236, United Brotherhood of Carpenters and Joiners of America, and the AFL-CIO ("Union") to negotiate their concerns.[28] The Union conducted organization and

---

[24] *See id.*

[25] *See Kolkka*, 170 F.3d at 93.

[26] *See id.* at 938 - 939 (9th Cir. 1999). John Kolkka is the sole proprietor of a sauna and furniture manufacturing business known as Kolkka Tables and Finnish-American Saunas. Kolkka employs approximately fifty persons in his factory.

[27] *See* Kolkka v. Carpenters Union Local 2236, NLRB JD (SF)-42-98, Cases 20-CA-27284 – 20-CA-27756-1 at 4 (1997).

[28] *See id.* The Union had no difficulty in obtaining sufficient authorization cards to support an election petition, despite the employers numerous violations of the NRLA. *See id.*

election proceedings as defined in the National Labor Relations Act ("NLRA").[29]

In May 1996, the Union filed a petition with the National Labor Relations Board ("NLRB")[30] for the right to hold an election among Kolkka's employees.[31] Shortly after receipt of the petition, Kolkka suspended several employees, suspecting that they were undocumented workers.[32] Kolkka then notified the NLRB that he would grant a short period for the suspended employees to demonstrate proper documentation, and therefore be included in the voting unit.[33] The Union alleged that Kolkka's request that the workers re-verify employee documentation was actually a threat of deportation to discourage employee support for the Union.[34]

Despite the conflicts existing between Kolkka and the Union, the parties entered into negotiations to decide which em-

---

[29] *See Kolkka,* 170 F.3d at 939.

[30] *See id.*

[31] *See id.* The election was for the employees to decide if they wanted to have a union and if this was the union which they wanted to represent them in collective bargaining and other aspects of union representation. *See id.*

[32] *See id.*

[33] *See Kolkka*, 170 F.3d at 939. Under the Immigration Reform and Control Act, workers must provide the employer with the proper documentation, green card, visa or citizenship documentation, to legally be employed in the United States.

[34] *See id.* Nonetheless, Kolkka's employees submitted documentation to verify their legal status, and they remained employees of the company. Kolkka argued that they were discharged because the employer discovered that the four employees did not posses correct social security numbers and were likely to be undocumented aliens not entitled to employment in the United States. *See also* Kolkka v. Carpenters Union Local 2236, NLRB JD (SF)-42-98, Cases 20-CA-27284 – 20-CA-27756-1 at 15 (1997).The employer argues that the four individuals who were fired, were not discharged initially, but were given an opportunity to correct their paperwork. In addition, during the Union organizing, the employer received a letter from the Social Security Administration, Office of Central Records Operations, advising them that more than ten percent of the forms W-2 which were provided by the employees to the Internal Revenue Service for employees for the tax year 1995 showed names or social security numbers which did not agree with SSA records. The employer then tracked the social security numbers of at least some of the employees, determining that nine did not have social security numbers that fell within the range described by the SSA. *See id.*

ployees would comprise the class of employees eligible to vote.[35] Following days of discussion the parties reached an accord and stipulated to the voting class for the election.[36] An election was held and the Union won.[37] However, because four employees were terminated, the Union filed unfair labor practice charges with the NLRB.[38] In defense, Kolkka filed a complaint with the NLRB to set aside the election.[39] Kolkka refused to recognize the Union, arguing that the election was invalid, because six employees allegedly submitted false documentation prior to the election. [40] In response, the Union filed a complaint to enforce the election.[41]

Upon investigating the charges brought by both parties, the NLRB dismissed Kolkka's objections.[42] Nevertheless, Kolkka refused to bargain with the Union, still contending that ineligible workers had voted in the election.[43] The Regional Director filed a complaint with the NLRB on behalf of the General Counsel alleging that Kolkka refused to bargain with the Un-

---

[35] *See Kolkka,* 170 F.3d at 939.

[36] *See id.* "All full-time and regular part-time production and maintenance employees employed by the Employer as it facilities located at 2384 Bay Road and 841 Kaynye Avenue, Redwood City, California including welders... excluding all office clerical employees, guards and supervisors as defined by the act."

[37] *See* Kolkka v. Carpenters Union Local 2236, NLRB JD (SF)-42-98, Cases 20-CA-27284 – 20-CA-27756-1 at 4 (1997). The tally showed that 25 voters had been case for the Union, while 18 were cast against representations. As a result of the tally, on January 8, 1997, a Certification of Representation was issued in favor of the Union. *See id.*

[38] *See id.*

[39] *See Kolkka,* 170 F.3d at 939. (alleging that six employees were ineligible to vote because they were undocumented aliens.)

[40] *See id.*

[41] *See id.*

[42] *See id.* The NLRB ordered Kolkka to certify the Union as the exclusive collection bargaining representative for Kolkka's employees. The NLRB Regional Director upon consideration of Kolkka's objections, recommended that Kolkka's objections be overruled. The NLRB adopted the Regional Director's findings and recommendations. *See id.*

[43] *See Kolkka,* 170 F.3d at 939.

ion in violation of the NLRA.[44] Kolkka admitted to the NLRB that it refused to bargain with the Union, yet continued to contest the certification of the Union.[45] The General Counsel submitted a motion for summary judgment.[46] The NLRB ordered Kolkka to show cause why the General Counsel's motion for summary judgment in favor of the Union should not be granted.[47] Upon considering the parties' motions, the NLRB granted summary judgment for the General Counsel on behalf of the Union concerning the unfair labor practice charge.[48] The NLRB then petitioned the Ninth Circuit to enforce the final order.[49] The United States Court of Appeals for the Ninth Circuit heard arguments.[50]

Kolkka argued that termination of the employees was necessary to avoid sanctions under the Immigration Reform and Control Act ("IRCA"). Specifically, he asserted that he was

---

[44] *See Kolkka*, 170 F.3d at 939. *See also* 29 U.S.C. §158(a)(5) (1998) states that it is a violation by the employer to, "[r]efuse to bargain collectively with representatives of its employees. 29 U.S.C. §158(a)(1) (1998) states that it is a violation for the employer. "To interfere with, restrain, or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain." *See id.*

[45] *See Kolkka*, 170 F.3d at 939. A union is certified as the represented bargaining unit, after they have gathered signatures from 50% plus 1 of the employees. The employer can then choose to recognize the union or the union will have to hold an election to determine their certification. In this case, Kolkka did not choose to recognize the union and the union became recognized through an election winning more than 50% of the employees vote. Kolkka requested an extension to respond to the NLRB's order. Claiming that new evidence indicated that the Union had threatened employees with physical harm or deportation if they did not vote for the Union. The NLRB granted Kolkka five days to demonstrate that the evidence was newly discovered and previously unavailable. Although Kolkka submitted further affidavits, none of them specifically addressed this issue. *See id.*

[46] *See Kolkka*, 170 F.3d at 940.

[47] *See id.*

[48] *See id.*

[49] *See id.* The NLRB petitioned for enforcement of its order finding that employer committed unfair labor practice by refusing to bargain with the Union because some of its employees who had voted for the Union were undocumented aliens. *See also* 29 U.S.C. §160(e); Eads Transfer v. NLRB 989 F.2d 373, 374 (9th Cir. 1993). Both the statute and case law grant the Ninth Circuit Court of Appeals jurisdiction rights over NLRB decisions and the power to enforce a final order from the NLRB. *See id.*

[50] *See Kolkka*, 170 F.3d 937.

required to verify the citizenship status of each employee.[51] Therefore, because he was in compliance with the IRCA, Kolkka argued that he did not violate the NLRA.[52] The IRCA enforces the federal legislative policy prohibiting the employment of undocumented workers by "employer sanctions."[53] IRCA states that an employer is prohibited from hiring applicants unless they have "documentation" showing they are allowed to work in the United States.[54] Thus, Kolkka alleged that the undocumented workers could not be considered employees within the meaning of the NLRA, and therefore, their participation in the election was invalid.[55] Kolkka argued that the IRCA clearly prohibits undocumented workers from being "employees" under the NLRA.[56] Based on these portions of the IRCA and the NLRA, Kolkka argued that because the election was invalid, he did not have to bargain with the Union.[57] Kolkka next argued that the United States Supreme Court's holding in *Sure-Tan, Inc. v. NLRB* was inapplicable in this case.[58] The Court in *Sure-Tan* held that undocumented work-

---

[51] *See id.* at 940 – 948. *See also* U.S.C. § 1324a (1988 & Supp. IV 1992). The Immigration Reform and Control Act of 1986 was designed to penalize an employer for hiring undocumented workers. IRCA requires the employer to check work authorization for employees hired after 1986. Employers are subject to fines or imprisonment if they knowingly hire or employ undocumented workers, or do not check work authorization.

[52] *Id.* at 940 – 948.

[53] 8 U.S.C. § 1324a (1988 & Supp. IV 1992).

[54] *See* Maria L. Ontiveros, *Forging Out Identities as Latino/a Workers*, at 4. "The documents can either show that the person is a U.S. citizen or that... he or she is in a status category that gives him or her the right to work here (i.e. has a visa which allow employment or is a legal, permanent residence or has a green card)... The person must provide to documents: one with a photograph which identifies the worker by name and a second which shows that the named person has the right to work here."

[55] *See Kolkka*, 170 F.3d at 940 - 941.

[56] *See Kolkka,* 170 F.3d at 940.

[57] *See id.*

[58] *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984). The United States Supreme Court held that undocumented alien workers as considered "employees" within the meaning of NLRA, prior to the IRCA. In Sure-Tan, the president of the defendant corporation sent a letter to the Immigration and Naturalization Services (INS) asking the agency to investigate the immigration status of a group of employees who had voted to unionize. Following an INS inquiry, five of the employees left the country to

ers are "employees" within the meaning of the NLRA, and their status is not altered by current immigration laws.[59]

In contrast, the Union contended that the term "employee" under the NLRA includes undocumented workers.[60] The Union argued that the Ninth Circuit must address whether an employer is required to collectively bargain with the employees' elected representative, when six of fifty employees are undocumented workers.[61]

In addition, the Union asserted that Kolkka used the IRCA requirements to pressure undocumented workers, with the threat of deportation, from voting or supporting the Union.[62] Further, the Union argued that it is an unfair labor practice under the NLRA if the employer attempts to interfere with the unionization process through intimidation of its employees.[63]

---

avoid deportation proceedings, but later filed claims against Sure-tan for unfair labor practices. Despite its decisions that the undocumented employees were protected by the NLRA, the Court reveres the Court of Appeal's modification of the NLRB's remedial order, holding that because the workers had left the country, they no longer available to work as required by the statue. *See id.*

[59] *See Kolkka,* 170 F.3d at 940.

[60] *See Sure-Tan*, 583 F.2d at 355. The Court in *Sure-Tan* determined that including undocumented aliens as employees under the NLRA was consistent with the policies of the act as well as the Immigration and Naturalization Act (INA). *See id.*

[61] *See Kolkka*, 170 F.3d at 939. (Due to Kolkka's admitted refusal to bargain with the Union, the court must grant the NLRB's enforcement petition unless Kolkka prevails in its challenge to the validity of the election.)

[62] *See Kolkka*, 170 F.3d at 939. Even thought this issue was not directly discussed on appeal, the Union felt that it was an important political tactic on behalf of the employer to encourage employees not to support the Union. *See also* David Bacon, *The Law That Keeps Workers Chained* (visited October 2, 1999) <http://www/igc.org/dbacon/> (*Quoting* UNITE regional manager Cristina Vasquez., "I see immigration law ... as a tool of the employers. They're able to use immigration law as a weapon to keep workers unorganized, and the INS has helped them use it.") *See also* David Bacon, *Immigrant Workers: Why Some Employees Can't Protest Slave Wages,* PACIFIC NEWS SERVICE (visited October 6, 1999)<http://hepm.org/immigrant_workers.htm> ("Any worker who seeks to organize a union risks retaliations, of course, but immigrant workers face a special threat as employers can and do use immigration law, often with the cooperation of the Immigration and Naturalization Service, to stop them.")

[63] *See Kolkka*, 170 F.3d at 941. *See also* 29 U.S.C. §§ 8(a)(1) and 8(a)(3).

The Ninth Circuit held that participation of undocumented workers in the Union representation election did not invalidate the elections, even though their employee status may have been subject to challenge under the IRCA.[64]

III. BACKGROUND

The central issue in *Kolkka,* whether undocumented workers have the right to vote in union elections, required the Ninth Circuit to interpret the National Labor Relations Act ("NLRA"). Surveying case interpretation of the NLRA, as well as other applicable employment statutes, such as the Fair Labor Standards Act and Title VII of the Civil Rights Act of 1964, the Ninth Circuit attempted to understand the current view of undocumented workers rights under labor and employment laws.[65] In addition to statutory and case analysis, the court recognized the importance of the fair administration of justice and the political implications their holding would have on the rights of undocumented workers.[66]

A. THE NATIONAL LABOR RELATIONS ACT

The NLRA establishes the respective rights of employees, employers and labor organizations.[67] The NLRA defines and protects the rights of employees and employers, encourages collective bargaining, and eliminates certain practices on the part of labor and management that are harmful to the general welfare.[68] The National Labor Relations Board ("NLRB"), established according to the NLRA, functions as a quasi-judicial

---

[64] *See id.*

[65] *See id.*

[66] *See id.*

[67] *See* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD 1 (National Labor Relations Board ed., 1997).

[68] *Id.*

body.[69] Thus, the NLRB interprets rules set forth by the NLRA.[70] In addition, the NLRB functions as a regulatory board for unions and employers dealing with labor organizing and collective bargaining.[71] The NLRB consists of five members appointed by the President.[72] Prior to a NLRB hearing, a charge is heard by an Administrative Law Judge ("ALJ"). The ALJ renders decisions containing findings of fact, conclusions of law, and recommendations as to the disposition of the case.[73] After the ALJ decides a case, upon petition of the losing party, it is then appealed to the NLRB.[74]

During the course of a hearing before an ALJ or the NLRB, the focus on Section 7 of the NLRA.[75] This is the cornerstone of employee rights within the NLRA.[76] It states:

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to

---

[69] *Id.* at 40. ("The NLRB includes the Board, which is composed of five members with their respective staff. The NLRB has two main functions: to conduct representation elections and certify the results, and to prevent employers and unions from engaging in unfair labor practices.").

[70] *See id.*

[71] *See* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 67, at 1. "It is in the national interest of the United States to maintain full production in its economy. Industrial strife among employees, employers, and labor organizations interferes with full production and is contrary to our national interest. Experience has shown that labor disputes can be lessened if the parties involved recognize the legitimate rights of each in t heir relation with one another. To establish these rights under law, Congress enacted the National Labor Relations Act." *See id.*

[72] *See id.* The five appointed members of the NLRB are appointed for five years with the advice and consent of the Senate

[73] *See id.* at 1, 40.

[74] *See id.* at 1 – 2. Appeals from the Board follow to the appropriate Circuit Court of Appeals and then to the United States Supreme Court.

[75] *See id.*

[76] 29 U.S.C. § 7 (1947), Taft-Hartley Act.

the extent that such right may be affected by an agreement requiring members in a labor organization as a condition of employment as authorized in Section 8(a)(3).[77]

These rights are enforced pursuant to 29 U.S.C. §158(a)(1), which prohibits an employer from interfering with, restraining, or coercing employees in exercise of their rights to join or assist a labor organization or to refrain.[78] In addition to granting the right to organize, 29 U.S.C. § 158(a)(5) prohibits the employer from, "[r]efusing to bargain collectively with representatives of its employees."[79]

The NLRA has also established guidelines pursuant to the rights stated above.[80] To unionize, employees must first elect a bargaining representative.[81] Generally, employees select their bargaining representative is through a secret-ballot election conducted by the NLRB.[82] The NLRB may conduct an election only after the employee's file a petition requesting one.[83] More than half of the employees who wish to be represented for collective bargaining must support the petition, stating that their employer declined to voluntarily recognize their employee representative.[84]

Even though the NLRA establishes clear guidelines on the organizing and election process, employers still violate these

---

[77] *See id.*

[78] 29 U.S.C. § 158(a)(5) (1998).

[79] *See id.*

[80] *See* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 67, at 2.

[81] *See id.*

[82] *See id.* at 10.

[83] *See id.* ("A petition for certification of representatives can be filed by an employee or a group of employees or any individual or labor organization acting on their behalf, or it can be filed by an employer.").

[84] *See* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 67, at 10. To hold an election, there must also be a defined bargaining unit. The appropriateness of a bargaining unit is determined on the basis of a community of interest of the employees involved. Those who have the same or substantially similar interest concerning wages, hours, and working conditions are grouped together in a bargaining union. *See id.*

guidelines.[85] A violation of the NLRA is called an unfair labor practice.[86] An unfair labor practice charge must be filed with the appropriate Regional NLRB Office.[87] A charge may be filed by an employee, an employer or a labor organization.[88] The Regional Office must conduct a full investigation of all charges and issue a complaint to the NLRB.[89] The Regional Director of the appropriate Regional Office determines whether an unfair labor practice has occurred.[90] If the Regional Director concludes that an unfair labor practice has occurred by either a union or by an employer, the claim must proceed through appropriate hearing and appeals process.[91] A decision by the NLRB is enforced through a decision by a federal circuit court.[92] A decision from the circuit court can be appealed to the United States Supreme Court.[93]

B. DEFINING "EMPLOYEE"

In *Kolkka,* the threshold question concerned whether undocumented workers are "employees" under the NLRA.[94] Labor and employment statutes do not expressly state whether undocumented workers are "employees."[95] Instead, these statutes only contain general language of "employee" with some

---

[85] *See id.*

[86] *See id.* at 17. "The unfair labor practices of employers are listed in Section 8(a) of the Act; those of labor organizations in Section 8(b)." *Id.*

[87] *See id.* at 45. "The procedure in an unfair labor practice case is begun by the filing of a charge. Like petitions, charge forms, which are also available at Regional Offices – that is, the Regional Office in the area where the alleged unfair labor practice was committed." *Id.*

[88] *See* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 67, at 45.

[89] *See id.* at 46.

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *See id.* at 46.

[94] *See Kolkka,* 170 F.3d at 937.

[95] *See infra* note 187.

detail as to who is excluded.[96] Due to this lack of specificity, "employee" is used as a shorthand label, however, it does not completely or accurately describe the contemporary American workforce.[97]

Because of the lack of clarity as to the status of undocumented workers under current law, it is important to define their rights and to protect them from workplace injustices.[98] Therefore, as the court did in *Kolkka,* this note will analyze the NLRA and other employment statutes to determine if undocumented workers are considered "employees."[99] Because judges interpret the statutes to determine whether employees are protected in particular circumstances, the following statutes discuss how case law has shaped the definition of "employee" to included undocumented workers.

1. The Fair Labor Standards Act & "Employee"

To determine whether the protections of the Fair Labor Standards Act ("FLSA") [100] includes undocumented workers, courts have consistently looked to the NLRA and other employment laws.[101] Conversely, courts interpreting the NLRA have looked to the FLSA.[102]

---

[96] *See id.*

[97] *See* James Nelson, *On Labor Law – Exploring the Definition of an Employee* (visited November 21, 1999) <http://www.sandiego.com/nelson.htm>. "Elusive" is used to describe the definition of an employee. *See id.*

[98] *See id.* ("Regardless of whether: employee or employer; plaintiff's attorney or defense attorney; labor or management, our collective goal is to advise and resolve issues between those who operate business and those through whom labor is provided to operate the business.").

[99] *See Kolkka,* 170 F.3d 937.

[100] 29 U.S.C. §§201-209 (1988 & Supp. IV 1992). The FLSA was enacted in 1938 to set minimum labor standards to ensure that employers did not engage in unfair competition in commerce by exploiting laborers. *See id.*

[101] *See* Patel v. Quality Inn South, 846 F.2d 700, 701 (11th Cir. 1988).

[102] *See id.*

Congress enacted the FLSA in 1938 to eliminate substandard working conditions.[103] The FLSA requires employers to pay their employees a statutorily prescribed minimum wage, and prohibits employers from requiring their employees to work more than forty hours per week unless the employees are compensated with overtime.[104] The FLSA imposes criminal sanctions upon employers who violated FLSA.[105] Further, employees may bring court action against their employer to recover unpaid wages, liquidated damages and attorney's fees.[106]

Specifically, Section 203(g) of FLSA defines, "employee" to include a person who has, "suffered" or is "permitted to work" as an employee, and any employee employed by an employer.[107] Congress intended to broadly define "employee" to include all workers not specifically excepted.[108] Consistent with Congressional intent, the courts have interpreted the FLSA to include undocumented workers in the workplace.[109]

For example, in *Alvarez v. Sanchez*[110] the court was faced with the question of whether undocumented workers could bring an action under the FLSA.[111] In *Alvarez*, a Mexican national commenced an action for underpayment and nonpayment of wages under the FLSA.[112] The court rejected the employer's affirmative defense that the plaintiff was an illegal

---

[103] *See* 29 U.S.C. § 202.

[104] *See* 29 U.S.C. §§ 206, 207(a)(1).

[105] *See id.*

[106] *See* 29 U.S.C. § 216(a),(b).

[107] 29 U.S.C. § 203(g). *See also* 29 U.S.C. § 203(e)(1). ("Except as provided in paragraphs (2), (3) and (4), the term 'employee' means any individual employed by an employer.").

[108] *See Patel*, 846 F.2d at 701. *See also* 29 U.S.C. § 213, for a list of exempt workers under FLSA.

[109] *See* Alvarez v. Sanchez, 105 A.2d 1114 (N.Y. App. Div. 1984). *See also Patel*, 846 F.2d at 701.

[110] *See id.*

[111] *See id.*

[112] *See id.*

alien, and therefore, had no right to recover for work preformed.[113] The court held that immigration status does not affect FLSA coverage.[114] Since the FLSA does not define the term "employee" to expressly exclude illegal aliens, the court held that the plaintiff's status did not preclude her from recovery under the statute.[115] Therefore, the court held that "illegal aliens are not precluded from recovering under FLSA.[116]

The holding in *Alvarez* demonstrates that a party's right to bring a claim under an employment statute is not controlled by their immigration status.[117] In addition, *Alvarez* gives deference to Congress, in stating that Congress did not expressly exclude undocumented workers in their definition of "employee."[118] Therefore, when confronting facts similar to *Kolkka*, a court could rely on *Alvarez* and conclude that undocumented workers have rights as "employees" unless the applicable statute expressly excludes them.[119]

Subsequent to *Alvarez*, the Eleventh Circuit in *Patel v. Quality Inn South*[120] addressed the question of whether an undocumented worker was an "employee" within the meaning of the FLSA.[121] Patel came to the United States from India on a visitor's visa that expired approximately four years prior to his action against his employer for back wages.[122] The employer argued that the IRCA made it unlawful to hire undocumented workers, and therefore that undocumented workers were un-

---

[113] *See id.*

[114] *See Alvarez*, 105 A.2d at 1114.

[115] *See id.*

[116] *See id.*

[117] *Id.*

[118] *See Alvarez*, 105 A.2d at 1114.

[119] *See id.*

[120] *See Patel*, 846 F.2d at 700.

[121] *See id.*

[122] *See id.* at 701.

able to recover under FLSA.[123] Agreeing with the defendant, the district court concluded that the application of FLSA to undocumented workers would conflict with the IRCA.[124] However, the circuit court in *Patel* held that Congress did not explicitly repeal or amend the rights of undocumented workers by enacting IRCA.[125] Since Congress did not intend to repeal or amend employment and labor laws with the passage of IRCA, the court refused to conclude that a later act implicitly repealed or amended an earlier one.[126] Thus, a court should not infer that Congress intended to revoke worker's rights under labor laws with the passage of IRCA.[127] Therefore, the court held that an undocumented worker was an "employee" within the meaning of FLSA.[128] As a result of the court's holding, an undocumented worker could bring an action under the FLSA for unpaid wages and liquidated damages.[129]

In addition, the *Patel* court relied on *Sure-Tan* and its interpretation of undocumented workers under the NLRA stating that, "[C]ongress enacted both the FLSA and the NLRA as part of the social legislation of the 1930's. The two acts have similar objectives. More importantly the two acts similarly define the term 'employee.'"[130] As a result of the similarities between the statutes, courts frequently look to decisions under the NLRA when defining the FLSA's coverage.[131] The Court in *Sure-Tan* held that undocumented workers were covered as

---

[123] *See id.*

[124] *See Patel*, 846 F.2d at 701.

[125] *See id.*

[126] *See id.*

[127] *See id.* In support of its decision to recognize undocumented workers as "employees" under the FLSA, the court stated, "The FLSA's coverage of undocumented workers has a similar effect [as IRCA] in that it offsets what is perhaps the most attractive feature of such workers-their willingness to work for less than the minimum wage... Employers might find it economically advantages to hire and underpay undocumented workers and run the risk of sanctions under the IRCA. *See id.*

[128] *See Patel*, 846 F.2d at 701.

[129] *See id.*

[130] *See id.*

[131] *See id.*

"employees" under the NLRA.[132] Therefore, the court in *Patel* held that IRCA did not change the meaning of FLSA, and further concluded that their holding was consistent with the interpretation of the NLRA.[133] Undocumented workers are, thus, covered as "employees." Regardless of IRCA[134]

The case law described above consistently holds that, undocumented workers are considered "employees" under FLSA.[135] In addition, cases interpreting the FLSA since the passage of IRCA clearly state that IRCA does not change the status of undocumented workers.[136] Most important, due to the statutes' similarities, the NLRA should also be interpreted to include undocumented workers as "employees."[137] Therefore, the court in *Kolkka* would be justified in relying on case law interpreting FLSA as including undocumented workers as "employees."

2. Title VII of the Civil Rights Act of 1964 and "Employee"

In addition to FLSA, courts interpreting the NLRA rely on cases involving Title VII of the Civil Rights Act of 1964 ("Title VII").[138] Congress enacted Title VII to prevent employment discrimination on the basis of race, color, religion, sex, or national origin.[139] Title VII created the Equal Employment Opportunity Commission to enforce the acts provisions.[140] Section 2000(e)(b) of Title VII defines "employee" as "an individual employed by an employer... which includes any individual who is a citizen of the United States employed by an employer in a workplace

---

[132] *See id* (citing Sure-Tan Inc. v. NLRB, 467 U.S. 883 (1984)).

[133] *See id.*

[134] *See Patel*, 846 F.2d at 701.

[135] *See Alvarez*, 105 A.2d at 1114. *See also Patel*, 846 F.2d at 701.

[136] *See Alvarez*, 105 A.2d at 1114.

[137] *See Alvarez*, 105 A.2d at 1114. *See also Patel*, 846 F.2d at 701.

[138] 42 U.S.C. § 2000e (1988 & Supp. IV 1992). *See also* 29 U.S.C. § 2000.

[139] *See* 29 U.S.C. § 2000.

[140] *See id.*

in a foreign country."[141] Like the FLSA, Title VII has been interpreted to protect undocumented workers.

For example, in *EEOC v. Tortilleria La Mejor*[142] the court was presented with the issue of whether Title VII extends coverage to undocumented workers, and further, whether the IRCA altered the coverage of Title VII.[143] Plaintiff Alicia Castrejon was not allowed to return to work after her pregnancy leave, and filed a claim with the EEOC.[144] In response to her claim, the employer moved for dismissal on the grounds that she was not a citizen and therefore not an "employee" under Title VII.[145] The employer further argued that the passage of IRCA implicitly amended Title VII to excluded undocumented workers.[146] The district court deferred to the EEOC's interpretation that Title VII protects undocumented workers.[147] Specifically, Title VII includes exemptions from the general definition of "employee," which does not list undocumented workers[148] Additionally, the court found that if Congress intended for the IRCA to repeal coverage for undocumented workers, it would have done so explicitly.[149] Therefore, the court in *Tortilleria La Mejor* held that undocumented workers are protected under employment laws and that their status was not altered by the passage of IRCA.[150]

Similarly, the court in *EEOC v. Hacienda Hotel*[151] addressed the issue of whether undocumented workers were entitled to

---

[141] *See* 29 U.S.C. § 2000(e)(b)

[142] *See* EEOC v. Tortilleria "La Mejor," 758 F.Supp. 585 (E.D. Cal. 1991).

[143] *See id.* at 586.

[144] *See id.*

[145] *See id.*

[146] *See id.*

[147] *See Tortilleria "La Mejor,"* 758 F.Supp. at 586.

[148] *Id.*

[149] *Id.* at 590-593.

[150] *Id. See also Patel,* 846 F.2d at 701.

[151] *See* EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).

protections under Title VII.[152] In *Hacienda Hotel*, three undocumented workers were discharged because of their pregnancies, religious practices and for complaining about sexual harassment.[153] The employer argued that, even though the employees were subject to discriminatory behavior, they were undocumented workers and therefore had no protections under Title VII.[154] The court deferred to the EEOC's interpretation that undocumented workers fall within the broad category of "individuals" protected under Title VII.[155] Thus, rejecting the employer's claim, the court held that undocumented workers are considered "employees" under Title VII.[156]

3. The National Labor Relations Act and "Employee"

The NLRA governs the relationship between employees, employers, and labor organizations.[157] The NLRA discusses the rights granted to employees and the means by which an employee is protected from unlawful actions of an employer or a labor organization.[158] Therefore, the definition of who is an "employee" is crucial to the efficient application of the NLRA.[159]

Specifically, Section 152(3) of the NLRA states that the term "employee" includes "any employee, and is not limited to the employees of a particular employer."[160] The NLRA specifically exempts workers who are not covered under the NLRA.[161]

---

[152] *See id.* at 1507.

[153] *See id.*

[154] *See id.* at 1517.

[155] *See id.*

[156] *See Hacienda Hotel*, 881 F.2d at 1517.

[157] *See* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 67, at 1.

[158] *See id.*

[159] *See id.*

[160] 29 U.S.C. §152(3)

[161] *See id.*

The list of exemptions does not include undocumented workers.[162]

For example in *In the Matter of Logan & Paxton*,[163] the NLRB dealt with the issue of whether undocumented workers or non-citizens should be disqualified from participation in a Union election.[164] There, the employer refused to recognize to the Union as the exclusive bargaining representative for the employees.[165] The NLRB concluded that the NLRA does not distinguish citizens from non-citizens.[166] Thus, to carry out the purpose of the NLRA, no distinction should be drawn on such a basis.[167] The NLRB noted that the eligibility of the undocumented workers should have been challenged by the employer at the time of the election.[168] Therefore, the status of the undocumented workers did not affect their right to be a member of the voting unit.[169]

Beginning in the early seventies, the NLRB specifically addressed the issue of whether undocumented workers are "employees" within the meaning of the NLRA. For example, in *Lawrence Rigging,* the employer alleged that the employee voting unit was inappropriate because an employee lacked working papers participated in the election.[170] The ALJ did not believe that the union authorization cards signed by undocumented workers were valid because they were not "employees"

---

[162] *See id.* The Act exempts agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA.

[163] *See* In the Matter of Logan & Paxton, 55 NLRB 310 (1944).

[164] *See Logan & Paxton,* 55 NLRB at 315.

[165] *See id.* at 312.

[166] *See id.* at 315.

[167] *See id.*

[168] *See Logan & Paxton,* 55 NLRB at 315.

[169] *See id.*

[170] *See Lawrence Rigging*, 202 NLRB 1094, 1095 (1973).

under the NLRA.[171] The ALJ concluded that undocumented workers were not "employees" within the NLRA, and therefore could not participate in union elections.[172] The NLRB, reversed the ALJ's decision, concluding that undocumented workers have the right to vote in union elections.[173] The NLRB clearly stated that undocumented workers are "employees" within the meaning of the NLRA.[174] Therefore, in *Lawrence Rigging,*[175] the NLRB held that the NLRA does not question the validity of an authorization card of an undocumented worker.[176] Thus, an undocumented worker is an "employee" within the NLRA.[177]

The NLRB further defined "employee" in, *Amay's Bakery & Noodle Co.,*[178] which also discussed the statute of undocumented workers under the NLRA.[179] In *Amay's Bakery,* upon learning that an unionization campaign was in progress, the employer demanded that workers lacking green cards not return to work.[180] Concluding that undocumented workers were "employees" as defined by the NLRA, the NLRB held that such actions by an employer constitute an unfair labor practice.[181] Consequently, the NLRB issued a cease and desist order to prevent the employer from threatening to report the undocumented workers to the Immigration and Naturalization Services ("INS") if the union was elected.[182] Therefore, undocu-

---

[171] *See id.*

[172] *See id.*

[173] *See id.*

[174] *See Lawrence Rigging,* 202 NLRB at 1095.

[175] *See id.* at 1094.

[176] *See id.*

[177] *See id.* at 1095.

[178] *See* Amay's Bakery & Noodle Co., 227 NLRB 214 (1976).

[179] *See id.* at 220.

[180] *See id.*

[181] *See id.*

[182] *See Amay's Bakery & Noodle Co.,* 227 NLRB at 220-221.

mented workers are protected from unfair labor practices committed by their employers.[183]

These NLRB decisions have consistently held that undocumented workers are "employees" within the meaning of the NLRA. Therefore, similar to FLSA and Title VII, the NLRA's broad definition of "employee" includes undocumented workers.[184] However, it does not ultimately protect them from employer abuses and challenges to their employment status under immigration laws.[185]

C. UNDOCUMENTED WORKER'S RIGHT TO VOTE

As discussed above, NLRB decisions have established that undocumented workers are "employees" under the NLRA.[186] However, this rule has not prevented or deterred employers from arguing that undocumented workers do not have a right to vote in the union elections.[187] Therefore, it is important to look beyond the threshold question of whether undocumented workers are "employees," to their participation as "employees" when voting in union elections.

In *Sure-Tan, Inc v. NLRB*,[188] the United States Supreme Court was faced with the question of whether the NLRB's position was correct, that undocumented workers have the rights and protections of the NLRA.[189] In *Sure-Tan,* the employer committed an unfair labor practice by reporting their undocumented workers to the INS in retaliation for participating in union activities.[190] The employer reported undocumented

---

[183] *See id.* at 220.

[184] *See id.*

[185] *See* 29 U.S.C. § 152(3). The Act does not expressly define undocumented workers as "employee."

[186] *See supra* notes 159 – 187 and accompanying text.

[187] *See* Sure-Tan, Inc v. NLRB, 476 U.S. 883 (1984).

[188] *Id.*

[189] *Id.* at 894.

[190] 476 U.S. 883 (1984).

workers who voted for the union to the INS.[191] The employer argued that the INS authorized him to report an undocumented worker.[192] However, the Court concluded that the employer's direct purpose in reporting the workers was to deter union activity, which is an unfair labor practice.[193]

The Court held that as "employees," undocumented workers are entitled to the rights and protections within the NLRA because Congress intended its broad definition of "employee" to protect undocumented workers.[194] Additionally, the Court emphasized that immigration statutes do not prohibit an undocumented worker from voting in a NLRB election, implying that Congress can extend rights to undocumented workers if it so desires.[195]

Finally, the Supreme Court expressed concern that refusing the right to vote to undocumented workers would encourage violations of the United States immigration laws, by tempting companies to hire a majority of undocumented workers to gain immunity from the unionization of its employees.[196] Therefore, the United States Supreme Court in *Sure-Tan* confirmed the NLRB's decisions that undocumented workers are "employees" under the NLRA.[197]

The Supreme Court was also concerned with the dangers undocumented workers face at the hands of employers who

---

[191] *See Sure-Tan,* 476 U.S. at 884.

[192] *See id.*

[193] *See Sure-Tan,* 476 U.S. 883.

[194] *See id.* Treating undocumented workers as employees was consistent with the NLRA's purpose of promoting the collective-bargaining process. Acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally authorized workers; and employment of undocumented workers under such conditions can diminish the effectiveness of labor unions. "[E]mployees do not forfeit their status because their employment violates Federal immigration law." *See id.*

[195] *See* National Labor Relations Board v. Sure-Tan, Inc. 583 F.2d 355 (1978).

[196] *See Sure-Tan,* 476 U.S. 883; *See also Sure-Tan,* 583 F.2d 355.

[197] *See Sure-Tan,* 476 U.S. 883.

believe they are not protected under the NLRA.[198] As a result, there is a constant debate surrounding what is the proper status of undocumented workers under the law.[199] This battle is not only present in the courtroom, but has also found its place in the American political and social arena.[200]

D. FURTHER DEBATE SURROUNDING THE MEANING OF "EMPLOYEE"

In addition to the NLRA, Title VII, and FLSA, the Worker Adjustment and Retraining Notification Act,[201] the Family and Medical Leave Act,[202] the Occupational Safety Health Act,[203] the Americans with Disabilities Act[204] and the Age in Discrimination Employment Act[205] define "employee" as an individual employed by the employer. Each of these acts potentially affect the rights of undocumented workers.[206] However, these acts do not discuss the effect of the worker's immigration status.[207] Furthermore, the IRCA lacks a definition of "em-

---

[198] *See id.*

[199] *See* James Nelson, *On Labor Law – Exploring the Definition of an Employee* (visited November 21, 1999) <http://www.sandiego.com/nelson.htm>.

[200] *Id.*

[201] *See* 29 U.S.C. § 2101(a)(5). "The term 'affected employees' means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. *See id.*

[202] *See* 26 U.S.C. §§ 2601, 101(3). "Employ; employee; state – The terms 'employ,' 'employee,' and 'state' have the same meanings given such terms in subsection (c), (e), and (g) of Section 3 of the Fair Labor Standards Act of 1938. *See id.*

[203] *See* 29 U.S.C. § 615(6) – The term "employee' means an employee of an employer who is employed in a business of his employer which affects commerce. *See id.*

[204] *See* 42 U.S.C. § 12111(4) employee. The term 'employee' means an individual employed by an employer." *See id.*

[205] *See* 29 U.S.C. § 630(f). "The term 'employee' means an individual employed by an employer." *See id.*

[206] *See* James Nelson, *On Labor Law – Exploring the Definition of an Employee* (visited November 21, 1999) <http://www.sandiego.com/nelson.htm>.

[207] *See id. See also* True, Walsh & Miller, *Your Legal Rights As A Foreign National in the United States,* (visited October 6, 1999) <http://www.newamericans.com/citizen/articles/legalrights.htm> ("All persons in the United States, including immigrants, have certain basic rights the ideally, must be respected by the Immigrations

ployee."[208] This definition is crucial to the work status of immigrants.[209] Specifically, a definition of terms "employee," "employer," or "employ," are not found in IRCA.[210]

As a result of unclear statutes, the courts have continually sought an understanding of when undocumented workers are

---

and Naturalization Services. These rights stem from both the United States Constitution and U.S. laws. The following rights include: your rights to refuse entry into your home, your right to remain silent, your rights if you are arrested, your right to sign any document, your right to send your children to public school and, your right to medical treatment.").

[208] *See* 8 U.S.C. § 1324a (1988 & Supp. IV 1992). *See also* Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII,* 20 N.Y.U. REV. L. & SOC. CHANGE 607, 612 - 613 (1994). The Immigration Reform and Control Act of 1986 was designed to penalize an employer for hiring undocumented workers. The employer sanctions provisions, are the first federal laws to make it illegal for employers to hire undocumented workers. Pursuant to IRCA, workers must provide the employer with the proper documentation, green card, visa or citizenship documentation, to legally be employed in the United States. IRCA requires the employer to check work authorization for employees hired after 1986. Employers are subject to fines or imprisonment if they knowingly hire or employ undocumented workers, or do not check work authorization. For undocumented workers, the passage of IRCA has a major affects on their immigration status in employment situation. Specifically, under IRCA, an undocumented worker may be refused employment for lack of proper documentation. *See id.*

[209] *See* 8 U.S.C. § 13249(a). Each and every employer must follow the guidelines of IRCA when hiring employees. As a result, if an employer hires an undocumented worker in violation of IRCA, the employer will not hesitate to terminate the employee for asserting their rights, under the disguises of IRCA. As a result, if undocumented workers begin to assert their rights under the NLRA and join a union, the employer would either terminate them or require the undocumented worker to re-verify documentation for employment under IRCA, in an attempt to discourage union activity. *See id.*

[210] *See* 8 U.S.C. § 13249(a):

> . In general it is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States, an alien, knowing the alien is an unauthorized alien with respect to such employment, or o hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section, or (ii) if the person or entity is an agricultural association, agricultural employer or a farm labor contractor to hire or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

IRCA does define what it means to hire an employee, that the employer must comply with the requirements for lawful employment in the United States. Further, IRCA details an employer sanction for their wrongful act of hiring an unauthorized worker. While IRCA does not define who is an "employee," IRCA also does not expressly exclude undocumented workers as employees. *See id.*

covered by the law.[211] Courts are influenced by statutory interpretation, case law, justice and fairness as well as current political and social debate surrounding undocumented workers.[212] Therefore, is it important to take note of the debate which arises concerning the status of undocumented workers and the true definition of "employee."[213]

The debate surrounding who is an "employee" contains two extreme views.[214] The first view, holds that undocumented workers should be included in the definition of "employee" under statutory law.[215] In contract, the opposite position denies undocumented persons the right to work, and opposes including undocumented workers as "employees."[216]

1. Undocumented Workers Are "Employees"

The first view emphasizes that it is important to define undocumented workers as "employees" under labor and employment laws.[217] The goal is to define undocumented workers as

---

[211] *See* Ontiveros, *supra* note 209, at 612 - 613.

[212] *See id.*

[213] *See id.*

[214] *See* ISBISTER, *supra* note 17, at 25.

[215] *See id.* The liberal view includes grass roots organizations, such as the Citizenship Project, the League of United Latin American Citizens, the American Immigration Lawyers Association, Democrats, as well as many politicians. *See id.*

[216] *See* PEREA, *supra* note 7, at 63, 66 - 68. This view is usually headed by right wing Republicans and "nationalist." A number of citizen organizations, such as Americans for Immigration Control (AIC), are openly pressing for immigration policies limiting immigration form non-Western European countries. In addition, groups such as Save our State (SOS), Stop the Out-of-Control Problems with Immigration Today (STOPIT) and the Voice of Citizens Together, are just a few of the many who oppose immigration. Individual opponents of immigration included politicians, David Duke and Patrick Buchanan. Duke and Buchanan became major players in conservative thought in the 1992 campaign session. Buchanan said, "A con-white majority is envisioned if today's immigration continues." He argues for a "time out for immigration" with a moratorium on all immigration. *See also* Doug Brugge, *The Anti-Immigrant Backlash*, THE PUBLIC EYE (visited November 15, 1999) <www.publiceye.org/magazine/immigran.html> ("The Republican party has scapegoated immigrants for some time, but now immigration has moved to the center of the party's agenda and ha become a platform to advance its political fortunes.").

[217] *See* ISBISTER, *supra* note 17, at 25.

"employees" in recognition of their role in the American work force.[218] Throughout history, undocumented workers have consistently worked in jobs that Americans were not willing to hold.[219] For example, a 1990 census showed a relatively high concentration of undocumented workers in the operators, laborers, fabricators and the service workers group.[220] In addition, undocumented workers make up a majority of the workforce in service and factor jobs.[221]

Since American-born workers will not take them, these jobs are left for undocumented workers, who endure low wages, and poor working conditions.[222] Most undocumented workers have limited English-speaking abilities and constantly fear deportation.[223] As a result, employers typically prefer undocumented workers because their vulnerability keeps them silent about the abuses they endure.[224] The reliance on undocumented workers for their cheap labor and yet denying them political, legal and civil rights creates an exploited, abused class of people.[225] "They are subject to exploitation because they cannot publicly protest unfair treatment without making themselves visible to American authorities and thereby subjecting themselves to deportation."[226] Therefore, this view argues, that it is only fair to recognize undocumented workers for their con-

---

[218] *See id.*

[219] *See id.*

[220] Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2180 (1994). ("These labor-intensive industries generally have low profit margins and thus offer generally low wages to their employees.").

[221] *See* ISBISTER, *supra* note 17, at 84.

[222] *See* Foo, *supra* note 221, at 2180. "Hundreds and thousands of California workers, primarily immigrants, who toil in "sweatshops" in the garment and restaurant industries, have been cheated out of billions of dollars in wages owed to them under federal minimum wage and maximum hour laws."

[223] *See id.*

[224] *See id.* at 2182.

[225] *See* ISBISTER, *supra* note 17, at 201.

[226] *See id.*

tributions to the American economy while granting them well deserved protections under the law.[227]

2. *Undocumented Workers Are Not "Employees"*

The nationalist view argues that undocumented workers do not have the right to be in the United States, and therefore, should not expect protection by any of the rights that American citizens and legal residents enjoy.[228] This theory has been a crucial part of the American anti-immigration movement and legislation as a major topic of public policy.[229]

The Federation for American Immigrant Reform (FAIR) is an active participant in the anti-immigration movement.[230] In a recent advertisement in a mainstream magazine, FAIR stated that "no where are the effects of out-of-control immigration more acutely felt than in the labor market. The original

---

[227] *See id.*

[228] *See id.* at 24 – 25.

[229] *See id.* at 49 – 55. One of the first immigration laws past after the Constitution was enacted in 1789, was the Naturalization Law of 1790... In 1875, Congress passed the first law restricting immigration, it was intended to exclude criminals, Chinese and prostitutes... Federal legislation to restrict and control immigration began in earnest in 1882 with two laws, The Chinese Exclusion Act and the Immigration Act... These acts set up boarders, limits on immigration, barriers to become a citizen, all in an attempt to limit Chinese workers from entering the American labor market.... An act in 1891 established the Bureau of Immigration, the precursor to the present Immigration and Naturalization Service. This was followed by the Quota Law of 1921, the Exclusion act of 1924 of Japanese immigration, and the Immigration Act of 1924.... The next major revision of legislation occurred in 1952, with the passage of the Immigration and nationality, or Walter-McCarran Act.... The history of Immigration law continues to grow from 1965 to present day legislation of the Immigration Reform and Control Act. *See also* Doug Brugge, *The Anti-Immigrant Backlash,* THE PUBLIC EYE (visited November 15, 1999) <www.publiceye.org/magazine/immigran.html>. In the 1965 Act, Congress repudiated the infamous 1952 McCarran-Walter Act, which followed 1920's-era legislation in parceling out immigrants' visas based on country of origin. Specifically, Conservative anti-immigration groups have placed the 1965 Immigration Act at the center of a campaign to promote anti-immigration sentiment in the 1980's and 1990's.

[230] *See* PEREA, *supra* note 3, at 88, 123. *See also* Doug Brugge, *The Anti-Immigrant Backlash,* THE PUBLIC EYE (visited November 15, 1999) <www.publiceye.org/magazine/immigran.html>. ("The Federation for American Immigration Reform is directly tied to more virulent racists by the funding it has received from the Pioneer Fund, totaling $295,000.").

intent or our nation's immigration laws... was to protect the American workers."[231]

In addition to FAIR, there have been many other nationalist campaigns to restrict the rights of undocumented workers, non-citizens and immigrants.[232] For example, California's Proposition 187, which in the words of its supporters was designed to "Save Our State" by preventing "illegal aliens in the United States from receiving benefits or public services in the State of California."[233] The anti-immigrant sentiment expressed in California quickly spread across the nation, as other states, some congressional representatives, and presidential candidates began to campaign against granting immigrants public rights and benefits.[234]

This view supports the legislators and voters' use of the political process to restrict the rights of undocumented workers.[235] Because it deems immigrants and undocumented workers as the perceived enemies of the American way of life.[236] In addition, the popular media and internet have also played a vital role of bringing the nationalist view to Americans throughout the country.[237] As a result, intense opposition

---

[231] *See id.*

[232] *See* PEREA, *supra* note 7, at 61.

[233] *See id.*

[234] *Id.* "Traditional definitions of who deserves to be an American and receive the benefits of the social contract are being challenged and redefined in unprecedented ways." *See also* Doug Brugge, *The Anti-Immigrant Backlash,* THE PUBLIC EYE (visited November 15, 1999) <www.publiceye.org/magazine/immigran.html> ("Many persons who have spoken and written in favor of restricting of immigration, have laid great stress upon the evils to society arising from immigration. They have claimed that disease, pauperism, crime and vice have been greatly increased through the incoming of the immigrants. Perhaps no other phase of the question has aroused so keen feeling, and yet perhaps on no other phase of the question has there been so little accurate information").

[235] *See* PEREA, *supra* note 7, at 1.

[236] *See id.*

[237] *See id.*

towards undocumented workers continues to grow in America.[238]

The political and social debate discussed above affects both public opinion and decisions of the courts when assessing the rights of undocumented workers. As a result, the decisions of the courts play a vital role in separating political pressure from justice. The Ninth Circuit in *Kolkka* was faced with case precedent interpreting the NLRA and other employment statutes to include undocumented workers as "employees."[239] However, the Ninth Circuit also recognized that the rights of undocumented workers is a popular political topic.[240] As a result, the Ninth Circuit heard the facts and the legal arguments in *Kolkka* but also confronted the political and social impact of their decision.[241]

IV. THE NINTH CIRCUIT'S ANALYSIS

The Ninth Circuit held that the participation of undocumented workers in union representation elections did not invalidate the election, even if their employee status could have challenged under the IRCA.[242]

First, the Ninth Circuit discussed whether the passage of the IRCA changed the meaning of "employee" in the NLRA to include undocumented workers.[243] Kolkka argued that the IRCA, which prohibits the employment of undocumented workers, prohibits them from being considered "employees" under the NLRA. The Ninth Circuit disagreed with Kolkka, holding that the plain language of the NLRA does not exclude undocumented workers.[244] The court relied on the legislative

---

[238] *See id.*

[239] *See Kolkka,* 170 F.3d at 939.

[240] *See id.*

[241] *See id.*

[242] *See id.*

[243] *Id.* at 940.

[244] *See Kolkka,* 170 F.3d at 941.

history of the IRCA, which indicated a deliberate choice not to limit the meaning or scope of "employee" under NLRA.[245]

The Ninth Circuit further examined the statutory construction of the NLRA and the IRCA to asses if the IRCA altered the meaning of the NLRA.[246] The court rejected Kolkka's claim that the IRCA implicitly repealed the NLRA definition of "employee."[247] Noting that Congress did not modify the NLRA after it adopted the IRCA, the Ninth Circuit stated that the repeal by implication occurs only in cases of irreconcilable conflict,[248] or where the later act covers the whole subject of the earlier one.[249] This argument is heavily disfavored. Since neither of the two categories applied to Kolkka's situation the court held that there was not sufficient evidence to establish either type of repeal by implication.[250]

Finally, the Ninth Circuit discussed the implications of holding that the IRCA altered the meaning of the NLRA.[251] The Court concluded that supporting Kolkka's argument that the IRCA altered the meaning of the NLRA would allow, an employer to avoid its obligations under both NLRA and the

---

[245] *See id.* The House Judiciary Committee Report on IRCA, was, "not intended to limit in any way the scope of the term 'employee' under the NLRA or the 'rights and protections stated in Sections 7 and 8." H.R. REP. NO. 99-682(I) 99th Cong., 2d Sess. at 58, reprinted in 1986 U.S.C.C.A.N. 5649, 5662. *See also* Joseph J. Bassano, Richard B. Gallagher, Timothy M. Hall, and Gray A. Hughes, *Labor Legislation*, 3B AM. JUR. 2.D ALIENS AND CITIZENS SECTION 2357 (1998). ("The House Committee on the Judiciary indicated in the Legislative history of IRCA of 1986 that the employer sanctions provisions were not intended to 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... to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies, or for engaging in activities protected by existing law").

[246] *See Kolkka,* 170 F.3d at 941.

[247] *See id.*

[248] *See id* (citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976)).

[249] *See id.*

[250] *See Kolkka,* 170 F.3d at 941.

[251] *See id.*

IRCA.[252] Thus, if the employer has not discharged its responsibilities under the IRCA prior to union election, the employer may not attempt to disqualify its employees from voting even if subsequent inquiry shows them to be subject to termination as unauthorized workers.[253]

The Ninth Circuit determined whether the undocumented workers were eligible to vote in the Union election.[254] Kolkka asserted that the Union election was invalid because undocumented workers participated.[255] Kolkka argued that the passage of the IRCA altered the NLRA's definition of "employee" for the purpose of determining who was eligible to vote in the election.[256] Declining to adopt Kolkka's interpretation of the IRCA, the Ninth Circuit held that the IRCA did not alter the NLRA definition of "employee" to determine who was eligible to vote in the election.[257] The court noted that the, "[r]elevant inquiry is not whether a particular individual may have been legally subject to termination on the date of the election, but

---

[252] *See id.* ("An employer would be rewarded for violating IRCA through the hiring and continued employment of unauthorized aliens because their participation in any union election would defeat that election, even if it was otherwise valid under the NLRA. Employers with undocumented alien employees could manipulate election results either post hoc, by discretionary modifying the composition of the voting unit, or prior to election, by using the threat of deportation to discourage pro-union support").

[253] *See id.* at 942.

[254] *See Kolkka,* 170 F.3d at 939.

[255] *Id.*

[256] *Id.* at 940.

[257] *See* 29 U.S.C. § 152(3) "The term 'employee' shall include any employee, and shall not limited to the employees of a particular employer." *See also Sure-Tan,* 467 U.S. at 891. The Court held that undocumented aliens are employees under the NLRA. *See also* NLRB v. Apollo Tire Co., 604 F.2d 1180, 1182-1183 (9th Cir. 1979) Holding that undocumented alien workers are considered employees under the NLRA. *See also Kolkka,* 170 F.3d at 940. The NLRB felt that the relevant inquiry was whether at the time of their participation in the election, he or she was in fact and employee as defined in the NLRA, not whether the person was legally subject to termination at the time of the election. *See id* (citing 29 U.S.C. § 152(3), Shoreline Enterprises of America, Inc. v. NLRB, 262 F.2d 933, 944 (5th Cir. 1959) (holding that eligibility to vote as determined under NLRA when one is an employee, depends on whether an employee is sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the selection of a collective bargaining agent.)).

whether at the time of their participation in the election, he or she was in fact an employee as defined in the NLRA."[258]

The court further discussed the eligibility to vote in a union organizing election.[259] Eligibility to vote in union elections "depends on whether an employee is sufficiently concerned with the terms and conditions of employment in a unit warrant his participation in the selection of a collective bargaining unit."[260] The court held that an employee's eligibility is not determined by documentation or status as a citizen, but on rights as an employee concerned with the terms and conditions of employment.[261] Therefore, the Ninth Circuit held that undocumented workers were eligible to vote in the union election as "employees" within the NLRA.[262]

The next question was whether the election was held within the established guidelines of the NLRA.[263] Kolkka argued that the election was invalid because the undocumented workers were allowed to vote as members of the voting unit.[264] The Ninth Circuit affirmed its "date certain test," which establishes eligibility to vote.[265] The "date certain" test requires that a person employed in a bargaining unit during the eligibility period is eligible on the date of the election to vote.[266] The Ninth Circuit concluded that Kolkka established a policy of employing workers with questionable documentation during the date certain test period.[267] Therefore, since Kolkka did not give his

---

[258] *See Kolkka*, 170 F.3d at 940.

[259] *See id.*

[260] *See id.*

[261] *See id.*

[262] *See Kolkka*, 170 F.3d at 940.

[263] *See id.*

[264] *See id.*

[265] *See id* (citing NLRB v. S.R.D.C., Inc., 45 F.3d 328, 331 (9th Cir. 1995)).

[266] *See Kolkka*, 170 F.3d at 940 (citing NLRB v. S.R.D.C., 45 F.3d 328, 331 (9th Cir. 1995)).

[267] *See Kolkka*, 170 F.3d at 940.

employees a date certain of termination, their participation in the election was valid, regardless of the employee's status.[268]

In conclusion, the Ninth Circuit granted the petition for enforcement of the NLRB's decision, holding that IRCA did not alter the meaning of "employee" within the NLRA and that undocumented workers are eligible to vote in union elections as "employees."[269]

V. CRITIQUE

A. THE NINTH CIRCUIT WAS CORRECT IN *KOLKKA*

In *Kolkka*, the Ninth Circuit affirmed that IRCA did not alter the meaning and protections of undocumented workers as "employees" under the NLRA.[270] The Ninth Circuit's holding is consistent with the NLRB's practice of recognizing undocumented workers as "employees" under NLRA.[271] In addition, the Ninth Circuit's holding is consistent with decisions from many other federal circuits granting undocumented workers protections under labor and employment laws.[272]

The Ninth Circuit's holding is further supported by *Sure-Tan*. In *Sure-Tan*, the Supreme Court transformed the NLRA into a bill of rights for American working people, by concluding that the protections of the NLRA apply to undocumented workers.[273] As a result, the Court held that a company commits an unfair labor practice by reporting undocumented

---

[268] *See id.*

[269] *See id.* at 942.

[270] *See id.* at 940.

[271] *See* Jose A. Barcamonte, *The National Labor Relations Act and Undocumented Workers: The De-Alienation of American Labor*, 21 SAN DIEGO L. REV. 29, 42-43 (1983). The NLRB has recognized the "employee" status of alien, and their right to vote as early as 1949. The Board noted that the aliens' right to vote was too well established to warrant justification. *See id.*

[272] *See supra* notes 151, 174, 188, and accompanying text.

[273] *See* Sure-Tan, Inc., v. NLRB, 476 U.S. 883 (1984).

workers upon their attempts to unionize.[274] Thus, Kolkka's refusal to collectively bargain with the elected constitutes resulted in an unfair labor practice.[275]

The Ninth Circuit was concerned that undocumented workers would be subject to manipulation and threats of deportation by their employers if they attempt to assert their rights.[276] To address that fear, the Ninth Circuit held that "[e]mployers with undocumented alien employees could manipulate election results... by using the threat of deportation to discourage pro-union support."[277] Therefore, to protect undocumented workers, the Ninth Circuit held that undocumented workers are an "employee" within the NLRA[278]

Even though undocumented workers are "employees" and are protected by the NLRA, the Ninth Circuit recognized that undocumented workers will likely not seek union representation or complain about low wages, poor working conditions and workplace injustices, for fear of losing their job.[279] The more likely result is that an undocumented worker will not vote or not get involved in a union. Ultimately, most undocumented workers will simply try to find a new job.[280] Therefore, it is highly unlikely that undocumented workers will assert their rights as established by the Ninth Circuit. As a result, employers will continue to be rewarded for violating the rights of

---

[274] *See id.* Therefore, the company would violate Section 158(a)(5) and possibly Section 158(a)(3) as well.

[275] *See Kolkka,* 170 F.3d at 940.

[276] *See id.*

[277] *See id.* at 941.

[278] Since legislation does not bestow "employee" rights to undocumented workers, they must rely on relevant case law that implicitly grants "employee" rights to these workers.

[279] It is important to note the limitations undocumented workers face. Undocumented workers are much more dependant on their paychecks then the average worker. Most likely, undocumented workers have limited English skills, and do not know how or where they can assert their rights. Clearly, undocumented workers do not have the same ability as other workers or their employers to assert their rights at work or in a courtroom.

[280] *See Kolkka,* 170 F.3d at 941.

undocumented workers. By rewarding employers, "nationalists" gain political clout and power in the debate concerning the status of undocumented workers.

The court in *Kolkka*, just as courts throughout America, are continually affected by political and social debates surrounding the rights of undocumented workers.[281] The current public opinion has been swayed by conservative advertisements and anti-immigrant organizations.[282] As a result, the historic view of immigrants viewed as future citizens has been shattered and replaced with immigrants as present enemy, and seen as the cause of economic hardship, loss of jobs and public services.[283]

The Ninth Circuit was aware of this political climate, which makes conditions for immigrants almost intolerable, forcing them into undesirable jobs with even lower pay and no benefits.[284] By victimizing this group, the government, corporations and employers drive wages down for all employees, and keep new workers out of the Unions.[285] The court in *Kolkka*, understood these dangers above, implicitly suggested that undocumented workers would be without any protections if the court

---

[281] *See* PEREA, *supra* note 7, at 17. *See also Immigrants Steal Jobs? What a Lie,* WORKERS WORLD NEWSPAPER, March 7, 1996 (visiting November 15, 1999) <www.workers.org/immigrants/
immig.html> The political climate results in a negative impact on the labor unions and the rights of undocumented workers to be "employees." This is further compounded by the American government and corporations. The United States government and corporations rely on immigration, as a cheap labor pool of workers, allowing them to pay undocumented workers wages that are lower than minimum wage as well as denying them safe working conditions. This reduces the costs of labor, which, in turn, reducing the costs of the product while simultaneously increasing profits for American corporations. *See id.*

[282] *See* ISBISTER, *supra* note 17, at 22 – 24. *See also* Doug Brugge, *The Anti-Immigrant Backlash,* THE PUBLIC EYE (visited November 15, 1999) <www.publiceye.org/magazine/immigran.html>.

[283] *See id.*

[284] *See Immigrants Steal Jobs? What a Lie,* WORKERS WORLD NEWSPAPER, March 7, 1996 (visited November 15, 1999) <www.workers.org/immigrants/immig.html>.

[285] *See Id. See also* Kimberly Hayes Taylor, at 1 *Local Hospitality Industry Among Many Dependant Upon Immigrants,* STAR TRIBUNE, November 15, 1999.

allowed the employer to ignore their duty under the NLRA in hiding behind the IRCA.[286]

The real concern, which the court in *Kolkka* recognized, is what rights undocumented workers should have and are they "employees?" The nationalist answers to these questions are implausible.[287] However, the court in *Kolkka* was able to focus on protecting undocumented workers despite the political pressures. Presently, undocumented workers rights are established on a case-by-case basis.[288] However, without express protection in labor and employment laws, these workers do not enjoy the benefit of being an "employee" with decent wages, a safe working environment, and better working conditions.[289] Ultimately, expressly defining undocumented workers as "employees" would begin to eliminate obvious exploitation of undocumented workers. Cases such as *Kolkka,* support the above solution, recognizing undocumented workers as employees with the right to vote. Clearly, then nationalist thought is contrary to the holding in *Kolkka* and the movement in the federal courts.

The Ninth Circuit was correct in recognizing these possible dangers to undocumented workers as well as rejecting the "nationalist" thought. However, the court should have done more; it should have called upon the legislature to expressly define undocumented workers as "employees" under labor and employment laws. Once the legislature defines undocumented workers as "employees," administrative agencies would be able to investigate, educate, and deter employers from taking advantage of the status of undocumented workers. Due to the Court's failure to call upon the legislature, undocumented

---

[286] *See Kolkka*, 170 F.3d at 940.

[287] *See* ISBISTER, *supra* note 17, at 25.

[288] *See supra*, notes 101, 109, 141, 151, 166, 172, 180, 188 and accompanying text.

[289] *See* Ontiveros, *supra* note 209, at 607.

workers will continue to struggle with powerful employers for their rights.[290]

Kolkka was not the first case to hold that undocumented workers are "employees" under NLRA or grant rights to vote in union elections.[291] Even thought the court did not call upon the legislature to clarify the that undocumented workers are "employees," the Ninth Circuit expanded the rights of undocumented workers by holding that undocumented workers may participate in union representation elections, even if their employee status is subject to challenge under the IRCA.[292] *Kolkka* is another important step in the continuing legal battles between employers, labor unions, and undocumented workers, and the NLRB's struggle to deal with this issue.[293]

---

[290] For example, employers will continue to pay them low wages knowing that they will not complain. Then, if an undocumented worker attempts to assert their rights or unionize, the employer will threaten deportation or termination. Furthermore, employers such as *Kolkka*, could threaten to report undocumented workers, under the guises of IRCA, and manipulate union support. Hiding behind IRCA, employers will continue to assert that the IRCA implicitly changed the employment status of undocumented workers under every employment and labor law. Finally, undocumented workers face extreme limitations in filing a claim and hiring an attorney, due to their limited language skills, fears of deportation, and access to legal aid. As a result, employers have the comfort of knowing that they workers have a limited ability of asserting their rights in the court room. Therefore, the holding in *Kolkka*, recognizes the possibility of rewarding employers, while neglecting to call upon the Legislature to put an end to the abuses undocumented workers face. *See id.*

[291] *See* Barcamonte, *supra* note 274, at 29, 45- 46.

[292] *See Kolkka,* 170 F.3d at 941.

[293] *See* Littler Mendelson, *NLRB General Counsel Shares View on Undocumented Aliens*. 8 NO. 21 CAL. EMPLOYMENT L. MONITOR 3 (1999). NLRB's General Counsel, Fred Feinstein, issued a memorandum to his subordinates with instructions on how to handle reinstatement and back pay issues for undocumented aliens. The memorandum discusses the NLRB and IRCA, offering a serious of scenarios involving undocumented workers. "For the past several years, the NLRB has struggled to determine the appropriate remedy for 'undocumented' aliens – person who are living and working in the United States without proper visa or work authorization... NLRB attorneys will seek reinstatement and back pay for undocumented aliens unless you show through independent evidence that the employee's documentation was fraudulent or that his work authorization has lapsed. Even then, you would be liable for the unfair labor practice and back pay up to that date." *See id.*

B. THE NINTH CIRCUIT SHOULD HAVE ENCOURAGED LEGISLATION TO *EXPRESSLY* STATE THAT UNDOCUMENTED WORKERS ARE "EMPLOYEES"

Undocumented workers need protection from unfair labor practices by employers and workplace injustices. Currently, the only protection against unfair labor practices is found *implicitly* in the NLRA, Title VII of the Civil Rights Act, and FLSA.[294] None of these employment or labor law statute *expressly* define undocumented workers as "employees." To increase protection for undocumented workers there must be a federal statute which defines them as "employees."

Congress has attempted, several times, to provide a definition of the term "employee."[295] However, Congress continually uses a general definition of "employee" instead[296] The general definition does not *expressly* protect undocumented workers. As federal courts have consistently held that employment and labor laws protect undocumented workers, the Ninth Circuit should have taken the progressive step of urging Congress to *expressly* include undocumented workers in the definition.

C. PROPOSED AMENDMENT TO FEDERAL LABOR AND EMPLOYMENT LEGISLATION DEFINITION OF "EMPLOYEE"

Employers often cite employment and labor law definitions of "employee" to determine that undocumented workers are not "employees."[297] In addition, employers argue that since the IRCA forbids the employment of undocumented workers, IRCA implicitly excluding undocumented workers as "employees."[298] Thus, employers assert that they are not required to treat un-

---

[294] *See supra* notes 218 - 228 and accompanying text.

[295] *See supra* notes 202 - 212 and accompanying text.

[296] *See* James Nelson, *On Labor Law – Exploring the Definition of an Employee* (visited November 21, 1999) <http://www.sandiego.com/nelson.htm>.

[297] *See supra* notes 218 - 228 and accompanying text.

[298] *See supra* notes 289.

documented workers as "employees."[299] Therefore, labor and employment statutes which were intended to be read broadly, are being interpreted by employers as excluding undocumented workers.[300]

In response to the confusion of who is an "employee," Congress must clarify this broad definition. The following definition is a proposed amendment to the current definition of "employee."

> *Employee - any worker not specifically excluded under this statute, who works, suffers or is held out as an employee by the employer. Employment status is not altered by citizenship or immigration status.*

This proposed definition will not change the broad definition found in current federal employment and labor law statute. Instead, it will add clarity to the "employment" status of undocumented workers whose immigration status is questionable under the IRCA or other immigration laws.[301]

The first sentence of the suggested definition is a synthesis of discussed labor and employment statutes that have previously defined "employee."[302] Specifically, the first sentence states that any worker not expressly excluded by statute. This echoes the already existing lists of excluded employees, and is consistent with Congresses' practice of granting a broad definition and listing specific employees to be excluded.

The second sentence contains the necessary clarification of the statutes of undocumented workers under labor laws, employment laws and immigration laws. Specifically, employment status is not altered by citizenship or immigration status, and codifies the statutory interpretation described in

---

[299] *See id.*

[300] *See id.*

[301] IRCA does not provide a definition of "employee."

[302] *See supra* note 298.

Part III of this note.[303] In addition, this language would eliminate any fears that employers would exploit employees with questionable immigration status, and avoid civil liability because of unclear law. Therefore, the second sentence would offer statutory clarity which would result in more effective enforcement of the laws. The proposed amendment offers the needed clarity and protection which undocumented workers need.

VI. CONCLUSION

Current case law has developed avenues for undocumented workers to assert their rights. For example, in *Kolkka*, the Ninth Circuit held that undocumented workers are "employees" under the National Labor Relations Act. Therefore, undocumented workers have the right to vote in Union elections. In conclusion, the legislature should adopt the courts' holdings by amending labor and employment laws to *expressly* include undocumented workers as "employees." The amendment proposed in this Note provides needed certainty in the definition of "employee."

Beth Wolf Mora[*]

---

[303] *See supra* notes 100 - 190 and accompanying text.

[*] J.D., Golden Gate University School of Law, 2000. Sonoma State University, B.A. with Distinctions, 1997. I feel passionately about this note and the employment and labor rights of undocumented and documented workers. Therefore, I would like to thank specific people for their help and support. First, Scott Sanford, my Journal Editor for his hard work, patients and commitment to getting this note published. Thomas Murphy, my Associated Editor for his insightful comments and input. Professor Maria Ontiveros, my Faculty Advisor, for her inspiring dedication to the rights of immigrants and workers, which encouraged me to write this note. Dan Mora, my father-in-law, whose hard work and dedication to his job taught me the "human" aspect of labor and the importance of the right to unionize and participate in union activities. My parents, family and friends for their support throughout the writing process and law school. Finally, and most important, Jeff Mora, my husband. I would like to thank Jeff for his unconditional love, for the many weekends we spent apart while I was writing and for the countless evenings he patiently listened through reads of the note. Thank you to all of my friends and family, I appreciate your love and support, and I hope that you and all of the readers enjoy this note as much as I enjoyed writing it.