Bryan Schwartz is the Chair of the State Bar of California's Labor and Employment Law Section. He also serves on the boards of the California Employment Lawyers Association, the Legal Aid Society-Employment Law Center, and the Foundation for Advocacy Inclusion and Resources (FAIR). His Oakland-based firm (www.BryanSchwartzLaw.com) represents employees in individual, class, and multi-plaintiff actions prosecuting discrimination, whistleblower, wage and hour, and other workers' rights claims in federal and state court and a variety of administrative venues.

Message From the Chair

By Bryan Schwartz

DOING OUR JOBS FOR IMMIGRANT WORKERS AND THEIR CALIFORNIA EMPLOYERS

According to the nonpartisan Public Policy Institute of California, about 27% of California's population is foreign-born—more than 10 million people—and 80% are working-age adults. In total, a third of California workers are immigrants, and nearly half of California's kids have at least one immigrant parent. Undocumented immigrants are 10% of California's workforce, according to our State's Controller, Betty Yee—with an impact of more than $180 billion a year in our state's economy.

Given the profound force that immigrants, both documented and undocumented, represent in California's workplaces, each of us must consider the lawful way to treat immigrant workers. It is, or should be, in our basic job description as California labor and employment attorneys, on both the plaintiffs' and defense side of the practice.

Here are some key facts to know and advise your clients, specifically as to undocumented workers:

Undocumented Workers Are Protected Against Discrimination

The Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act protect against discrimination, including national origin-based discrimination and harassment—and those protections extend to all immigrant employees, including undocumented workers. Employers cannot rely on after-acquired evidence or the "unclean hands" defense as a complete bar to a worker's relief under the anti-discrimination laws. *See Salas v. Sierra Chemical Co.*, 59 Cal. 4th 407 (2014) *cert. denied*, 135 S. Ct. 755; *see also Rivera v. NIBCO*, 364 F.3d 1057 (9th Cir. 2004) (precluding discovery on immigration status in early stages of Title VII and FEHA litigation, and doubting undocumented workers are precluded from Title VII relief); *E.E.O.C. v. Tortilleria "La Mejor"*, 758 F. Supp. 585, 590 (E.D. Cal. 1991) (finding that undocumented workers are protected under Title VII).

Under *Salas*, undocumented workers are entitled to a lost pay award under the anti-discrimination statutes in the period before the employer's discovery of the worker's immigration status (including the post-termination period before discovery of immigration status). In situations where an employer knowingly hires or continues to employ an unauthorized worker, federal law does not preempt lost wages remedies for violations of state laws like FEHA.

California Protections for Undocumented Workers Are Not Preempted

Salas held that California's Senate Bill 1818, enacted in 2002, extending employment and labor protections to California workers regardless of immigration status, is not preempted by the federal Immigration Reform and Control Act of 1986 (8 U.S.C. §§ 1101, et seq.) (IRCA). The California Supreme Court explained:

> [*N*]*ot* allowing unauthorized workers to obtain state remedies for unlawful discharge, including . . . lost wages [earned before the unlawful immigration status is discovered], would effectively immunize *employers* that, in violation of fundamental state policy, discriminate against their workers on grounds such as disability or race, retaliate against workers who seek compensation for disabling workplace injuries, or fail to pay the wages that state law requires. The resulting lower employment costs would encourage employers to hire workers known or suspected to be unauthorized aliens, contrary to the federal law's purpose of eliminating employers' economic incentives to hire such workers by subjecting employers to civil as well as criminal penalties. . . . It would frustrate rather than advance the policies underlying federal immigration law to leave unauthorized alien workers so bereft of state labor law protections that employers

have a strong incentive to "look the other way" and exploit a black market for illegal labor.

Salas, 59 Cal. 4th at 426 (emphasis in original).

Undocumented Workers Remain Protected Under Most Worker-Protection Statutes

Under reasoning like that in *Salas*, undocumented workers are likely entitled to most labor and employment-related relief available to any other employees. *See, e.g.*:

- *Bay Area Roofers Health & Welfare Trust v. Sun Life Assurance Co. of Canada*, 73 F. Supp. 3d 1154 (N.D. Cal. 2014) (granting summary judgment against insurer as to its contractual obligation to reimburse for medical care by undocumented workers, explaining "California Government Code section 7285 makes the protections and benefits offered to employees by private employers, excepting back pay, equally available to undocumented workers");
- Labor Code § 3351(a) (defining "employee" for purposes of worker's compensation law as "every person in the service of an employer . . . whether lawfully or unlawfully employed, and includes: (1) Aliens");
- Labor Code § 1171.5(a) (extending all protections under state law to those who have "been employed" in this state, which includes "all individuals regardless of immigration status");
- *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (holding that the National Labor Relations Act applies to unfair labor practices committed against undocumented workers);
- *Singh v. Jutla & C.D. & R.'s Oil, Inc.*, 214 F. Supp. 2d 1056, 1058 (N.D. Cal. 2002) (holding that the Fair Labor Standards Act's anti-retaliation provisions apply to undocumented workers);
- *NLRB v. C & C Roofing Supply, Inc.*, 569 F.3d 1096, 1099 (9th Cir. 2009) (finding that undocumented workers can receive liquidated damages pursuant to a wrongful termination claim, and that such damages do not run afoul of IRCA);
- *NLRB v. Kolkka*, 170 F.3d 937 (9th Cir. 1999) (finding that undocumented workers have the right to vote in union elections);
- *Ulin v. ALAEA-72, Inc.*, No. C-09-3160-EDL, 2011 WL 723617 (N.D. Cal. Feb. 23, 2011) (stating that IRCA's purpose "is not to prevent aliens from being compensated for work already performed").

Immigration Status Should Not Be a Target of Employment Discovery Disputes

More than a dozen years ago, the Ninth Circuit case of *Rivera v. NIBCO* upheld a protective order precluding an employer from obtaining discovery on immigration status. In recent months, the more conservative Fifth Circuit, in *Cazorla v. Koch Foods of Mississippi*, 838 F.3d 540 (5th Cir. 2016), held that the EEOC did not need to divulge immigration status-related information regarding a class of Hispanic workers alleging discrimination at a poultry plant. The employer had alleged that immigration-related concerns motivated the plaintiffs' discrimination claims—*i.e.*, that they brought discrimination claims to try to obtain U visas (for victims of crimes and their immediate family members)—and the lower court had required some discovery of the sensitive information, subject to a protective order. The Fifth Circuit reversed, holding that "allowing discovery of U visa information may have a chilling effect extending well beyond this case, imperiling important public purposes. . . . [H]aving weighed *all* of the problems U visa discovery may cause against [the employer's] admittedly significant interest in obtaining the discovery, we are compelled to conclude that the discovery the district court approved would impose an undue burden and must be redefined." *Id.* at 564.

California Has Implemented New Protections for Undocumented Workers

In the last three years, California has enacted extensive new protections, especially prohibiting retaliation against undocumented workers. After an undocumented worker files a Labor Code or local ordinance wage complaint in good faith, Labor Code § 1019 makes it unlawful for an employer to request more or different work authorization documents, or to threaten to file or file a report or complaint with federal agencies or immigration authorities. Section 1019 creates a rebuttable presumption in favor of the employee's retaliation claim if the employer engages in an unfair immigration-related practice within ninety days after an undocumented worker's exercise of such rights. The penalties for non-compliance are serious—suspension of a business license among them.

Labor Code § 244(b) extends the protection against retaliation to all Labor Code, Government Code, and Civil Code claims and prohibits retaliation by reporting suspected citizenship or immigration status not only of the employee, prospective employee, or former employee, but also of his or her family members.

Labor Code §§ 98.6 and 1102.5, which are whistleblower protection statutes, were amended to encompass protection from retaliation against family members of someone who engaged in or is perceived to have engaged in protected activities. The statutes also extend protection to encompass labor contractors or staffing firms, such as those that employ many undocumented workers.

Labor Code § 2814 strictly limits the timing of employers' usage of the E-Verify system, imposing up to $10,000 in penalties for unlawful use of the E-Verify system to check potential employees', employees', and ex-employees' employment authorization status other than as required by the federal statute.

A new statute effective this year, Labor Code § 1019.1, makes it unlawful for an employee to request more or different documents than required under federal law when verifying an employee's work authorization.

These are by no means all of the protections of which undocumented workers might avail themselves. Both employer- and employee-side advocates should become familiar with the full range of relevant legislation. There are provisions of the Evidence Code, Penal Code, and numerous other statutes that might be implicated.

Some areas remain as yet undefined. For example, what will happen with many thousands of Deferred Action for Childhood Arrival (DACA) beneficiaries in the California workforce if the current administration does not renew their work authorization permits? How will employers react, and what recourse, if any, will the employees have?

As the overlap between immigration and employment issues takes on increasing importance for our clients, the Labor and Employment Law Section is here to help with training to get us all prepared. A program at our Annual Meeting, a webinar, a know-your-rights radio show, and outreach programs coordinated with non-profits statewide—these are just some of the upcoming offerings about immigration-related topics in labor and employment law. I pledge, as Chair, that our Section will respond quickly to members' immigration-related concerns and work together toward compliant workplaces for millions of California immigrant workers and their employers.