WISCONSIN WORKER'S COMPENSATION BENEFITS AND THE UNDOCUMENTED WORKER

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I. DEFINITION OF EMPLOYEE UNDER CHAPTER 102.

Wis. Stat. § 102.07 – Employee Defined.

"Employee" as used in this chapter means:

> (4)(a) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees, but not including the following:
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> 1. Domestic servants.
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> 2. Any person whose employment is not in the course of a trade, business, profession or occupation of the employer, unless as to any of said classes, the employer has elected to include them.

The statute also specifically excludes from its coverage farmers and certain family members (§102.07(5)); independent contractors (§102.07(8)); volunteers (§102.07(11m)); and members of qualified religious sects (§102.28)(3).

II. PREREQUISITES FOR COMPENSABLE INJURY UNDER CHAPTER 102.

In order to prove an employer's liability under chapter 102, the injured worker must prove five elements:

a. The employee sustained an injury;
b. The employer and the employee were subject to Chapter 102 at the time of the injury;
c. The injury grew out of and was incidental to the employment;
d. The injury was not self-inflicted;
e. The injury arose out of the employment.

III. UNEMPLOYMENT INSURANCE ELIGIBILITY COMPARED.

Wis. Stat. § 108.04(18)(a): Illegal Aliens

> (a) The wages paid to an employee who performed services while the employee was an alien shall, if based on such services, be excluded from the employee's base period wages for purposes of sub. (4) (a) and ss. 108.05 (1) and 108.06 (1) unless the employee is an alien who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for the purpose of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of section 212 (d) (5) of the federal immigration and nationality act (8 USC 1182 (d) (5)). All claimants shall be uniformly required to provide information as to whether they are citizens and, if they are not, any determination denying benefits under this subsection shall not be made except upon a preponderance of the evidence (emphasis added).

IV. WISCONSIN SUPREME COURT PRECEDENT CONCERNING INJURIES TO UNDOCUMENTED WORKERS (PERSONAL INJURY CONTEXT).

Arteaga v. Literski**,** 83 Wis.2d 128, 265 N.W.2d 148 (1978) was an action in which the plaintiffs, undocumented aliens, sought compensation for personal injuries they had sustained, allegedly as a result of their defendant landlord's negligence. The circuit court had held that the plaintiffs "lacked the capacity to bring a civil action for personal injuries and were barred from maintaining their action in the courts of the State of Wisconsin as a matter of law … ." 83 Wis.2d at 130.

The Wisconsin Supreme Court stated that the question before it was: "Do illegal aliens have the right to sue in the courts of Wisconsin for injuries negligently inflicted upon them?" Id. at 129. The Court decided that the plaintiffs did have the right to bring their negligence claims in the Wisconsin courts, reasoning as follows, in part:

> ...[I]if the policy is to discourage illegal immigration, that policy is not furthered by refusing aliens access to the courts. It cannot be seriously argued that people enter this country illegally so they can recover for an injury that will be inflicted upon them later. Moreover, landlords will not be discouraged from providing housing for aliens they know to be here illegally if the landlords can negligently injure the aliens and bear no responsibility for their negligence.
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> There is no public policy that is served by refusing access to our courts to illegal aliens who are injured through the negligence of another. The sources of our basic concepts of justice between people is that there should be even handed justice meted out to all. ...
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> Our law permits recovery for injuries negligently inflicted on one's person. The Constitution says every person, it does not limit its protection to citizens or aliens lawfully admitted.
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> We hold that illegal aliens have the right to sue in the courts of the State of Wisconsin for personal injuries negligently inflicted upon them. To the extent that Coules may be interpreted as holding that illegal aliens have no access to the courts, it is overruled.

Arteaga, 83 Wis.2d at 132-33 (emphasis added).

V. LIRC PRECEDENT UNDER CHAPTER 102.

A. Arista Rea v. Kenosha Beef Int'l, WC Claim No. 1990070904 (LIRC, 5/5/1999).

The employer argued that it had work available for the applicant within his limitations, but that it could not employ him because of his illegal alien status. The Commission awarded temporary

total disability benefits, permanent partial disability and medical expenses to Mr. Arista Rea, an undocumented alien. In awarding benefits, the Commission reasoned:

> The court [Brakebush Brothers, Inc. v. LIRC, 110 Wis.2d 623, 549 N.W.2d 287) (Ct. App. 1996)] also upheld the commission's finding that even a termination for good cause does not act to deprive a disabled former employee from receiving worker's compensation for disability which is the result of a work injury. (*Id.* at 634.) Neither is there a provision in the Act which provides for the withholding of temporary disability benefits to a disabled employee whose ability to work is compromised by an illegal alien status; nor, from an employer's perspective, is there any practical difference between an individual who has been terminated for good cause and one who has been terminated due to an illegal alien status. Neither of such individuals will be rehired by the employer.
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> The employer might argue that an illegal alien occupies a different position, because he is legally precluded from obtaining employment in this country until he rectifies his immigration status. However, this is an equitable argument which would be properly presented to the Wisconsin Legislature, because there is no provision in the Act which would allow the withholding of temporary disability benefits due to illegal alien status. In this context it is significant to note, again from a practical standpoint, that illegal aliens routinely find new employment in this country after losing a job. In fact, the applicant found employment as a restaurant cook on or about December 21, 1995, and continued in that employment until sometime in March of 1996 [footnote omitted]. The employer's argument that temporary disability should be denied due to the applicant's illegal alien status must be rejected.

See, particularly, footnote 1 of the Arista Rea decision, in which the Commission cited with approval the New Jersey appellate court's decision in Luis Castro Mendoza v. Monmouth Recycling Corp., 288 N.J. Super, 240, 672 A.2d 221 (1996), in which that court stated: 'Surely, the effect on the worker of his injury has nothing to do with his citizenship or immigration status. If his capacity to work has been diminished, that disability will continue whether his future employment is in this country or elsewhere." Id. at 224.

B. Geraldo Oliva v. Schmidt Engineering Co., WC Claim No. 2000040319 (LIRC, 6/30/2003) (Commission awarded temporary disability benefits, citing Arista Rea).

C. Juan Ramos Vasquez a/k/a Pedro Ramirez v. Emmpak Foods, WC Claim No. 2002041629 (LIRC, 6/10/2005).

In this case, the Commission acknowledged the viability of its decision in Arista Rea, but nonetheless denied some the temporary total disability benefits the applicant claimed:

> As noted in Arista-Rea v. Kenosha Beef, WC Claim No. 1990-070904 (LIRC May 5, 1999) (affirmed in Kenosha Beef Int'l and Transportation Ins. Co. v. LIRC and Arista Rea, No. 99-CV-000539) (Wis. Cir. Ct. Kenosha County March 6, 2000)), a worker who is discharged because of illegal alien status, and not offered reemployment, remains eligible for temporary disability benefits. The reason for such eligibility is that no provision in Wisconsin's Worker's Compensation Act disqualifies such an individual from receiving temporary disability. However, the employer in Arista-Rea did not offer the applicant reemployment after his discharge. The employer in the case at hand informed the applicant by letter dated August 20, 2002, that work was available for him as soon as he provided valid documentation. For reasons *not explained* by the applicant, he chose not to obtain such documentation until December 2002, and even then he did not attempt to return to employment with the employer. [Fn. omitted.] The applicant did not establish that he was an illegal alien, or that he was otherwise unable to obtain proper documentation sooner than he did obtain it in December 2002. The employer's demand that the applicant provide his legal name and social security number was entirely reasonable, and had been made to the applicant in May 2002, well before his work injury. The employer had given the applicant ample time to obtain the documentation, but after he failed to do so, the employer hired an individual to replace him.
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> The applicant's unexplained failure to respond to this bona fide offer was the equivalent of a refusal of an offer of work, and it was this refusal rather than the effects of the work injury that caused the applicant's unemployment and underemployment during the periods in question. However, because the employer's offer was not made until August 20, 2002, and because a reasonable period of time for the applicant to have received and responded to it is inferred to have

been two weeks, temporary total disability will be allowed through September 2, 2002.

D. Jesus Cadena-Bretado v. Ceresero Roofing, WC Claim No. 2007017997 (LIRC, 2/25/2009).

Commission awarded temporary total disability, permanent partial disability, and medical expenses against the Uninsured Employers Fund. In so doing, the Commission rejected the UEF's contention that the applicant himself was an employer, rather than an employee. This conclusion was based on the Commission's inference that because the applicant was an undocumented alien, did not have a social security number, did not have a checking account, and did not file tax returns, it was improbable that he furnished the tools and materials necessary to be deemed an employer under the Act.

VI. LOSS OF EARNING CAPACITY AND PERMANENT TOTAL DISABILITY.

To date, there is no Commission precedent (nor any ALJ decision, to my knowledge) in which it has been decided whether an injured undocumented worker may claim a loss of earning capacity or permanent total disability benefits. However, based on the rational the Commission employed in Arista Rea, particularly its citation to the New Jersey appellate precedent, it seems likely that the Commission would find an undocumented worker eligible to make such claims.

VII. OVERVIEW OF WORKER'S COMPENSATION BENEFITS IN OTHER JURISDICTIONS.

A. States Where Undocumented Workers Are Barred from Receiving Benefits.

1. States where undocumented workers are totally barred from receiving benefits.

- Wyoming's compensation statute includes only lawfully employed aliens in its definition of employee, and compensation has been denied to an illegal alien based on that provision. WS. 1977§27-14-102(a)(vii), "includes legally employed minors and aliens authorized

to work by the United States department of justice, immigration and naturalization service."; *see also*. Felix v. State ex rel. Workers' Safety & Comp. Div., 986 P.2d 161 (Wyo. 1999*)*. (The court found that the plaintiff was not authorized to work by the INS and therefore he was not an employee entitled to workers' compensation benefits.)

- Idaho has a similar provision. Idaho Code § 72-1366(19)(a). "Benefits shall not be payable on the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time the services were performed." Idaho Code § 72-102.

- Virginia Code Ann. § 65.2-101: "Every person, including aliens and minors, in the service of another under any contract of hire or apprenticeship, written or implied, whether lawfully or unlawfully employed ..."

  In the wake of the Virginia Supreme Court's decision in Granados v. Windson Dev. Corp., 257 Va. 103, 509 S.E.2d 290 (1999), the state legislature amended the statute (over the governor's veto) so as to ensure coverage of illegal aliens. In *Granados*, the claimant, an illegal alien, was injured while working as a carpenter's helper. At the time he was hired, he had provided false immigration and social security documents to the employer. The injured employee argued that there was no causal relationship between his failure to provide proper documentation and his injury and the court agreed. However, the court also held that because the Immigration Reform and Control Act of 1986 prohibits the employment of an illegal alien, the claimant's purported contract for employment was void. As a result, the court found that the claimant was not an employee and therefore not entitled to benefits.

  See also Rios v. Ryan Inc. Cent., 35 Va. App. 40, 542 S.E.2d 790 (2001). This claimant was an illegal alien at the time he attempted to contract for hire with the employer. At that time he provided the employer with false papers which purported to identify him as an alien authorized to work within the state. The court held that the employment contract was void and unenforceable under Granados, *supra*. Because the claimant failed to prove the requirements to be a citizen or an alien lawfully admitted for permanent residence, the court found that the claimant was not an "employee" under the Act. The claimant's marriage to an American citizen months before his injury

did not convert the claimant's status to that of "legal citizen." The amendment to the Virginia statute, which covers legal or illegal aliens, was not applicable as it was enacted well after the claimant's injury.

2. <u>States where undocumented workers are barred from receiving some benefits</u>.

- California: As to the provision of vocational rehabilitation benefits, California considered this issue in <u>Del Taco v. Workers' Comp. App. Bd</u>., 79 Cal. App. 4th 1437, 94 Cal. Rptr. 2d 825 (2000). The claimant was awarded temporary disability benefits and also accepted modified work offered by the employer. He was fired one week later after the employer learned that he was an illegal alien. The claimant subsequently sought vocational rehabilitation benefits. The employer argued that it was denied equal protection of the laws, when it was required to provide vocational rehabilitation benefits to the claimant. The California court held that the illegal alien was a covered employee, but nevertheless it agreed with the employer, finding that the vocational rehabilitation requirement resulted in more extensive and costly benefits being awarded to an illegal worker, than those that could be awarded to a legal worker. The court noted that if an employer offers modified work consistent with an employee's medical restriction then vocational rehabilitation benefits are not available. Because a legal worker would not have been provided vocational rehabilitation benefits based on the employer's offer of modified work, the court found it a violation of equal protection to require the payment of such a benefit to an illegal worker otherwise prohibited from accepting such an offer.

- Georgia: A Georgia court has held that an injured employee who was legally "unable" to take an offered position – It required that he have or obtain a valid driver's license and his status as an illegal alien prevented him from obtaining the license – was appropriately disqualified from receiving further benefits. <u>Martines v. Worley & Sons Constr</u>., 278 Ga. App. 26, 628 S.E.2d 113 , cert. denied, 2006 Ga. LEXIS 765 (Sept. 8, 2006).

- Maine: Maine Rev. Stat. 39-A M.R.S.A. § 218(8). “Foreign workers. If an employee is prevented from accepting an offer of reinstatement because of residence in a foreign country or termination of status as a lawfully employable alien, the employee is deemed to have refused the offer.”

- In Michigan, temporary disability benefits were denied as the undocumented workers admitted to the use of fake documents to obtain employment, which constituted "commission of a crime" under the state worker's compensation statute. The fact that the claimant, an illegal alien, had not been formally convicted was irrelevant because there was no dispute that he had used false documentation to obtain the job. *See* Sanchez v. Eagle Alloy, Inc., 254 Mich. App. 651, 658 N.W.2d 510 (2003) and WDCA §361(1).

- Nebraska has denied vocational rehabilitation services to an illegal immigrant on the grounds that his undocumented status made him ineligible to return to his employment in the United States. Ortiz v. Cement Prods., Inc., 270 Neb. 787, 708 N.W.2d 610 (2005).

- Nevada: In Tarango v. State Indus. Ins. Sys., 177 Nev. 444, 25 P.3d 175 (Nev. 2001), the claimant, an unauthorized alien who had been awarded a 10 percent permanent partial disability payment, was unable to return to work at full duty. The claimant applied for vocational rehabilitation which was denied. On appeal, the court held that, in accordance with the reasoning in Del Taco, awarding vocational training benefits to the claimant would violate the equal protection laws. Furthermore, the court held that the federal Immigration Reform and Control Act forbids providing employment opportunities to unauthorized aliens. Therefore, the State Industrial Insurance System's duty to provide employment or training to the claimant had been preempted.

- New York: New York has held that an undocumented alien is not entitled to an award of "additional compensation" under a special statute, N.Y. Workers' Comp. Law § 15(3)(v), which allows an increase in benefits to a claimant whose earning capacity is impaired by reason of a job-related loss of use of 50 percent or more of, among other things, a hand, on the grounds that the claimant was ineligible for employment in the United States and, thus, his loss of earning capacity was not solely attributable to his compensable injury. Matter of Ramroop v. Flexo-Craft Print, Inc., 2008 NY Slip Op 5777 ; 2008 N.Y. LEXIS 1828 (June 26, 2008). *aff'g* 837 N.Y.S.2d 444 (App. Div. 2007).

- Another difficulty is caused by the subsequent absence of the undocumented worker from the country and the impact on the provision of medical and vocational rehabilitation services. See, e.g., Ortiz v. Cement Prods., Inc., 270 Neb. 787, 708 N.W.2d 610 (2005). The court determined that to award the worker vocational

rehabilitation services "in light of his avowed intent to remain an unauthorized worker in this country would be contrary to the statutory purpose of returning [him] to suitable employment" 270 Neb. at 791, 708 N.W.2d at 613.

- One strategy by the state of Washington is to place a limit on the amount payable for medical treatment obtained outside the U.S. Wash. Rev. Code § 51.04.030(2). "No service covered under this title, including services provided to injured workers, whether aliens or other injured workers, who are not residing in the United States at the time of receiving the services, shall be charged or paid at a rate or rates exceeding those specified in such fee schedule, and no contract providing for greater fees shall be valid as to the excess." Washington also provides that the nonresident injured worker may be required to return to the United States to submit to a medical examination. Wash. Rev. Code § 51.32.110. "An injured worker, whether an alien or other injured worker, who is not residing in the United States at the time that a medical examination is requested may be required to submit to an examination at any location in the United States determined by the department or self-insurer."

B. States Allowing Undocumented Workers Benefits.

- Alabama: Ala. Code §§ 25-5-1(5) "EMPLOYEE or WORKER. The terms are used interchangeably, have the same meaning throughout this chapter, and shall be construed to mean the same. The terms include the plural and all ages and both sexes. The terms include every person in the service of another under any contract of hire, express or implied, oral or written, including aliens and also including minors who are legally permitted to work under the laws of this state, ..."

- Arizona: Ariz. Rev. Stat. § 23-901(6)(b): "... including aliens and minors legally or illegally permitted to work for hire ... ."

- California: Cal. Lab. Code § 3351(a): "... whether lawfully or unlawfully employed, and includes ... Aliens and minors ... ." See also Del Taco v. Workers' Comp. App. Bd., 79 Cal. App. 4th 1437, 94 Cal. Rptr. 2d 825, *review denied*, No. S088719, 2000 Cal. Lexis 5703 (Cal. July 12, 2000).

- Colorado: Colo. Rev. Stat. §§ 8-40-202(1)(a)(VI)(b), "Every person in the service of any person, association of persons, firm, or private corporation, including any public service corporation, personal representative, assignee, trustee, or receiver, under any contract of hire, express or implied, including

aliens and also including minors, whether lawfully or unlawfully employed, … ."

- Connecticut: Dowling v. Slotnik, 244 Conn. 781, 712 A.2d 396 (1998). The claimant was an illegal alien employed as a live-in housekeeper and nanny. She was injured when she slipped and fell on ice while retrieving the mail. She was awarded disability benefits and medical expenses. The employer sought a reversal of the award, arguing that the Immigration Reform and Control Act (IRCA) preempted the state workers' compensation act. The employer also argued that there was no valid contract of service covered by the act due to taint from the claimant's illegal status and therefore the claimant was not an "employee" as defined by the act. First the court held that the IRCA did not preempt the state workers' compensation act. Then turning to the employer's other arguments, the court noted that the determination of whether an illegal alien is an employee covered by the act is one of statutory construction. The court found no express language in the compensation statute that excluded illegal aliens; instead the court found the language to imply that there was no limitation. The award of benefits was affirmed.

- Florida: Fla. Stat. ch. 440.02(15)(a): "... whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors." Gene's Harvesting v. Rodriguez, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982). The court upheld the award of benefits to an undocumented worker, finding that the statute clearly included illegal aliens for coverage under the act.

- Georgia: Dynasty Sample Co. v. Beltran, 224 Ga. App. 90, 479 S.E.2d 773 (1996). In order for an illegal alien's fraudulent misrepresentation of his or her legal status to bar an award of benefits, the employer must prove that the misrepresentation was causally connected to the claimant's injury. Because the employer failed to make such a showing, the court upheld the award of benefits.

- Illinois: 820 Ill. Comp. Stat. 305/1(b)(2) : "... including aliens, and minors ... ."

- Kentucky: Ky. Rev. Stat. Ann. § 342-0011(21). Similar to the Idaho statute (Idaho Code §72-102), the Kentucky statute defines the term "alien." However, unlike Idaho, it is otherwise silent on the issue.

- Louisiana: Artiga v. M.A. Patout & Son, 671 So. 2d 1138 (La. Ct. App. 1996). The court held that illegal aliens are included in the definition of employee under the workers' compensation act. The definition of employee includes "every person performing services." Also, illegal aliens are not included in the list of individuals who are not covered under the act.

- Maine: 39-A M.R.S.A. §218(8).

- Maryland: Design Kitchen & Baths v. Lagos, 388 Md. 718, 882 A.2d 817 (2005). The Court of Appeals of Maryland, after reviewing the workers' compensation statute, its legislative history, and public policy, determined that the workers' compensation statute covers illegal aliens.

- Massachusetts: *Cf.* Brambila's Case, DIA No. 6734092 (Mass. Aug. 22, 1997), *as reported in,* Skoler, Abbott, & Presser, *It's No Fun Being An Illegal Alien,* Massachusetts Employment Law Letter, February 1998. The act states that every person under any contract for hire is a covered employee. The Department of Industrial Accidents Board held that illegal aliens are included under this definition.

- Michigan: Mich. Comp. Laws § 418.161(1): An employee is defined as "[e]very person ... including aliens." See also Sanchez v. Eagle Alloy Inc., 254 Mich. App. 651, 658 N.W.2d 510 (2003), *supra*. The Michigan statute covers illegal aliens because otherwise the word "aliens" would have been preceded by the adjective "legal."

- Minnesota: Minn. Stat. § 176.011 subd.9(1). An employee covered under the act is "any person ... including aliens."

- Mississippi: Miss. Code Ann. § 71-3-27: "Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be in the same amount as provided for residents ... "

- Montana: Mont. Code Ann. M.C.A. § 39-71-118(1)(a): "The terms include aliens and minors, whether lawfully or unlawfully employed."

- Nebraska: Neb. Rev. Stat. §§ 48-115(2), 48-144 " ... including aliens and also including minors ... ." § 48-115(2).

- Nevada: Nev. Rev. Stat. Ann. § 616A.105: "...whether lawfully or unlawfully employed, and include, but not exclusively: [ ] Aliens and minors."

- New Jersey: Mendoza v. Monmouth Recycling Corp., 288 N.J. Super. 240, 672 A.2d 221 (App. Div. 1996). Noting that denying compensation to illegal aliens may have the effect of encouraging employers to hire more illegal aliens and take less care to provide safe workplaces, and that awarding compensation to illegal aliens would not be inconsistent with the policies behind the compensation law, the court reversed the administrative denial of

compensation to the claimant, an illegal alien. The court held that the workers' compensation act does not expressly bar illegal aliens from its provisions.

- New Mexico: N.M. Stat. Ann. § 52-3-3: "... every person in the service of any employer subject to the New Mexico Occupational Disease Disablement Law including aliens and minors legally or illegally permitted to work for hire ... ."

- New York: Testa v. Sorrento Restaurant, Inc., 10 A.D.2d 133, 197 N.Y.S.2d 560 (1960). The claimant, an Italian, entered this country illegally, was injured, was awarded compensation, and agreed to depart the country voluntarily in lieu of deportation. The employer argued that the claimant's benefits should be commuted as of the date of his departure as provided in the compensation act. However, the court found that an American-Italian treaty (63 U.S. Stat. §§ 2255, 2272) accorded rights and privileges no less favorable for the alien than for the citizen under the compensation laws of the respective countries and thus rendered the commutation requirement ineffective. The employer contended the treaty did not apply to illegal entries. The court held that there was nothing in the treaty to indicate that it did not apply to illegal entries. The court held that compensation was payable regardless of any question of wrongdoing. Therefore, the award would not be commuted as of the date of departure from this country.

- North Carolina: N.C.G.S.A.§ 97-2(2): "... including aliens, and also minors, whether lawfully or unlawfully employed ... ." See also Gayton v. Gage Carolina Metals, Inc., 149 N.C. App. 346, 560 S.E.2d 870 (2002). Unless the employer can show that "but for" the claimant's illegal alien status, he would be capable of performing available work, the claimant's illegal alien status does not relieve the employer of the duty to provide compensation and rehabilitation services. To make this "but for" showing, the employer may have to provide vocational rehabilitation services to help the claimant regain the capacity to perform the type of work which is available, but the employer is not required to show that a job has actually been offered to the claimant.

- North Dakota: N.D. Cent. Code § 65-01-02(16)(a)(2) “the term includes: aliens.”

- Ohio: Ohio Rev. Code Ann. § 4123.01(A)(1)(b): "Every person ... including aliens and minors ... ."

- Oklahoma: Lang v. Landeros, 918 P.2d 404 (Okla. Ct. App. 1996). The claimant was injured at work when he slipped and fell while removing hot cooking oil from a restaurant kitchen. The court held that injured employees who are illegal aliens are not expressly precluded from receiving compensation under the act.

- Pennsylvania: Reinforced Earth Co. v. Workers' Comp. App. Bd. (Astudillo), 570 Pa. 464, 810 A.2d 99 (2002). The Pennsylvania Supreme Court refused to prohibit illegal aliens from receiving workers' compensation benefits on the basis of public policy. While the employer may be able to obtain a suspension of disability benefits based on the fact that it is the claimant's immigration status, rather than his or her medical situation, that prevents the claimant from working, the employer cannot avoid paying medical benefits on that basis.

- South Carolina: S.C. Code Ann. § 42-1-130: "Every person ... including aliens and also including minors, whether lawfully or unlawfully employed ... ."

- Texas: Tex. Lab. Code §§ 401.011, 406.092: "A resident or nonresident alien employee or legal beneficiary is entitled to compensation under this subtitle." § 406.092.

- Utah: Utah Code Ann. § 34A-2-104(1)(b): "... including aliens and minors, whether legally or illegally working for hire ... ."

- Washington: Wash. Rev. Code §§ 51.04.030(2), 51.32.110. These provisions cover medical benefits and medical exams for nonresident aliens.

C. The Remaining Fifteen States Have Definitions for Employees Covered Under the Act But Do Not Specify Whether Aliens, Legal or Illegal, Are Covered Under the Act.

Based upon our research, in the remaining 15 states (Alaska, Arkansas, Delaware, Hawaii, Indiana, Iowa, Kansas, Missouri, New Hampshire, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, and West Virginia), the statutory definition of “employee” does not specifically include or exclude legal or illegal aliens, nor are there any published cases interpreting the relevant statute.

D. Professor Arthur Larson’s View of Undocumented Workers and Worker’s Compensation.

> If the employee in question is a legal resident of the United States, he or she, for Constitutional reasons, is treated the same as a citizen insofar as workers' compensation is concerned. However, the outcome may be different when illegal aliens are involved. The Federal Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful to knowingly hire undocumented (illegal) aliens.

> The Act also makes it unlawful for an employer to continue to employ an illegal alien once the employer learns of the employee's illegal status. Thus it is not a foregone conclusion that such employees are entitled to workers' compensation. Various state statutes and court decisions have addressed this question, as discussed above. The usual outcome has been to permit compensation to be awarded to illegal aliens, although there are some exceptions.
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> A variety of arguments have been made as to why illegal aliens cannot or should not be afforded the protections of state workers' compensation laws: 1) that the IRCA preempts state workers' compensation laws, 2) the invalidity of the contract for employment; and 3) the public policy concern that the availability of workers' compensation benefits would act as an incentive to draw illegal aliens into the United States.
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> Given that illegal aliens are entitled to access to the courts and have the ability to file both contract and tort claims, it would seem illogical to bar illegal alien workers from seeking compensation benefits long considered a substitute for damages. The other obvious implication is that a lack of coverage can expose an employer to tort liability. [Footnotes omitted.]

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