HYBRID-STATUS IMMIGRANT WORKERS

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ABSTRACT

Precarious work arrangements have become a dominant feature of twenty-first-century political economy. One employer strategy that has contributed to eroding workers' rights and protections is misclassifying them as independent contractors, avoiding the obligations that come with employee status. Recently, policymakers in some states and at the federal level have sought to combat this trend by expanding the definition of employment, notably by adopting the three-prong standard known as the ABC test. The misclassification problem has received much attention in both legal scholarship and public discourse, but these discussions have not sufficiently addressed how these reforms affect a particularly vulnerable subset of precarious workers: undocumented immigrants without federal employment authorization.

Immigrant workers often depend on independent contractor status to work. Federal immigration law requires employers to verify that all employees are permitted to work in the United States, but does not require such verification for independent contractors. As a result, immigrants can work as independent contractors without having to fraudulently claim work authorization. Independent contractor jobs are no less precarious for immigrants than for their native-born counterparts, but new reforms may improve their working conditions by extending to them many of the protections of labor and employment law. However, these reforms may also have the unintended consequence of shutting immigrant workers out of the formal economy by defining more work arrangements as employment.

This Article examines how efforts to combat employee misclassification can include immigrants without federal work authorization. It argues that immigrant workers can hold a hybrid status: defined as "employees" under new, broader labor and employment law definitions of the term, while remaining "independent contractors" for immigration purposes. As a result, these reforms do not trigger new work authorization verification requirements for employers that make it harder for immigrants to work. At the same time, allowing this hybrid status to coexist between work law and immigration law contexts will likely require action on the part of both state legislatures and federal agencies. In the fast-evolving context of immigration federalism, promoting hybrid status for unauthorized workers promises to be a powerful tool for states seeking to implement an inclusive immigration agenda.

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INTRODUCTION

In 2019, the California state legislature passed a landmark law that redefined who counts as an "employee" under state law. Drafters of Assembly Bill 5 (AB5) were concerned that companies routinely "misclassify" their employees as independent contractors to "avoid obligations such as payment of payroll taxes, payment of premiums for workers' compensation, Social Security, unemployment, and disability taxes."[1] This misclassification, they wrote, "has been a significant factor in the erosion of the middle class and the rise in income inequality."[2] California's solution to the employee misclassification problem was to mandate a legal standard known as the "ABC test" for virtually all state employment law contexts, affecting an estimated one million workers statewide.[3] In contrast to the traditional common law approach, the ABC test presumes that most workers are employees—and therefore covered by employment protections—requiring a narrower analysis to find that a worker is instead an independent contractor.[4] Other states are reportedly looking to follow California's example by adopting this test.[5] In March 2021, the United States House of Representatives attempted to follow through on President Joe Biden's campaign promise to enshrine the ABC test into federal law by passing the PRO Act, which would it to extend collective bargaining rights to many workers currently classified as independent contractors.[6]

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[1] 2019 Cal Stats. Ch. 296 § 1(b).

[2] *Id.* § 1(c).

[3] LYNN RHINEHART ET AL., ECON. POLICY INST., MISCLASSIFICATION, THE ABC TEST, AND EMPLOYEE STATUS: THE CALIFORNIA EXPERIENCE AND ITS RELEVANCE TO CURRENT POLICY DEBATES (2021), https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/.

[4] The ABC test is so named for its three-pronged structure. *See* Cal. Labor Code § 2750.3(a)(1); Anna Deknatel & Lauren Hoff-Downing, *ABC On the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes,* 18 U. PA. J. L. & SOC. CHANGE 53, 67 (2015).

[5] Eli Rosenberg, *Gig Economy Bills Move Forward in Other Blue States, After California Clears the Way*, WASH. POST (Jan. 17, 2020), https://www.washingtonpost.com/business/2020/01/17/gig-economy-bills-move-forward-other-blue-states-after-california-clears-way/ (discussing legislators in New York, New Jersey, and Illinois considering similar bills).

[6] Protecting the Right to Organize (PRO) Act, H.R. 842, 117th Congress, § 101(b); THE BIDEN PLAN FOR STRENGTHENING WORKER ORGANIZING, COLLECTIVE BARGAINING, AND UNIONS, https://joebiden.com/empowerworkers/# [https://perma.cc/5F8A-DDG2] (last visited Sept.12, 2022). Despite candidate Biden's promise to use the ABC test to fight misclassification, his administration declined to adopt it in recent Department of Labor (DOL) rulemaking. Though it indicated that the ABC test might be preferable to the traditional approach, proposed rule published in October 2022 concluded that Supreme Court precedent denies DOL the authority to adopt the ABC test to distinguish employment and independent contracting for the purposes of the Fair Labor Standards Act (FLSA). Employee or Independent Contractor Classification under the Fair Labor Standards Act, 87

State and federal reform efforts may well succeed in providing key work law[7] protections to workers who would otherwise be denied them. Fighting misclassification is an important front in the battle against the growing trend towards precarious forms of labor.[8] But while the misclassification problem and the ABC solution have received widespread attention in both legal scholarship and popular media, there has been little research on how these reforms affect a particularly vulnerable subset of the precarious workforce: unauthorized immigrants.[9]

Working as an independent contractor is one way for immigrants without federal employment authorization to earn an income within the framework of federal immigration law.[10] The Immigration Reform and Control Act of 1986 (IRCA)[11] forbids employers from hiring unauthorized noncitizens as employees, and requires them to verify all employees' immigration status, but it does not require this kind of verification for independent contractors.[12] Enforcement against employers is lax, and violations of IRCA are widespread in many industries.[13] Still, unauthorized workers can access independent contractor jobs without having to show fraudulent proof of immigration status—which in many cases can result in liability for civil or criminal penalties.

Fed. Reg. 62,218, 62,231 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. §§ 780, 788, 795).

[7] The term "work law" encompasses all laws regulating work, including both employment law (employers' obligations to employees in the workplace) and labor law (workers' rights to engage in collective bargaining). *See* Veena B. Dubal, *Wage Slave or Entrepreneur? Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 101, 106 n.11 (2017).

[8] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014); Ruth Milkman, IMMIGRANT LABOR AND THE NEW PRECARIAT (2020).

[9] Since many "undocumented" immigrants (i.e. those without lawful immigration status) have employment authorization—and in fact many noncitizens with status do not—I use the terms "unauthorized immigrant" or "unauthorized worker" to refer to noncitizens who lack federal employment authorization. *See* 8 U.S.C. § 1324a(h)(3) (defining "unauthorized alien" as a noncitizen who "is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act [the Immigration and Nationality Act] or by the Attorney General"). For an overview of categories of noncitizens authorized to work, see 1 Charles Gordon et al., Immigration Law & Procedure § 7.03[d]. My use of "unauthorized" is therefore technical, and not intended to carry the pejorative connotation of terms like "illegal." Similarly, I also do not use the term "alien," despite its presence throughout the relevant case, statutory, and regulatory text.

[10] *See* Kit Johnson, *Lawful Work While Undocumented: Business Entity Solutions*, 64 ARIZ. L. REV. 89, 99-104 (2022).

[11] Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986).

[12] 8 U.S.C. § 1324a(1)(A).

[13] *See* MUZZAFAR CHISHTI & CHARLES KAMASAKI, MIGRATION POLICY INST., IRCA IN RETROSPECT: GUIDEPOSTS FOR TODAY'S IMMIGRATION REFORM 3-5 (2014), https://www.migrationpolicy.org/research/irca-retrospect-guideposts-today-s-immigration-reform.

This Article examines how adoptions of the ABC test in the work law context affect the legal status of low-wage immigrant workers in industries that routinely classify them as independent contractors. In many of the industries where unauthorized immigrants are most likely to work, including residential construction, landscaping, building maintenance, and taxi and delivery services, employers choose independent contractor status to avoid both IRCA sanctions and work law obligations.[14] In this sense, a significant portion of the unauthorized workforce may be "misclassified."

As state and federal policymakers move to expand[15] employee status to these misclassified workers, it is critical to understand how federal immigration law will respond. If a new work law definition of employment transforms an immigrant worker from independent contractor to employee, does this alter her status under IRCA? This Article is the first to explore this possibility in detail.[16] The consequences for millions of unauthorized immigrants are significant. On the one hand, if the requirement to treat workers as employees for work law purposes triggers the obligation to verify their work authorization status, this may force many immigrants out of a job, or into a more precarious situation at work. On the other hand, if there is no such obligation, unauthorized workers may benefit from expansions of employee rights and protections, marking a major step towards full participation in the formal economy.

This Article argues that it is possible for unauthorized immigrants to hold a hybrid status: simultaneously employees for work law purposes, and independent contractors under IRCA. The U.S. legal system regularly accommodates this kind of "disharmony" between immigration and work law. Courts have repeatedly held that IRCA's prohibition of unauthorized employment does not categorically exclude unauthorized immigrants from

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[14] Unauthorized immigrants also make up a large share of workers in agriculture and domestic service. *See* PEW RESEARCH CTR., OCCUPATIONS OF UNAUTHORIZED IMMIGRANT WORKERS (Nov. 3, 2016), https://www.pewresearch.org/hispanic/2016/11/03/occupations-of-unauthorized-immigrant-workers/. Because federal law includes several specific provisions governing workers in these industries that do not apply generally to commonly "misclassified" occupations, I leave them aside for the purposes of this Article. *See* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2583 (1983) (enacting various protections for migrant and seasonal agricultural workers); Immigration and Nationality Act [INA] § 218; 8 U.S.C. § 1188 (creating visas for temporary agricultural workers); 8 C.F.R. § 274a.1(f) (excluding employees in "casual domestic service" from restrictions on unauthorized employment).

[15] This Article frequently characterizes legal reforms adopting the ABC test as "expanding" the definition of employment. By the same token, this aim can also be stated as "narrowing" the definition of independent contracting.

[16] Recent scholarship has nonetheless acknowledged the possibility of misclassification reform affecting IRCA's treatment of immigrant workers. Most recently, in an article on immigrant business entity formation, which includes a discussion of independent contractor status, Kit Johnson writes: "Insofar as the states' recategorization of these workers would affect how the jobs are viewed in terms of immigration law, such changes would radically restrict the type of work available to noncitizens without employment authorization." Johnson, *supra* note 10, at 104-05.

either federal or state work law statutory definitions of employment.[17] While IRCA was enacted to discourage the employment of unauthorized immigrants, the law also aimed to uphold labor and employment protections from employer abuses.[18] Disharmony between immigration and work law definitions of employment is necessary to promote both of these aims. Furthermore, various work law regimes apply different legal standards to distinguish independent contractors from employees, making it possible for the same worker to fall into both categories simultaneously. Finally, immigration regulations clearly articulate a traditional common law approach to independent contractor status—which defines employment more narrowly than the ABC test. As a result, reforms to work law definitions of employment do not necessarily trigger any change to how IRCA classifies immigrant workers.

At the same time, policymakers interested in promoting both immigrants' and workers' rights can and should take steps to ensure that this hybrid status can work in practice. Whether acting on advice of counsel from cautious attorneys, or simply out of habit, employers may assume that if workers are now considered "employees" for work law purposes, they are required to provide proof of work authorization. This Article explores several steps state and federal actors can take to clarify unauthorized workers' dual status under work law and immigration law, to ensure that immigrants are not needlessly pushed out of their jobs.

This Article has two aims. First, it clarifies the immigration stakes of independent contractor reform, addressing both the potential unintended consequences of this reform, and how to avoid them. Many immigrants' reliance on independent contractor work to earn a living—as well as the risks they can face by seeking less precarious arrangements—ought to be a part of the ongoing discussion of the role misclassification plays in contemporary political economy. To that end, it is crucial to understand how the disharmonies between immigration and work law enable immigrant workers to hold a hybrid status. Armed with this understanding, policymakers can ensure that immigrants are included in any solution to the misclassification problem.

Second, having identified the immigration dimensions of the misclassification issue, this Article explores its implications for immigration federalism.[19] As immigration has become a highly polarized partisan issue, state policymakers have developed new tools to advance both inclusive and

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[17] *See infra* Part III.

[18] *See* Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 LEG. & PUB. POL'Y 881 (2014) (providing a systematic analysis of IRCA's legislative history).

[19] For a helpful overview of the development of immigration federalism scholarship since the 1990s, *see* Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1340-47 (2019); *see also* Pratheepan Gulasekaram & S. Karthick Ramakrishnan, THE NEW IMMIGRATION FEDERALISM 12-56 (2015) (summarizing the history of state- and local-level immigration policy in the United States).

restrictionist policy agendas. In some states, restrictionists have turned to identity theft laws and other similar criminal provisions to punish unauthorized immigrants who use false documents to seek employment, a practice upheld by the Supreme Court's recent decision in *Kansas v. Garcia*.[20] Where these states restrict immigrant work opportunities by harmonizing state law with federal immigration law, other states can take a more inclusive approach by promoting hybrid-status work arrangements.

Part I of this Article details how federal immigration law allows employers to hire unauthorized immigrants as independent contractors, and the central role of the immigrant workforce in the contemporary "misclassified" economy. Part II explains how adopting the more employee-friendly ABC test may affect the jobs where many unauthorized immigrants work. Part III analyzes how immigrant workers can hold a hybrid status: employees under the broader ABC test in the work law context, and simultaneously independent contractors under the narrower common law test. Part IV explores state and federal policy options to clarify and promote this hybrid status. Finally, Part V situates the preceding sections within the contemporary landscape of immigration federalism.

I. INDEPENDENT CONTRACT WORK UNDER FEDERAL IMMIGRATION LAW

Federal immigration law narrowly limits immigrants' options to earn a living without work authorization. IRCA's prohibition of unauthorized employment forces many immigrants into precarious work arrangements. Given the potential consequences of seeking formal employment, independent contractor status can be a relatively low-risk option. While many independent contractor jobs are underpaid or dangerous, such as construction, landscaping, building maintenance, and taxi and delivery services, these jobs do not require workers to provide proof of work authorization. Out of many bad options, independent contract work therefore provides significant opportunity for immigrants to support themselves.

Part I begins by explaining the role of independent contractor status within IRCA's employer sanctions system. Because IRCA does not require verification of work authorization for independent contractors, this status allows immigrants to access work without violating employer sanctions. It then discusses the role of IRCA in the creation of today's "fissured workplace."[21] In the last half-century, employers in numerous low-wage industries have turned to strategies such as employee misclassification to avoid obligations to their workers. Viewed in this context, employer sanctions compounded the effects of market forces pushing unauthorized immigrants into precarious work.

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[20] 140 S. Ct. 791 (2020).
[21] Weil, *supra* note 8.

A. *The independent contractor exception to IRCA employer sanctions*

When Congress enacted IRCA in 1986, it imposed for the first time a nationwide ban on hiring noncitizen workers without work authorization.[22] As discussed below, a primary purpose of IRCA's employment restrictions was to discourage unauthorized migration by limiting work options in the United States.[23] However, IRCA does not impose criminal penalties on unauthorized immigrants for accepting employment. The statute makes it "unlawful for any person or 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."[24] In other words, IRCA's enforcement system most directly regulates employers, penalizing those who hire employees without work authorization.

IRCA also requires employers to verify all employees' work authorization, regardless of their immigration status. Employers must submit a Form I-9 for each new employee, which requires the employee to attest to their legal permission to work, and provide supporting documents such as a U.S. passport or Social Security card.[25] Any employer who knowingly hires an unauthorized worker as an employee, or fails to provide the required forms, may be subject to civil penalties, and in some cases criminal prosecution.[26]

Crucially, IRCA does not subject independent contractor arrangements to the same verification requirements as employment. The regulations that define "employees" under federal immigration law directly exclude "independent contractors."[27] Employers remain subject to sanction for knowingly "obtaining the labor" of an "unauthorized alien" through a "contract, subcontract, or exchange."[28] But employers are not required to verify independent contractors' status via the I-9 process.[29] As a result, employers can generally hire unauthorized immigrants as independent

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[22] *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 192-204 (2007) (discussing the history of IRCA, and noting that before IRCA twelve states had enacted prohibitions against unauthorized employment); Maurice A. Roberts & Stephen Yale-Loehr, *Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act*, 21 INT'L L. 1013 (1987).

[23] *See infra* Part III.C; Griffith, *supra* note 18.

[24] 8 U.S.C. § 1324a(a)(1)(A) (emphasis added).

[25] 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2. The latest version of Form I-9 can be found at U.S. Citizenship and Immigration Services, I-9, Employment Eligibility Verification, https://www.uscis.gov/sites/default/files/document/forms/i-9-paper-version.pdf (last visited Dec. 5, 2022).

[26] 8 U.S.C. § 1324a(e); 8 C.F.R. § 274a.10.

[27] "The term employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors." 8 C.F.R. § 274a.1(f).

[28] 8 U.S.C. § 1324a(a)(4).

[29] 8 C.F.R. § 274a.2(b)(1)(i) (specifying the I-9 requirement for "A person or entity that hires or recruits or refers for a fee an individual *for employment*") (emphasis added).

contractors without fear of IRCA penalties. In turn, immigrants do not need to demonstrate work authorization to access jobs that employers designate as independent contractor positions.

There are potential immigration consequences for working as an independent contractor without work authorization. Notably, an immigrant who works without authorization can be barred from adjusting their status to become a lawful permanent resident.[30] Certain holders of nonimmigrant visas can also become deportable if they perform work that violates the specific conditions of their status.[31] However, both of these restrictions only apply to noncitizens who have either a viable path to green card eligibility, or a valid nonimmigrant status. There are also several common exemptions to the adjustment bar, notably for immediate relatives of U.S. citizens applying for green cards based on family status.[32] All things considered, federal immigration law makes independent contract work a relatively low-risk option for undocumented immigrants who do not have the option of applying for work authorization or permanent resident status.

B. *Avoiding the perils of document fraud*

Under IRCA, immigrants do not have to make any false claims about their immigration status or produce false documents to work in jobs designated as independent contractor positions. Many unauthorized immigrants nonetheless do engage in these kinds of fraud, such as using a fake Social Security card.[33] In so doing, they expose themselves to serious legal risks.

There are several reasons an unauthorized worker might decide to acquire employment through fraud. First, though independent contractor status is common in a number of industries that disproportionately employ undocumented workers, employee status is the norm for most work arrangements in the United States.[34] Second, as we will see below, employee status is typically more attractive in terms of the pay, benefits, and

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[30] INA §§ 245(c)(2), (8); 8 U.S.C. §§ 1255(c)(2), (8). This provision of the INA relies on the same 8 C.F.R. § 274a.1 definition of "employment" as in the employer sanctions context. However, in practice, U.S. Citizenship and Immigration Services does not consistently distinguish independent contract work from employment when considering these consequences for individual applicants.

[31] INA § 237(a)(1)(C); 8 U.S.C. § 1227(a)(1)(C).

[32] INA §§ 245(c)(2), (8); 8 U.S.C. §§ 1255(c)(2), (8). Waivers to the bar for unauthorized employment may also be available in certain cases under INA §§ 212(d)(3)(A)(ii), 245(k); 8 U.S.C. §§ 1182(d)(3)(A)(ii), 1255(k).

[33] *See* Chishti & Kamasaki, *supra* note 13.

[34] The Bureau of Labor Statistics estimates that independent contractors make up only 6.9 percent of the U.S. workforce. U.S. BUREAU OF LABOR STATISTICS, USDL-18-0942, CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS NEWS RELEASE, (2018). A Government Accountability Office study puts the figure somewhat higher, at 13 percent. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS (2015).

job protections it offers.[35] Finally, though unlawful, it is not difficult to commit this kind of fraud. In many cases, all an unauthorized immigrant must do is check a box on the Form I-9 certifying that she has work authorization, and produce supporting documents such as a fake or borrowed Social Security card.[36]

Hiring employees who fraudulently claim work authorization is typically of minimal risk to employers who go through the required verification process.[37] Recognizing that many employers lack the expertise to determine whether a worker's documents are genuine, IRCA offers employers a good-faith defense to liability.[38] As long as employers complete the Form I-9 and collect the required documents from their employees, they are unlikely to be penalized.

In these situations, the legal risk of engaging in fraud to procure employment falls on the immigrant worker. The use of fraudulent documents triggers a ground of inadmissibility for misrepresentation, barring many noncitizens from acquiring lawful immigration status.[39] It is particularly easy to trigger this bar by checking a box on the Form I-9 indicating one is a U.S. citizen or permanent resident. Making a false claim to citizenship can bar an applicant from virtually all forms of immigration status.[40] The consequences of falsely claiming permanent resident status are only slightly less severe.[41] These immigration penalties for fraud and misrepresentation typically present a far greater obstacle to receiving lawful status than the consequences of merely working without authorization, which contain several common exceptions and waivers.[42]

The use of fraudulent documents can also subject immigrants to criminal liability. Federal law prohibits the use of a false "identification document" for the purpose of satisfying IRCA verification, punishable by up to five

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[35] *See infra* Part II.A. For example, a study of the construction industry in California found that independent contractors—both those correctly identified as such and those who are misclassified by their employers—earn significantly less than employees. Whereas the median income of an employee worker in this industry was $30,000, bona fide independent contractors earned $22,282, and misclassified workers earned $15,473. YVONNE YEN LIU, ET AL., ECONOMIC ROUNDTABLE, SINKING UNDERGROUND: THE GROWING INFORMAL ECONOMY IN CALIFORNIA CONSTRUCTION 11-12 (2014), https://economicrt.org/publication/sinking-underground/.

[36] *See* 8 U.S.C. § 1324a(b)(1)(C)(i) (listing documents that can be used as evidence of employment authorization, including a Social Security card).

[37] Chishti & Kamasaki, *supra* note 13, at 3.

[38] 8 U.S.C. § 1324a(a)(3).

[39] INA § 212(a)(6)(C); 8 U.S.C. § 1182(a)(6)(C).

[40] INA § 212(a)(6)(C)(ii); 8 U.S.C. § 1182(a)(6)(C)(ii). This provision has been interpreted to be perhaps the harshest subsection of the INA's code of immigrant inadmissibility, barring all forms of immigration relief without the possibility of a waiver. Munoz-Avila v. Holder, 716 F.3d 976, 978 (7th Cir. 2013) ("[8 U.S.C. § 1182(a)(6)(C)(ii)] has been characterized as the 'immigrant version of the death penalty,' because that ground of inadmissibility cannot be waived").

[41] INA § 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i).

[42] *See supra* Part I.A, note 29.

years in prison.[43] Several states also use identity theft laws to penalize the use of false identification to seek employment.[44] As a result, an immigrant who uses fraudulent documents to get a job can be subject to imprisonment under both state and federal law. A criminal conviction for identity theft or similar offenses may also trigger further immigration consequences.[45]

Finally, immigrants who work using false documents are at increased risk of exploitation by their employers. Less scrupulous employers may well suspect that their employees are unauthorized, and use this fact to their advantage. For this reason, industries that hire large numbers of unauthorized employees—for example, meat processing—are notorious for low pay, strenuous working conditions, and lack of recourse against abuse by employers.[46] When immigrant employees attempt to respond to poor working conditions by organizing a union, employers frequently use this as an opportunity to reexamine the validity of their work authorization status.[47]

Immigrants can avoid many of these risks by working as independent contractors. As discussed in more detail below, independent contractor jobs are often not what most would consider good jobs, excluded from virtually all work law rights and benefits. Unauthorized workers tend to be vulnerable to exploitation at work regardless of whether they are classified as employees or independent contractors. However, the possibility of working without having to engage in fraud—thereby avoiding potentially serious civil and criminal liability—is a distinct advantage of independent contract work.

C. *Immigrant workers in the fissured economy*

IRCA created incentives for unauthorized workers and their employers to opt for independent contract status at a time when numerous market forces were pushing in a similar direction. The economist David Weil has identified the proliferation of independent contract arrangements as a key

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[43] 18 U.S.C. § 1546(b).

[44] Leticia Saucedo, *The Making of the Wrongfully Documented Worker*, 93 N.C. L. REV. 1505, 1530-35 (2013) (discussing state identity theft laws in Alabama, Arizona, Georgia, Iowa, Michigan, Mississippi, Nebraska, North Dakota, South Carolina, Utah, and Wisconsin, as well as several other criminal statutes in Idaho, Utah, Minnesota, Missouri, and California that have been used to penalize false documents in the employment context). *See also infra* Part V.

[45] *See* Ibarra-Hernandez v. Holder, 770 F.3d 1280 (9th Cir. 2014) (holding that an immigrant admitted to committing a crime involving moral turpitude, triggering immigration consequences, by pleading guilty to identity theft for using another person's Social Security number to gain employment).

[46] *See* Chishti & Kamasaki, *supra* note 13, at 4; Eric Franklin Amarante, *Criminalizing Immigrant Entrepreneurs (and Their Lawyers)*, BOS. C. L. REV. 1323, 1348-51 (2020) (describing harsh working conditions in the meat processing industry).

[47] *See* Shannon Gleeson & Kati L. Griffith, *Employers as Subjects of the Immigration State: How the State Foments Employment Insecurity for Temporary Immigrant Workers*, 46 L. & SOC. INQUIRY 92, 96 (2021).

feature of what he terms the "fissuring" of the U.S. workplace in the second half of the twentieth century. In this process, many businesses sought to "convert employer-employee relationships into arm's-length market transactions," and in so doing, made work in general "more precarious, with risk shifted onto … individual workers, who are often cast in the role of independent businesses in their own right."[48] Employers have sought to misclassify workers as independent contractors ever since modern workplace protections first emerged, but the practice has become particularly acute over the past half-century.[49]

Of course, employers have plenty of reasons besides IRCA sanctions to prefer hiring independent contractors. U.S. work law imposes far more extensive legal and financial obligations on employers who hire employees rather than independent contractors, creating strong incentives to opt for the latter category.[50] Under both federal and state law, virtually all benefits and protections are reserved for employees, including remedies against discrimination; minimum wage and overtime pay protections; collective bargaining rights; and inclusion in retirement, worker's compensation, unemployment insurance, and Social Security systems.[51] Misclassifying workers as independent contractors allows employers to avoid such a wide range of legal obligations that many analysts treat this phenomenon as a part of the "informal economy."[52]

Misclassification affects workers regardless of immigration status, but it is particularly common in industries that tend to hire unauthorized workers.

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[48] Weil, *supra* note 8, at 8-9.

[49] *Id.*; Richard Carlson, *Why the Law Still Can't Tell an Employee When It Sees One, and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 301-10 (2001) (describing the origins of misclassification as employers sought to avoid obligations under new worker protection laws in the Progressive and New Deal eras).

[50] *See* Gali Racabi, *Despite the Binary: Looking for Power Outside the Employee Status*, 95 TUL. L. REV. 1167, 1168 (2021) (describing the "binary structure" of U.S. work law, recognizing "individual legal claims in the workplace" and protecting the "regulation of collective claims of workers" only for employees, and not other categories of workers).

[51] For a helpful table laying out the most important federal and state work law protections and the legal tests used to adjudicate them, *see* Veena B. Dubal, *Economic Security & the Regulation of Gig Work in California*, 13 EUR. L. J. 51, 53 (2022).

[52] *See* ANDREW ELMORE & MUZAFFAR CHISHTI, MIGRATION POLICY INSTITUTE, STRATEGIC LEVERAGE: USE OF STATE AND LOCAL LAWS TO ENFORCE LABOR STANDARDS IN IMMIGRANT-DENSE OCCUPATIONS 9 (2018), https://www.migrationpolicy.org/research/strategic-leverage-use-state-and-local-laws-enforce-labor-standards-immigrant ("Immigrants make up a significant share of workers in the informal economy, where such practices [misclassification] are most common"); Liu, et al., *supra* note 30, at 7 (including both unreported workers and misclassified independent contractors in its estimation that there are 143,900 "informal workers" in California's construction industry); MAGNUS LOFSTROM ET AL., PUB. POLICY INSTITUTE OF CALIFORNIA, LESSONS FROM THE 2007 LEGAL ARIZONA WORKERS ACT 25 (Mar. 2011), https://www.ppic.org/publication/lessons-from-the-2007-legal-arizona-workers-act/ (discussing how the 2007 Legal Arizona Workers Act, which created additional employer penalties for hiring unauthorized workers, pushed Hispanic immigrants into informal work arrangements including independent contracting).

The largest of these is residential construction.[53] As of 2014, unauthorized immigrants made up 16 percent of the industry's workforce, despite representing only five percent of the labor force as a whole.[54] The labor law scholar Mark Ehrlich describes the restructuring of construction as typical of the "fissuring" trend over the past half-century, including the move towards widespread misclassification.[55] In practice, construction work requires strict chains of command, making it hard to take seriously the claim that large numbers of workers are independent, self-directed entrepreneurs.[56] Employers have nonetheless reaped significant benefits from treating their workers as independent contractors. Misclassification not only saves employers from numerous financial obligations under the law, but also enabled them to dismantle the power of organized labor, which was considerable in the construction industry throughout much of the twentieth century.[57] Recent estimates have found that around 25 percent of residential construction workers today are misclassified.[58] Misclassification is particularly acute in "specialty trades" such as roofing or drywall installation. Despite what the name may suggest, specialty trades are the largest subsector in the construction industry, and also employ most of its the lower-skilled workers.[59]

Construction is merely the largest sector of the unauthorized and misclassified workforce. Similar trends in the restructuring of work have been observed in building services and janitorial work,[60] landscaping,[61] and taxi services,[62] to name only a few examples. By effectively forcing many unauthorized workers into independent contracting jobs, IRCA played a role in creating this workforce.[63] But as the labor sociologist Ruth Milkman has

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[53] Mark Erlich, *Misclassification in Construction: The Original Gig Economy*, 74 ILR REV. 1202, 1214 (2021).

[54] Elmore & Chishti, *supra* note 52, at 10; *see also* Erlich, *supra* note 53, at 1213-17; Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L. J. 111, 116 (2008) (discussing the prevalence of misclassified unauthorized immigrant workers in construction).

[55] Erlich, *supra* note 53, at 1207.

[56] *Id.* at 1212 ("Construction operates with a relatively clear organizational structure…. The project manager and superintendent coordinate the various subcontractors whose foremen, in turn, supervise workers carrying out the day-to-day tasks. There is no room for a worker to operate independently from the chain of command. It simply would not work").

[57] *Id.* at 1204-06; Liu et al., *supra* note 35, at 13 (quoting a California Carpenter's Union officer who stated in 1969 that "There isn't a nail driven in this area that isn't driven by a union man with a union card in his pocket"); RUTH MILKMAN, L.A. STORY: IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT, 52-59 (2006) (providing a brief history of construction unionism in the mid-twentieth century).

[58] Elmore & Chishti, *supra* note 52, at 10.

[59] Liu et al., *supra* note 35, at 12-15.

[60] Milkman, *supra* note 8, at 80-84; Elmore & Chishti, *supra* note 52, at 11; Wishnie, *supra* note 22, at 214.

[61] Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMM. L. J. 243, 270 (2017).

[62] *See* Dubal, *supra* note 7, at 116-134.

[63] *See* Erlich, *supra* note 53, at 1213.

convincingly argued, there is a deeper structural explanation for why so many immigrant jobs are organized under precarious arrangements such as independent contracting.[64]As businesses developed strategies to weaken the power of organized labor and avoid costly obligations to workers, jobs that had once been relatively stable, safe, and well-compensated became much less attractive. Workers who had better options left these jobs, and quite often, only more vulnerable immigrant workers were willing to fill them.[65] Through labor market segmentation, solid unionized working-class jobs were "transformed into 'jobs that Americans don't want.'"[66]

D. *Entrepreneurs by necessity*

Critics of the contemporary "gig economy" have warned that app-based service platforms have spread precarious, informal work arrangements predicated on treating workers as independent business operators.[67] Some philosophers and social theorists go even further. For the philosopher Michel Foucault as well as more recent thinkers like Wendy Brown, the "neoliberal" political and economic order of the last several decades encourages individuals to think and act as "entrepreneurs of themselves," striving to maximize themselves as "human capital."[68] For gig companies, this description is not so much a critique, but rather a part of their recruiting pitches, which typically extol the virtues of micro-entrepreneurship.[69] Defenders of the gig model praise the proliferation of independent contract work, and typically oppose reform efforts like California's AB5 on the grounds that they will make it harder to access freelance and self-employed work options.[70]

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[64] Milkman, *supra* note 8.

[65] For Milkman, this story of labor market segmentation explains why there is not nearly as much competition between immigrant and native-born workers as is commonly believed. *Id.* at 20-31.

[66] *Id.* at 29.

[67] *See, e.g.* Weil, *supra* note 8; Robert Kuttner et al., *The Future of Real Jobs: A Prospect Roundtable*, THE AMERICAN PROSPECT (May 14, 2019), https://prospect.org/economy/future-real-jobs-prospect-roundtable; Alex N. Press, *Silicon Valley Wants to Entrench the Gig Economy and Neutralize the Labor Movement*, JACOBIN (Feb. 2, 2021), https://jacobin.com/2021/02/silicon-valley-gig-economy-labor-biden.

[68] MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979 (2008) ("In neo-liberalism … there is also a theory of *homo oeconomicus*…. An entrepreneur of himself, being for himself his own capital, being for himself his own producer, being for himself the source of [his] earnings"); WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION (2015).

[69] For example, Doordash's website promises delivery drivers that they will be able to "work when you want," and "forget about reporting to an office – or a boss." Doordash, "Sign up to become a Dasher," https://dasher.doordash.com/en-us [https://perma.cc/U798-4Y6V] (last visited Nov. 10, 2022).

[70] *See, e.g.* Ben Wilterdink, *The Good, the Bad, and the Ugly of Proposition 22*, ORANGE CTY. REGISTER (Nov. 17, 2020), https://www.ocregister.com/2020/11/17/the-good-the-bad-and-the-ugly-of-proposition-22/; Shawn Carolan, *What Proposition 22 Now*

Long before the rise of companies like Uber, Lyft, and Doordash, unauthorized immigrant workers were pushed into similar forms of micro-entrepreneurship. Market pressures in low-wage industries, the formal requirements of immigration law, and the unique vulnerabilities of undocumented status have worked together to shape these workers into what Eric Franklin Amarante refers to as "necessity entrepreneurs," forced to act as independent business owners to survive.[71]

Many unauthorized immigrants embrace entrepreneurship and thrive as small business owners.[72] Federal immigration law does not prevent unauthorized immigrants from creating business entities such as limited liability companies (LLCs), and in many situations, operating one's own business does not create an employment relationship.[73] Since business owners routinely agree to provide services to other entities, immigrant entrepreneurs often simultaneously operate as independent contractors. These two pathways to what Kit Johnson has termed "lawful work while undocumented" therefore overlap.[74] Legal scholars and immigrant advocate organizations have identified various financial and legal benefits of forming businesses, making them a vital pathway to social mobility for undocumented entrepreneurs.[75]

The remainder of this Article is nonetheless chiefly concerned with immigrants who work as independent contractors due to prevailing employer practices in low-wage industries, rather than those who choose to become entrepreneurs. Bills like California's AB5 do not outlaw independent contracting by bona fide independent business owners. Rather, they impose a broader definition of "employment"—the ABC test—which

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Makes Possible, THE INFORMATION (November 10, 2020), https://www.theinformation.com/articles/what-proposition-22-now-makes-possible.

[71] Amarante, *supra* note 46, at 1344 ("A necessity entrepreneur is someone who starts a business because they lack alternative choices. This is in contrast to opportunity entrepreneurs, who make business choices based on their self-interested motivations…. [O]ne might consider an undocumented immigrant entrepreneur to be the quintessential necessity entrepreneur").

[72] *See* Dubal *supra* note 7, at 148-56 (sharing the results of interviews with San Francisco immigrant taxi drivers, many of whom identify strongly with their status as independent entrepreneurs).

[73] Johnson, *supra* note 10, at 111-29; Amarante, *supra* note 46, at 1359-66.

[74] Johnson, *supra* note 10. Imagine Ed is the sole member (i.e., the owner and operator) of Ed's Construction, LLC, and hires Humberto, a gardener, as to plant flowers on the property of one of the LLC's clients. If Humberto works as an independent contractor, he does not have to fill out a Form I-9 to work for Ed's Construction. Nor is Ed required to do so, since he is not an employee of the client who hired his LLC for the project. This example is adapted from the facts of an employer sanctions case, United States v. Mr. Z Enterprises, 1991 OCAHO LEXIS 4 (OCAHO 1991).

[75] *See* Johnson, *supra* note 10, at 122-29 (discussing the advantages of LLCs for tax and legal liability as well as worker benefits). The most prominent organization advocating for immigrant entrepreneurship is Immigrants Rising, which provides resources for undocumented students on income generation. Immigrants Rising, Resources, https://immigrantsrising.org/resources/ (last visited Nov. 10, 2022).

makes it harder for employers to classify low-wage workers as independent contractors as a routine business practice.[76] Adopting the ABC test in the work law context is therefore likely to affect the status of workers in industries like residential construction, landscaping, building maintenance, and taxi and delivery services.[77] The immigration implications of this work law reform will be the focus of later parts of this Article.

II. PREVENTING MISCLASSIFICATION: THE ABC TEST

Part I described how both IRCA sanctions and a wide range of work law benefits hinge on whether a worker is an employee or an independent contractor. Part II examines the legal tests that courts, administrative agencies, and other adjudicative bodies use to determine which workers fall into these two categories. The problem of how to distinguish employees from independent contractors is a very old one in U.S. law, and it has been the subject of an immense body of legal scholarship.[78] Rather than attempt a comprehensive summary of this scholarship, this Part begins with a brief discussion of the distinction between the two main approaches to defining independent contractor status—the common law control test and the ABC test. This discussion will demonstrate how the ABC test is more likely than the common law test to find that a low-wage immigrant worker is an employee. Part II concludes by examining a number of criticisms of and alternatives to the ABC test as a model for misclassification reform.

A. *Misclassification under the common law control test*

The common law control test, derived from the law of agency, remains the dominant legal standard for distinguishing employees from independent contractors across most federal and state work law. The basic principle of the common law approach is that an employee is a worker whose employer "controls or has the right to control the manner and means of [her] performance."[79] Absent such control, the worker is an independent contractor.[80] To determine employer control, courts and other adjudicative

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[76] *See* Deknatel & Hoff-Downing, *supra* note 4.

[77] *See* SARAH THOMASON ET AL., U.C. BERKELEY CTR. FOR LABOR RESEARCH AND EDUC., ESTIMATING THE COVERAGE OF CALIFORNIA'S NEW AB 5 LAW 3 (2019), https://laborcenter.berkeley.edu/wp-content/uploads/2019/11/Estimating-the-Coverage-of-Californias-New-AB-5-Law.pdf.

[78] *See, e.g.*, Carlson, *supra* note 49; Dubal, *supra* note 7; Racabi, *supra* note 50; Noah Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 A.B.A. J. LAB. & EMP. L. 279 (2011); Guy Davidov & Pnina Alon-Shenker, *The ABC Test: A New Model for Employment Status Determination?*, 51 INDUS. L. J. 235, 243 (2022).

[79] Restatement (Third) of Agency § 7.07(3)(a).

[80] *See* Leticia Saucedo, *Employment Authorization and Immigration Status: The Janus-Faced Immigrant Worker*, 42 OHIO N. U. L. REV. 471, 472 (2017) ("Essentially, an

bodies consider a nonexhaustive, multifactor test, which is essentially a totality-of-the-circumstances test.[81]

Over time, some courts have articulated alternative principles to replace employer control, but in effect, these principles have simply been added to the sprawling list of factors to consider.[82] While the precise formulation of the multifactor test varies across various work law contexts, all versions of the common law control test require adjudicators to weigh the totality of the circumstances using a list of nonexhaustive factors.[83]

The open-endedness of the common law control test tends to favor employers seeking to classify workers as independent contractors. The sheer number of factors that may be considered evidence of employer control make it difficult to predict how an adjudicator might characterize a given

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employee is a worker who is not an independent contractor. Employees are protected under federal statutes, whereas independent contractors are not").

[81] Carlson, *supra* note 49, at 327 (discussing several variations of the common law test, concluding that "every test … was open-ended in application, freely incorporating all sorts of factors, and they led to more or less the same multi-factoral analysis"); *see also* United States v. Siddikov, 2015 OCAHO LEXIS 18, *15-16 (OCAHO 2015) (discussing the application of this totality-of-the circumstances test in the IRCA context).

[82] Lehigh Valley Coal Co. v. Yensavage, 281 F. 547, 552-53 (2d Cir. 1914) (articulating what has become known as the "economic realities" test, which considers a worker's dependence on a single employer as evidence of employee status); FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009) (articulating the "entrepreneurial potential" test, which defines an independent contractor as a worker has "significant entrepreneurial opportunity for gain or loss" (internal citations omitted). The D.C. Circuit in *FedEx Home Delivery* made explicit that variations such as these should be understood as shifts in emphasis between different common law factors rather than a distinct legal test: "Both this court and the [National Labor Relations] Board, while retaining all of the common law factors, *shifted the emphasis* away from the unwieldy control inquiry in favor of a more accurate proxy: [entrepreneurial opportunity]." *FedEx Home Delivery*, 563 F.3d at 497 (emphasis added).

[83] *See, e.g.* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) ("Among the factors relevant to this inquiry are [1] the skills required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; [12] and the tax treatment of the hired party").

The I.R.S. definition of independent contractor status involves an even more intricate list of factors: "(1) Instructions; (2) Training; (3) Integration; (4) Services Rendered Personally; (5) Hiring, Supervising, and Paying Assistants; (6) Continuing Relationship; (7) Set Hours of Work; (8) Full Time Required; (9) Doing Work on Employer's Premises; (10) Order or Sequence Set; (11) Oral or Written Reports; (12) Payment by Hour, Week, or Month; (13) Payment of Business and/or Traveling Expenses; (14) Furnishing of Tools and Materials; (15) Significant Investment; (16) Realization of Profit or Loss; (17) Working for More Than One Firm at a Time; (18) Making Service Available to the General Public; (19) Right to Discharge; (20) Right to Terminate." U.S. Internal Revenue Service, Rev. Rul. 87-41.

work arrangement.[84] According to the California Supreme Court, in a decision that helped pave the way for the AB5 law, "the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities."[85] Employers can usually point to some aspect of a worker's job that suggests independent contractor status, such as the use of her own equipment, or the option to set her own hours. Furthermore, although disputes about employee status typically arise under laws that protect employees against their employers' abuse, courts have held that the common law definition of "employee" does not take such statutory purpose into account.[86] For these reasons, many legal commentators have concluded that the common law test, as applied traditionally, facilitates misclassification.[87]

To be clear, misclassification of employees is illegal under the common law test. If a court or adjudicating agency finds that workers treated as independent contractors are actually employees, it can hold the employer liable for penalties in both the immigration and work law contexts. In disputes over employee benefits or labor rights, workers can and do successfully sue their employers for misclassifying them as independent contractors under the common law test. However, Veena Dubal has observed that these suits have generally been unsuccessful in deterring the broader practice of misclassification.[88] Particularly when seeking to hold large companies to account, plaintiff workers are most likely to succeed by filing class action litigation. But since successful lawsuits are typically settled out of court, they stand little chance of creating strong legal authority supporting their status as employees.[89]

B. *The ABC test and the presumption of employment*

Recognizing the ways in which the common law control test facilitates employee misclassification, many policymakers seeking to reverse this trend

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[84] *See* Buscaglia, *supra* note 54, at 130.

[85] Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903, 955 (2018); *see also* Carlson, *supra* note 43 at 336; ("legal uncertainty encourages and rewards employer conduct that tests the limit of the law").

[86] Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 325 (upholding a "presumption that Congress means an agency law definition for 'employee,'" and abandoning earlier case law "construing that term in the light of the mischief to be corrected and the ends to be attained") (internal quotation marks omitted).

[87] Carlson, *supra* note 49, at 336; Buscaglia, *supra* note 54, at 130; Deknatel & Hoff-Downing, *supra* note 4, at 60 (the common law test is "easily manipulated by employers and … generat[es] uncertainty over a worker's employee status"); Dubal, *supra* note 51, at 54 (noting businesses' preference for the common law variant that emphasizes workers' "entrepreneurial opportunity").

[88] Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739 (2017).

[89] *Id.* at 757.

have settled on an alternative legal standard, known as the ABC test.[90] While the ABC test shares several elements with the common law approach, it adopts a broader definition of employment, making it harder to misclassify employees as independent contractors.[91] Several varieties of the ABC test exist, and many have been codified in state employment law for decades.[92] This section examines the version of the ABC test enacted by California's AB5 law, detailing how each of its components seeks to reduce misclassification.[93]

Most importantly, the ABC test creates a rebuttable presumption that a worker is an employee, placing the burden on the employer to establish an independent contractor relationship. The California law states that "for purposes of the provisions of this code … a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions [discussed below] are satisfied."[94]

The first of the three criteria for identifying independent contractors—the "A" prong of the test—incorporates the common law factor of employer control, but with the burden on the employer to show lack of control in order to overcome the presumption of employment: "(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact."[95] The traditional employer control factors remain relevant under the ABC test. However, the ABC test's structure no longer reduces the determination of independent contractor status to the unpredictable totality-of-the-circumstances test created by the common law.

The "B" and "C" prongs of the ABC test give weight to factors that courts in the common law tradition have tended to dismiss.[96] To find that a worker is an independent contractor, the ABC test requires a finding that both "(B) The person performs work that is *outside the usual course of the hiring entity's business*" and "(C) The person is customarily engaged in an *independently established trade, occupation, or business* of the same nature as that involved in the work performed."[97] Requiring that an independent contractor work outside of the employer's core business reduces the likelihood that an employer will succeed in categorizing its primary workforce as independent contractors. However, businesses may seek to convince a court that their "usual course of business" is something other

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[90] *See* Deknatel & Hoff-Downing, *supra* note 4 (discussing various legislative adoptions of the ABC test before California's AB5 bill).

[91] *See Id.* at 61; Davidov & Alon-Shenker, *supra* note 78, at 243.

[92] Deknatel & Hoff-Downing, *supra* note 4 at 54 n.11.

[93] Cal. Labor Code § 2750.3(a); *cf.* PRO Act, H.R.842, 117th Congress § 101(b).

[94] Cal. Labor Code § 2750.3(a)(1).

[95] *Id.* § 2750.3(a)(1)(A).

[96] *See* Carlson, *supra* note 49.

[97] Cal. Labor Code §§ 2750.3(a)(1)(B)-(C) (emphasis added).

than what it seems.[98] The requirement that an independent contractor be part of an "independently established field" further limits what types of occupations will typically be found consistent with independent contractor status.

AB5 made the ABC test the near-universal standard for defining employment across California's work law systems.[99] California's was the most ambitious attempt to use the ABC test to combat employee misclassification, reclassifying an estimated one million independent contractors as employees.[100] Soon after AB5's passage in 2019, influential gig economy companies including Uber, Lyft, Doordash, Postmates, and Instacart soon put their support behind a ballot initiative to exempt app-based taxi and delivery drivers from the ABC test. These companies spent over 200 million dollars on the successful campaign to pass Proposition 22 in November 2020.[101] While the ABC test continues to apply to most other workers, ongoing litigation in California courts will ultimately decide the fate of Proposition 22's exceptions.[102] In the meantime, other states have considered passing similar bills to AB5, while gig economy companies have also begun campaigns to solidify independent contractor status for their workforces under state law.[103]

C. *Comparing the common law and the ABC tests as applied to unauthorized workers*

IRCA administrative case law has on several occasions addressed the issue of employee misclassification in the immigration context. Applying the common law test required by regulation, these cases have not produced a clear or consistent approach to how immigration law defines the boundary between employee and independent contractor status. What is relatively clear, however, is that application of the ABC test in this context would

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[98] *See* Dubal, *supra* note 51, at 59.

[99] AB5 nonetheless does make exceptions for certain classes of workers, including medical and legal professionals, applying the common law-derived standard articulated in S. G. Borello & Sons, Inc. v. Dep't of Industrial Relations, 48 Cal.3d 341 (1989). *See* Cal. Labor Code § 2750.3(b).

[100] Rhinehart et al., *supra* note 3.

[101] Dubal, *supra* note 51, at 63.

[102] In August 2021, a state trial court judge held that Proposition 22 violated the state constitution by limiting the legislature's power over the worker's compensation system. *Castellanos v. State*, 2021 Cal. Super. LEXIS 7285 (August 20, 2021). Proposition 22's exemptions for gig economy drivers remain in effect while the case is on appeal.

[103] Rosenberg, *supra* note 5 (discussing AB5-like proposals in New York, New Jersey, and Illinois); Faiz Siddiqui, *Uber Says it Wants to Bring Laws Like Prop 22 to Other States*, WASH. POST (Nov. 5, 2020), https://www.washingtonpost.com/technology/2020/11/05/uber-prop22/; Adam M. Rhodes, *Lyft Won Big in California. Now It's Set Its Sights on Illinois*, CHICAGO READER (Nov. 23, 2020), https://chicagoreader.com/news-politics/lyft-won-big-in-california-now-its-set-its-sights-on-illinois/.

make findings of employee status far likelier than under present law. In other words, the current common law test used under immigration law is less likely than the ABC test to find that an unauthorized worker is an employee triggering IRCA sanctions.

IRCA employer sanctions cases are adjudicated by Administrative Law Judges (ALJs) within the Office of the Chief Administrative Hearing Officer (OCAHO). OCAHO is a branch of the Executive Office for Immigration Review (EOIR), the Department of Justice agency that adjudicates certain immigration cases.[104] Immigration regulations provide the following definition of independent contractor status:

> The term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: [1] supplies the tools or materials; [2] makes services available to the general public; [3] works for a number of clients at the same time; [4] has an opportunity for profit or loss as a result of labor or services provided; [5] invests in the facilities for work; [6] directs the order or sequence in which the work is to be done and [7] determines the hours during which the work is to be done.[105]

The immigration law definition of independent contractor is a version of the common law control test.[106] While ALJs must adhere to this regulatory definition, they typically also consult a wide variety of federal case law distinguishing employees and independent contractors in the work law context.[107] As a result, OCAHO applies the kind of multifactor totality-of-the-circumstances discussed above.[108]

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[104] *See* Charles Gordon et al., 1 Immigration Law & Procedure § 7.05.

[105] 8 C.F.R. § 274a.1(j) (numerals added).

[106] United States v. Siddikov, 2015 OCAHO LEXIS 18, *10 (OCAHO 2015) (articulating this test's grounding in the common law).

[107] *Id.* at *8-9. *See also* United States v. Mr. Z Enterprises, 1991 OCAHO LEXIS 4, *81 (OCAHO 1991) ("In addition to the statutory definitions, the common law test for distinguishing between employee and independent contractor adopted by the Ninth Circuit is instructive"); United States v. Robles, 1991 OCAHO LEXIS 28, *13-14 (OCAHO 1991) ("even though the words are somewhat different, in application [the factors listed in 8 C.F.R. § 274a.1(j)] are really no different from the common law rules compiled in the Restatement (Second) of Agency").

[108] *See supra* Part II.A; *Siddikov*, 2015 OCAHO LEXIS 18, at *16 ("however the test itself is articulated, courts tend in practice to look at the totality of the circumstances").

OCAHO has noted that an increasing number of immigrant workers "appear to fall in the gray areas between the two categories,"[109] and the agency's case law has addressed a number of common unauthorized work arrangements—to mixed results. In a 2015 decision on this issue, *United States v. Siddikov,* a cleaning company was initially fined for failure to prepare the Form I-9 for several of its workers, but successfully defended itself against liability by contending that these cleaners were independent contractors.[110] This finding rested on several facts: the cleaners worked only occasionally and not exclusively for the company; customers, rather than the company, provided cleaning equipment; and customers agreed on the payment method with the workers.[111] Concluding that the cleaners were independent contractors, the ALJ noted that "cleaning and maintenance work have historically been among the types of tasks that are most frequently subcontracted.[112] An earlier case similarly found that a gardener hired by a construction company was an independent contractor.[113]

Other similar cases come out the other way. *United States v. Robles*, a 1991 OCAHO decision involving roofing workers, found facts supporting both independent contractor and employment status, but ultimately opted to sanction the company for failure to prepare Form I-9.[114] The ALJ in *Robles* found several facts supporting independent contractor status: namely, the workers were paid "by the square" for each bundle of roofing shingles they attached, could decide which jobs to work, and required minimal supervision.[115] Additionally, the ALJ acknowledged that independent contractor status was standard in the local roofing industry.[116] However, the ALJ chose to give more weight to factors suggesting employment: the roofing workers had no special skills; did not hold themselves as independent business operators or demonstrate an entrepreneurial motive; and their employer maintained worker's compensation coverage for them.[117]

The immigration law definition of independent contractor—like the common law test in general—makes it difficult to predict precisely the outcomes of these close cases. Immigration regulations specify that this definition is interpreted on a case-by-case basis, and OCAHO cases

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[109] *Id.* at *18.
[110] *Id.* at *25.
[111] *Id.* at *22-23.
[112] *Id.* at *23-24.
[113] United States v. Mr. Z Enterprises, 1991 OCAHO LEXIS 4 (OCAHO 1991); *see also* United States v. Valdez, 1989 OCAHO LEXIS 43 (OCAHO 1989) (accountant working for a restaurant was an independent contractor).
[114] United States v. Robles, 1991 OCAHO LEXIS 28 (OCAHO 1991).
[115] *Id.* at *6.
[116] *Id.* at *30.
[117] *Id.* at *21-24; *see also* United States v. Hudson Delivery Service, Inc., 1997 OCAHO LEXIS 98 (OCAHO 1997) (finding that delivery drivers for a grocery store were employees in because they were told where and when to work, provided tools, required to maintain logs, and worked for only one employer); United States v. Bakovic, 1993 OCAHO LEXIS 3 (OCAHO 1993) (fishing crewmen paid by output were employees).

regularly emphasize that these fact-specific decisions are difficult to generalize.[118]

What is clear, however, is that the relevant immigration regulation makes it far easier to conclude that a worker is an independent contractor than the ABC test.[119] Like all variants of the common law control test, § 274a.1(j) does not presume employee status, and allows adjudicators to choose to give weight to any of a wide variety of facts in any given case. While this feature of the common law test often does not play out in workers' favor in the work law context, for IRCA purposes, it can be an advantage for unauthorized immigrants working as independent contractors. Maintaining the common law test in the immigration context increases the likelihood that unauthorized workers who have been treated as independent contractors—thereby exempt from the I-9 verification requirement—can continue as such, regardless of how work law labels them.

D. *The benefits and limits of the ABC test*

Proponents of the ABC test contend that by making it harder for employers to choose independent contractor status, more low-wage workers will enjoy work law protections, rights, and benefits.[120] Whereas the common law control test is unpredictable, leaving ample opportunities for employers to misclassify their workers, the ABC test is "enforcement-oriented."[121] For many legal scholars, the ABC test's narrower definition of independent contract work more accurately categorizes workers in the contemporary economy who actually intend to operate independent businesses.[122] The ABC test therefore has the potential to be a powerful tool for policymakers seeking to combat misclassification and the informalization of the low-wage immigrant workforce. Of the approximately one million workers who may be newly classifiable as employees as a result of the AB5 law in California, significant numbers work in immigrant-heavy occupations such as cleaning services, taxi services, grounds maintenance services, and construction.[123]

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[118] 8 C.F.R. § 274a.1(j) ("Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis"); *see, e.g.* United States v. Siddikov, 2015 OCAHO LEXIS 18, *16 (OCAHO 2015) ("Commentators have … expressed concern that the traditional tests [including 8 C.F.R. § 274a.1(j)] do not provide an adequate modern standard for determining who is or is not an employee");

[119] 8 C.F.R. § 274a.1(j).

[120] *See, e.g.* Rhinehart et al., *supra* note 3; Veena Dubal, *AB5: Regulating the Gig Economy is Good for Workers and Democracy*, LPE BLOG (Oct. 23, 2019), https://lpeproject.org/blog/ab5-regulating-the-gig-economy-is-good-for-workers-and-democracy/.

[121] Dubal, *supra* note 51, at 59.

[122] *See, e.g. id.*; Deknatel & Hoff-Downing, *supra* note 4, at 83-84; Davidov & Alon-Shenker, *supra* note 78.

[123] Rhinehart et al., *supra* note 3; Sarah Thomason et al., *supra* note 77, at 3.

The ABC test nonetheless has its limits, starting with the challenge of enforcement. Misclassification has become widespread not only because of the deficiencies of the common law control test, but also simply because of failures to enforce the law.[124] Even the most accurate legal definition of the boundary between employment and independent contracting is only as good as state and federal agencies' ability to hold employers accountable. At the same time, given some unauthorized immigrants' reliance on self-employment and entrepreneurship discussed above,[125] there is also a danger of overcorrection, where zealous enforcement of "employee" status may make it difficult for bona fide immigrant entrepreneurs to find work as independent contractors.

On a conceptual level, a major limitation of the ABC test is that it preserves the "binary" structure that hinges worker rights and protections on "employee" status in the first place.[126] Noah Zatz has written that any solution that continues to place so much weight on the question of who is an employee "does not account for the firms' power to *choose* the methods by which they obtain labor," or "the *constitutive role of law* in how firms make that choice."[127] In other words, employers generally hold the power to shape workplaces in ways most advantageous to them, and they take the law into account in doing so. As a result, as long as there is a legal definition separating those entitled to benefits (i.e., employees) and those who are not (i.e., independent contractors), employers will tend to create work arrangements that fit the latter category.

One possible alternative to the ABC test is to create an intermediate category of worker that is neither an employee nor an independent contractor, with its own set of legal rights and claims. Several other countries have enacted legal classifications along these lines, and New York state has considered doing so as well.[128] In its own way, California's Proposition 22 created the beginnings of an intermediate worker category, exempting app-based drivers from full employee status, but enacting special provisions to guarantee a minimum wage, protect drivers against discrimination, and provide subsidies for healthcare plans through the

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[124] *See* Deknatel & Hoff-Downing, *supra* note 4, at 62-63, 74-79 (discussing the limits of federal enforcement efforts, and listing various state initiatives to strengthen enforcement in the 2010s); Elmore & Chishti, *supra* note 52, at 15-48 (calling for robust misclassification enforcement mechanisms at the state level and through state-federal partnerships).

[125] *See supra* Part I.D.

[126] *See*, Racabi, *supra* note 50, at 1167; Dubal, *supra* note 7, at 156-159; Carlson, *supra* note 49, at 300; Zatz, *supra* note 78.

[127] *Id.* at 288 (emphasis in original).

[128] These intermediate categories are sometimes referred to as "dependent workers" or "dependent contractors." *See* Miriam A. Cherry and Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635 (2017) (discussing examples of "dependent contractor" categories in Canada, Italy, and Spain); "Dependent Worker Act," N.Y. Senate Bill S6358 (June 15, 2019).

Affordable Care Act.[129] However, empirical studies since Proposition 22's enactment have found that the law has failed to live up to its guarantees. For example, since Proposition 22's $15.60 minimum wage does not apply to drivers' wait time, the actual hourly wage drivers receive can be as low as $5.64.[130]

Intermediate categories such as "dependent contractors" may have useful applications for unauthorized immigrants. For workers who generally lack access to any sort of formal work law protections, even a limited set of workplace rights may be better than nothing. This approach may also be more politically feasible in a context where employers are fiercely opposed to expanding employee status universally.

However, as long as federal immigration law relies on the binary between employment and independent contracting, the question remains of how IRCA would apply to a new intermediate category of workers. In cases involving potential sanctions for employers of these intermediate workers, OCAHO adjudicators would still have to decide which of the traditional categories best applies. A reform project that seeks to include unauthorized workers within the scope of this new category would therefore still have to show that it can fit the immigration definition of independent contract work.

While the possibility of protecting unauthorized immigrants through an intermediate worker category merits further study, this Article examines the immigration implications of reforms adopting the ABC test. This model has gained political momentum among policymakers seeking to address the misclassification problem, both in several states and within the Biden administration. It is therefore important to understand its immigration implications. Despite some of the flaws of the ABC test discussed in this section, applying a more expansive definition of "employee"—which carries the full range of work law rights and benefits—is likely to have a positive effect. It may never be possible to eliminate the threshold question of who is entitled to these legal protections, whether by virtue of employee status, or some other criterion. But as it stands today, applying the ABC test appears to be a powerful tool for including more of the U.S. workforce within the formal economy. The question that remains is whether unauthorized immigrants can also benefit from these expanded protections.

III. HYBRID STATUS UNDER IMMIGRATION AND WORK LAW

Legal reforms that expand the definition of "employment" via the ABC test have the potential to bring large numbers of unauthorized immigrants under the formal protections of work law. If successfully implemented, bills

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[129] 10.5 Cal Bus & Prof Code §§ 7454-7462.

[130] KEN JACOBS & MICHAEL REICH, U.C. BERKELEY LABOR CENTER, THE UBER/LYFT BALLOT INITIATIVE GUARANTEES ONLY $5.64 AN HOUR (2019), https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/.

like California's AB5 and the PRO Act can extend the employee protections of both state and federal work law to precarious immigrant workers who are currently excluded. This prospect nonetheless depends on how these workers are be treated under federal immigration law.

How will new definitions of employment affect outcomes under IRCA? If work law reclassifies common immigrant independent contractor jobs as employment, employers will inevitably be confronted with the question of whether immigration law must reclassify them as well, subjecting them to the I-9 verification requirement. As Kit Johnson writes, "[i]nsofar as the states' recategorization of these workers would affect how the jobs are viewed in terms of immigration law, such changes would radically restrict the type of work available to noncitizens without employment authorization."[131] If this is the case, adopting the ABC test may have the opposite effect as intended for immigrant workers, pushing them further outside of the law's protections.

Part III demonstrates that work law adoptions of the ABC test do not necessarily trigger any change to the immigration law treatment of independent contract work. While both areas of law define employment for their own purposes, they do so independently of one another. We can observe "disharmonies" between the way U.S. law defines "employment" in two different respects: first, in considering whether the scope of this definition can include unauthorized workers in the first place; and second, in distinguishing employees from independent contractors.[132] As a result, immigrant workers in occupations that have been treated as independent contract work can be simultaneously classified as employees for work law purposes and independent contractors the purpose of IRCA and I-9 verification.[133] While OCAHO case law does not always uphold the legality of common immigrant work arrangements under IRCA, the common law

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[131] Johnson, *supra* note 10, at 104-05.

[132] My discussion of "disharmonies" in some respects resembles what Jonathan Siegel has termed the "polymorphic principle" of statutory interpretation, by which a single term in a single statute or across statutes may be given different meanings depending on the situation. *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339 (2005). I nonetheless prefer the musical or acoustic metaphor to Siegel's computer science comparison. Though I do not go as far as to call for a complete "acoustic separation" between immigration and work law, I find it valuable to pose the question of whether it is necessary or desirable for there to be consonance or dissonance between how these two areas of law operate. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

[133] In other contexts, immigration law itself regularly deals with disharmonies between state and federal definitions of the same legal concept. Notably, certain categories of criminal convictions affect an individual's eligibility for immigration status under federal law, leaving open the question of when a state criminal offense fits one of these categories. *See* INA § 212(a)(2); 8 U.S.C. § 1182(a)(2); INA § 237(a)(2); 8 U.S.C. § 1227(a)(2). Courts have developed a mode of analysis known as the "categorical approach" for analyzing state criminal statutes to answer this question. *See* Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013) (articulating how the categorical approach is generally applied).

approach required by immigration regulations largely preserves employers' ability to offer these kinds of jobs to unauthorized immigrants.

A. *Disharmony between IRCA and work law definitions of employment*

While IRCA dramatically changed how U.S. law has viewed the employment of unauthorized immigrants, it did not place them beyond the definitional scope of "employment" in the work law context. Before IRCA's passage in 1986, unauthorized workers generally enjoyed the same work law rights as those with lawful status.[134] Notably, the Supreme Court held in *Sure-Tan Inc. v. NLRB*[135] that the National Labor Relations Act's (NLRA) definition of employment applied to unauthorized workers, granting them the right to collective bargaining.[136] However, after IRCA made it unlawful to hire for employment an immigrant without work authorization, courts were faced with the question of whether these workers could continue to assert their rights to collective bargaining, wage and hour guarantees, protection against discrimination, worker's compensation, and the like. For several decades, courts generally agreed that these rights remained unchanged despite the new employment framework IRCA created.[137]

The Supreme Court's 2002 decision in *Hoffman Plastic Compounds, Inc. v. NLRB*[138] complicated the question, but did not change the fundamental fact that unauthorized immigrants remain within the scope of work law definitions of employment. The question in *Hoffman* was whether unauthorized workers who had been fired as a result of unfair labor practices could receive backpay under the NLRA. The Court held that they could not in light of IRCA.[139] Not only does IRCA's prohibition on unauthorized employment directly foreclose reinstatement of an employee without work authorization;[140] Justice Rehnquist's majority opinion also holds that the backpay remedy violates the purpose of the law.[141] As a result, when employers illegally fire unauthorized workers to stop them from forming a

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[134] *See* Saucedo, *supra* note 74, at 473.

[135] 467 U.S. 883 (1984).

[136] *Id.* at 892 ("Undocumented aliens … plainly come within the [NLRA's] broad statutory definition of "employee").

[137] *See* NLRB v. Kolkka, 170 F.3d 937, 941 (9th Cir. 1999) (holding that post-IRCA, the NLRA definition of employment continues to include unauthorized immigrants); *accord* Del Rey Torilleria, Inc. v. NLRB, 976 F.2d 1115, 1121 (7th Cir. 1992). *See also* Patel v. Quality Inn S., 846 F.2d 700, 704-05 (11th Cir. 1988) (holding that the FLSA definition of employee continues to include unauthorized immigrants); *accord* In re Reyes, 814 F.2d 168, 171 (5th Cir. 1987).

[138] 535 U.S. 137 (2002).

[139] *Id.* at 151 ("We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA").

[140] *Id.* at 148.

[141] *Id.* at 151.

union, the NLRB cannot grant them the pay they otherwise would have received.

Crucially for this discussion, though, the Court did not hold that unauthorized immigrants are categorically excluded from the NLRA definition of employment. While it found that the NLRB's remedy exceeded the agency's discretion by contravening IRCA, it allowed the Board to award other remedies—such as issuing cease and desist orders—for NLRA violations committed against unauthorized workers.[142] *Hoffman* recognizes formally that unauthorized immigrants can be employees entitled to collective bargaining rights, even it strips them of the tools to enforce these rights in practice.

In the years following *Hoffman*, federal and state courts considered once again the implications of IRCA for various areas of U.S. work law. Overwhelmingly, courts have upheld the principle that unauthorized immigrants are entitled to employee rights and protections. For example, in 2008 the D.C. Circuit held that neither IRCA nor *Hoffman* altered the definition of employment under the NLRA to exclude those without work authorization.[143] The majority in *Agri Processor Co. v. NLRB* noted that *Hoffman* declined to revisit the Supreme Court's pre-IRCA decision in *Sure-Tan*. In the D.C. Circuit's view, *Hoffman* was fundamentally about what remedies are available to unauthorized workers under the NLRA, not whether they are within the statute's scope in the first place.[144] This narrow interpretation of *Hoffman* remains the dominant approach in the NLRA context.[145]

Courts in other federal and state work law contexts post-*Hoffman* have also preserved unauthorized workers' ability to avail themselves of employee status. Immigrants' eligibility under the Fair Labor Standards Act's (FLSA) minimum wage and overtime standards are most secure, with courts ruling virtually unanimously that such workers may recover unpaid

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[142] *Id.* at 152.

[143] Agri Processor Co. v. NLRB, 514 F.3d 1, 4 (D.C. Cir. 2008) ("Neither IRCA nor *Hoffman Plastic* supports the company's argument" that "IRCA … somehow amended the NLRA to exclude undocumented aliens from its coverage, and that *Hoffman Plastic* overruled *Sure-Tan*"); *accord* NLRB v. Concrete Form Walls, Inc., 225 Fed. App'x 837 (11th Cir. 2007).

[144] *Agri Processor*, 514 F.3d at 7-8.

[145] *See* Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1306-07 (11th Cir. 2013) (*Hoffman* does not alter NLRA or FLSA definitions of employment). A review of circuit court decisions since 2008 shows no case in which a federal Court of Appeals took the opposite view. However, the dissenting opinion in *Agri Processor* was written by then-Judge Brett Kavanaugh, who currently sits on the U.S. Supreme Court. In his dissent, Judge Kavanaugh argued that *Sure-Tan*'s holding depended on there being no prohibition against hiring unauthorized immigrants; since IRCA subsequently enacted such a prohibition, he would have held that these workers could not be considered "employees" under the NLRA. *Agri Processor*, 514 F.3d at 10-15 (Kavanaugh, J. dissenting).

wages.[146] Many courts have expressed unwillingness to hold that IRCA bars a worker from recovering payment for work she has already completed.[147]

Under state laws guaranteeing similar workplace protections—including wage loss, worker safety, and worker's compensation schemes—courts have mostly followed this trend towards treating unauthorized workers as employees. Many of these cases arose as preemption challenges, with courts generally rejecting the notion that these benefits for unauthorized workers conflict with IRCA's regulatory scheme, as interpreted by *Hoffman*.[148] As Tobias Kuehne has recently written, state courts in these areas generally uphold the principle that these workers are entitled to benefits as participants in the labor market.[149] However, in some cases arising under state work law, courts have barred unauthorized workers from receiving certain remedies analogous to those involved in *Hoffman*.[150] Additionally, some states have

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[146] *See, e.g.* Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 930 (8th Cir. 2013); Jin-Ming Lin v. Chinatown Rest. Corp., 771 F.Supp. 2d 185, 187-188 (D. Mass. 2011); Villareal v. El Chile, Inc., 266 F.R.D. 207, 212-14 (N.D. Ill. 2010); Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1277 (N.D. Okla. 2006); Zavala v. Wal-Mart Stores, Inc., 393 F.Supp. 2d 295, 323 (D.N.J. 2005); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501–03 (W.D. Mich. 2005); *see also* Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. UNIV. L. REV. 1361, 1370 (2009).

[147] *See Villareal*, 266 F.R.D. at 213 (distinguishing the NLRA backpay and reinstatement remedies barred by *Hoffman* from FLSA remedies awarding the worker compensation for work already completed); *accord Zavala*, F.Supp. 2d at 322; *but see Jin-Ming Lin*, 771 F.Supp. 2d at 187 (concluding that *Hoffman* did not rest on this distinction).

[148] *See* Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 362-63 (2006) (holding that IRCA does not preempt lost wages recovery for unauthorized workers under New York state Labor Law); *accord* Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 249 (2d Cir. 2006); Reyes v. Van Elk, 148 Cal. App. 4th 604, 618-619 (2007) (there is no conflict preemption of California prevailing wage laws); Farmer Brothers Coffee v. Workers' Comp. Appeals Bd., 133 Cal. App. 4th 533, 542 (2005) ("We conclude that the Workers' Compensation Act, with the addition of section 1171.5 prohibiting reinstatement remedies to undocumented aliens, is not in conflict with the IRCA and comports with the reasoning of *Hoffman* … since prohibited remedies necessarily include backpay"); Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. Ct. App. 2003) (holding that Texas law allows for recovery by unauthorized workers, and dismissing preemption challenge). *See also* Tobias Kuehne, *Immigration and Employment Federalism: State Courts and Workers' Compensation for Unauthorized Workers*, 43 BERKLEY J. EMP. & LAB. L. 415, 441-46 (2022) (discussing the trend against finding preemption in state worker's compensation cases).

[149] *Id.* at 446.

[150] *See, e.g.* Veliz v. Rental Serv. Corp. USA, Inc., 313 F.Supp. 2d 1317, 1336 (M.D. FL 2003) (holding that IRCA forbids an award of lost wages, unlike worker's compensation); Sanchez v. Eagle Alloy Inc., 254 Mich. App. 651, 673-673 (2003) (unauthorized worker became ineligible for state wage loss benefits applying to the period after his immigration status was discovered by his employer). *See also* Griffith, *supra* note 18, at 889 (discussing cases excluding remedies for immigrants who used fraudulent documents, or limiting the amount available to recover).

enacted statutes excluding unauthorized immigrants from receiving work law benefits.[151]

The status of unauthorized workers' antidiscrimination claims has remained less certain. In *Rivera v. NIBCO Inc.*, the Ninth Circuit stated in dicta that *Hoffman* does not preclude backpay remedies in Title VII cases, reasoning in part that these remedies are essential to the functioning of private discrimination claims, whereas the NLRB in *Hoffman* had other remedies at its disposal to enforce collective bargaining rights.[152] However, in many cases—including *Rivera* after it was remanded to the district court—Title VII plaintiffs without work authorization have withdrawn claims to backpay rather than let a court decide how IRCA might apply to them.[153] Results of state antidiscrimination cases have been similarly mixed.[154]

These lines of cases demonstrate that the U.S. legal system tolerates a great deal of disharmony between immigration and work law definitions of employment. While courts have at times limited the availability of certain remedies, unauthorized workers are not categorically barred from nearly any work law system under federal or state law that hinges on the definition of employment.[155] IRCA's prohibition on unauthorized immigrants' employment has not prevented various work law regimes from treating these same workers as employees for their own purposes.

B. *Disharmony between state and federal independent contractor definitions*

As a threshold matter, then, unauthorized immigrants in "misclassified" occupations are not definitionally excluded from work law reforms that extend coverage under employee protections. But in claiming employee status for work law purposes, must immigrant workers also become

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[151] *See, e.g.* Sandoval v. Williamson, 2019 Tenn. LEXIS 153 (upholding the constitutionality of Tenn. Code Ann. § 50-6-207, which excludes unauthorized workers from certain benefits under Tennessee's worker's compensation system).

[152] Rivera v. NIBCO Inc., 364 F.3d 1057, 1067-1068 (9th Cir. 2004).

[153] Rivera v. NIBCO, Inc., No. CIV-F-99-6443, 2006 WL 845925, at *1 (E.D. Cal. Mar. 31, 2006); *see also* Cunningham-Parmeter, *supra* note 135, at 1370.

[154] *See, e.g.* Salas v. Sierra Chemical Co., 59 Cal. 4th 407, 424 (2014) (holding on preemption grounds that unauthorized workers may recover in an employment discrimination statute, but only for the period before the employer's discovery of their unauthorized status); Crespo v. Evergo, 366 N.J. Super. 391, 401 (2004) (holding that unauthorized workers cannot prevail on claims of wrongful termination under New Jersey's employment discrimination statute).

[155] An empirical study of federal and state cases in the decade following *Hoffman* found that only roughly five percent of cases resulted in a denial of relief for an unauthorized immigrant plaintiff based on a reasoning mirroring *Hoffman*. Michael H. Leroy, *Remedies for Unlawful Alien Workers: One Law for the Native and for the Stranger who Resides in Your Midst? An Empirical Perspective*, 28 GEO. IMMIGR. L. J. 623, 629 (2014); *cf.* Griffith, *supra* note 18.

employees under IRCA? Or rather, is it possible to be an employee under an expanded work law definition of the term, while simultaneously an independent contractor under the traditional test used for immigration purposes? Considering the numerous definitions of independent contractor status across the U.S. legal system, this hybrid-status outcome is hardly without precedent.

Work law itself is well accustomed to this sort of disharmony between tests that distinguish employees from independent contractors. There are many work law contexts where these definitions are adjudicated: from state agencies that enforce worker's compensation and wage and hour laws, to the National Labor Relations Board in the collective bargaining context, to federal courts hearing discrimination cases under Title VII of the Civil Rights Act. In each of these cases, statutes, regulations, and judicial case law impose a distinct legal standard for determining who is an employee and who is an independent contractor. Furthermore, other areas of law beyond immigration and work law, such as tort and tax law, also employ their own standards.[156] No standard from one context controls what standard should apply in another. While one area of law may influence another, fundamentally they are autonomous. IRCA's system for distinguishing employees from independent contractors must be understood in this broader context.

At the state level, there is a patchwork of legal tests to determine when a worker is an independent contractor. Many states employ combinations of common law tests and the ABC test, depending on which work law benefits are at issue.[157] For example, some states have adopted the ABC test only to determine employee status in select industries, such as construction.[158] Others employ the ABC test only in disputes over certain work law benefits.[159] California's attempt to make the ABC test a near-universal standard is relatively uncommon.[160] But the AB5 bill itself—even before it was modified to include Proposition 22's carveouts for app-based drivers—

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[156] *See* Olson v. La Jolla Neurological Associates, 85 Cal.App. 5th 723, 737 (2022) (articulating the common law control test used to establish vicarious liability for employee torts); U.S. INTERNAL REVENUE SERVICE, Rev. Rul. 87-41 (providing the I.R.S. definition of independent contractor for federal tax purposes).

[157] *See* Deknatel & Hoff-Downing, *supra* note 4, at 64-74.

[158] *See, e.g.*, 43 Pa. Stat. Ann. § 933.3(a) (West 2014) (adopting a modified version of the ABC test "For purposes of workers' compensation, unemployment compensation and improper classification of employees … in the construction industry"); *see also* Deknatel & Hoff-Downing, *supra* note 4, at 73 n.127 (listing similar statutes in New York, Maine, Minnesota, Delaware, New Jersey, and Illinois).

[159] Maine, for example, only applies the ABC test to determine workers' eligibility for workers' compensation and unemployment insurance benefits. Me. Rev. Stat. Ann. tit. 26, § 1043(11)(E) (2014); Me. Rev. Stat. Ann. tit. 39-A, § 102(13-A).

[160] Deknatel & Hoff-Downing, *supra* note 4, at 72 (observing, before the passage of AB5, that "no state has implemented a universally applicable ABC test and presumption for all workers and across all statutes governing employee-relevant benefits and legal obligations").

creates numerous exceptions for specific occupations.[161] The common law control test also continues to apply in other state law contexts such as vicarious tort liability, creating further possibilities that a worker might be considered an employee in some situations and an independent contractor in others.[162] Even in a state where the legislature undertook explicitly to harmonize state work law under a single standard governing independent contractor status to achieve its policy aims, numerous disharmonies remain.

Nor does federal work law sing in unison when it comes to defining employees and independent contractors. Federal law distinguishes between the traditional common law control test (applied in Title VII, ADEA, and ERISA cases), the "economic realities" test (applied in FLSA, FMLA, and SSA cases), and the "entrepreneurial potential test" (applied in NLRA cases).[163] As noted above, in practice these variations on the common law theme tend to converge in a single totality-of-the-circumstances test.[164] Nevertheless, they are formally distinct, and the different labels used to apply this test can lead courts to emphasize certain factors over others.[165] Within these common law variants, some tests are considered to be more likely than others to find that a given worker is an employee, notably the FLSA economic realities test.[166]

This complex web of divergent legal standards across state and federal work law regimes allows for the possibility of the same workers being categorized as employees under one system while being categorized as independent contractors under another. Such an outcome was possible long before contemporary adoptions of the ABC test. Veena Dubal's work discusses the example of San Francisco taxi drivers whose petitions for protected bargaining unit status were rejected by the NLRB. Later, however, the California Supreme Court found that San Francisco's Yellow Cab Cooperative exercised control over its drivers under a common law analysis, and that therefore the drivers were employees for purposes of workers' compensation and unemployment insurance.[167] If more jurisdictions adopt the ABC test and its presumption of employee status, these disharmonies are likely to occur with increasing frequency.

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[161] Cal. Labor Code § 2750.3(b).

[162] *See* Olson v. La Jolla Neurological Associates, 85 Cal.App. 5th 723, 737 (2022) ("The most important factor in distinguishing an agent from an independent contractor [in the context of vicarious liability] is whether the principal has a right to control the manner and means by which the work is to be performed").

[163] See Dubal, *supra* note 51, at 53 (table and accompanying notes summarizing the legal standards that apply in each context, and the corresponding legal authority).

[164] *See supra* Part II.A.

[165] *See* FedEx Home Delivery v. NLRB, 563 F.3d 492, 497 (D.C. Cir. 2009).

[166] *See* Dubal, *supra* note 51, at 54; Davidov & Alon-Shenker, *supra* note 78, at *7.

[167] See Dubal, *supra* note 7, at 109 n.18 (discussing Luxor Cab Co. v. United Taxicab Workers, 20-RC-16314 (NLRB June 15, 1989); Yellow Cab Cooperative, Inc. v. Chauffeurs Union Local No. 265, 20-RC14735 (NLRB Mar. 28, 1979); Tracy v. Yellow Cab Cooperative, No. 938786 (Cal. Super. Ct. Oct. 22, 1996)).

C. *Implications of ABC reform for IRCA adjudications*

From the preceding discussion, it becomes clear that adopting the ABC test in the work law context does not necessarily alter outcomes in the IRCA context. State and federal courts and administrative agencies use a variety of legal standards to adjudicate work law disputes over who is an employee and who is an independent contractor, but none of these has any bearing on the definition used in the immigration law context. The definition of independent contractors for IRCA purposes is determined by immigration regulations, which require a multifactor test for employer control in the common law tradition.[168]

IRCA adjudicators can and do look to work law decisions for guidance, but this guidance is merely persuasive. OCAHO's most recent binding decision defining independent contractors states that ALJs should first look to the regulatory definition at 8 C.F.R. § 274a.1(j), then to prior OCAHO decisions, and finally to "principles of agency law discussed in federal cases."[169] Case law from the federal work law context is instructive because it develops these "principles of agency law" that are fundamental to the common law approach § 274a.1(j).[170] But this persuasive effect has its limits.

While ALJs can look outside of immigration law to inform their application of § 274a.1(j), they may not depart entirely from this common law test. The 1991 decision in *United States v. Robles* which states that "an IRCA 'employee' is synonymous with the definition of 'employee' under federal labor laws" is therefore misleading.[171] Federal work law can assist OCAHO ALJs in interpreting the immigration law definition of employment, but the two are not identical. Should the federal labor law definition of employment incorporate the ABC test—for example, if Congress enacts the PRO Act or the Department of Labor adopts the test through rulemaking—this would not change the regulatory definition that binds IRCA adjudications. Even less should we expect state laws like AB5 test to alter the definitions of employment and independent contracting under federal immigration law.

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[168] 8 C.F.R. § 274a.1(j).

[169] United States v. Siddikov, 2015 OCAHO LEXIS 18, *8-9 (OCAHO 2015).

[170] *Id.*; *see also* United States v. Mr. Z Enterprises, 1991 OCAHO LEXIS 4, *81 (OCAHO 1991) ("In addition to the statutory definitions, *the common law test* for distinguishing between employee and independent contractor adopted by the Ninth Circuit is instructive") (emphasis added).

[171] United States v. Robles, 1991 OCAHO LEXIS 28, *12 (OCAHO 1991). The ALJ in *Robles* may not have intended to make the claim that OCAHO is required to follow changes to definitions of employment and independent contracting in federal labor law. No such change had occurred at the time *Robles* was decided, and so this statement may have simply been a reaffirmation of the persuasive authority of federal labor law in interpreting the common-law standard.

D. *Disharmonies and IRCA's Twin Aims*

Congress did not intend for immigration and work law definitions of employment to move in lockstep when it enacted IRCA. Clearly, the purpose of the employer sanctions system was to restrict the employment of unauthorized immigrants. The initiative to enact the employer sanctions system in the 1980s emerged from a report from the Select Commission on Immigration and Refugee Policy (SCIRP).[172] The SCIRP report observed that many undocumented immigrants were "induced to come to the United States by offers of work from U.S. employers," and proposed as a solution "a new law to penalize employers who hire undocumented/illegal aliens."[173]

At the same time, IRCA's legislative history indicates that Congress was concerned not only with discouraging unauthorized labor migration, but also with upholding protections in the workplace. Crucially, it recognized a tension between these two aims. For example, the SCIRP report observed not only that undocumented immigrants are drawn to work opportunities in the United States, but also that employers are eager to exploit immigrant workers' vulnerable status and by "breaking … minimum wage and occupational safety laws."[174]

Congress was concerned that the prohibition of unauthorized employment might have the unintended consequence of encouraging employers to violate work law. That is to say, if barring immigrants from employment also meant denying them the protections of work law, businesses would have more incentive to hire them, not less. A key House Judiciary Committee report states that

> It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees…. In particular, the employer sanctions provisions are not intened [*sic*] to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA).[175]

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[172] *See* Wishnie, *supra* note 22, at 200-01.

[173] SELECT COMM'N ON IMMIGRATION & REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS, 97th Cong., 1st Sess. 12-14 (Mar. 1, 1981). For a comprehensive analysis of the legislative history of IRCA, *see* Griffith, *supra* note 18, at 902-16.

[174] U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 158, at 42.

[175] H.R. Rep No. 99-682(1), 99th Cong., 2d Sess. at 58.

A House Education and Labor Committee Report similarly concludes that IRCA does not limit the power of state or federal work law agencies, because to do so "would be counter-productive of our intent to limit the hiring of undocumented employees."[176]

In other words, Congress did not intend for IRCA's ban on unauthorized immigrant "employment" to weaken the labor and employment protections afforded to "employees" generally. IRCA sought to discourage unauthorized employment while simultaneously upholding work law protections.[177] In order for these two aims to support rather than undermine one another—that is, to ensure that the ban on unauthorized employment does not allow employers to violate immigrant workers' rights with impunity—the immigration and work law definitions of employment must operate in distinct ways.[178] Disharmony between immigration and work law was therefore a logical result of the tensions between Congress's major aims in passing IRCA.

Post-IRCA case law recognizes this rationale for separating immigration and work law definitions of employment. Federal appellate decisions limiting the impact of IRCA on work law protections frequently cite the House Judiciary Committee Report passage reproduced above, and conclude that excluding unauthorized immigrants from these protections would weaken these protections for all workers.[179] Justice Breyer's dissent in *Hoffman* articulates a similar principle, arguing that the majority's decision to limit NLRA remedies available to unauthorized workers "lowers the cost

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[176] H.R. Rep No. 99-682(2), 99th Cong., 2d Sess. at 8-9.

[177] *See* Griffith, *supra* note 18 at 909-16. Griffith's article refers to the view that IRCA's two aims are in "harmony" with one another, meaning that upholding worker protections is compatible with banning unauthorized employment. *Id.* at 890. My discussion of "disharmonies" between immigration and work law is not meant to challenge this reading of IRCA.

[178] *See* Lozano v. City of Hazelton, 724 F.3d 297, 307 (3d Cir. 2013) (describing Congress's decision to exclude independent contractors from IRCA's employer sanctions system as "a deliberate distinction that Congress included as part of a balance it struck in determining the scope and impact of IRCA's employer sanctions"); Kuehne, *supra* note 148, at 427-28 (noting IRCA's "internal tensions" resulting from contradictions between its various aims).

[179] *See, e.g.* NLRB v. Kolkka, 170 F.3d 937, 941 (9th Cir. 1999) (citing the House Judiciary Committee Report's intention not to diminish work law protections, and concluding that "the *Sure Tan* interpretation of the NLRA buttresses rather than conflicts with the purpose of the IRCA"); Del Rey Torilleria, Inc. v. NLRB, 976 F.2d 1115, 1121 (7th Cir. 1992) (citing the same passage from the House Judiciary Committee Report); Patel v. Quality Inn S., 846 F.2d 700, 704-05 (11th Cir. 1988) (citing the same passage, and explaining that unauthorized workers' coverage under the FLSA promotes IRCA's aim of discouraging the hiring of these workers); Agri Processor Co. v. NLRB, 514 F.3d 1, 4-5 (D.C. Cir. 2008) (citing the House Judiciary Committee and Education and Labor Committee reports); Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 243 (2d Cir. 2006) (enforcing the FLSA against employers of unauthorized immigrants "does not … condone that violation or continue it. It merely ensures that the employer does not take advantage of the violation"); *accord* Lucas v. Jerusalem Cafe, LLC, 721 F.3d 927, 935 (8th Cir. 2013).

to the employer of an initial labor law violation (provided, of course, that the only victims are illegal aliens)," thereby increasing "the employer's incentive to find and hire illegal-alien employees" in violation of IRCA's objectives.[180]

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In summary, there is no legal mechanism that would require federal immigration law to follow changes in state or federal work law adopting the ABC test. In fact, were OCAHO ALJs to do so, they would violate the common law approach of the immigration regulations. More fundamentally, the view that immigration law's definition of employment should closely track its work law counterpart undermines a key aim of IRCA itself. IRCA's employer sanctions system does not, and was not intended to, impose an absolute exclusion of unauthorized immigrants from work law doctrines. Since IRCA came into effect in the late 1980s, Congress and the courts have understood that immigration and work law share the aim of preventing employer violations of workplace protections through the hiring of vulnerable immigrant workers. Accommodating the disharmonies between immigration and work law doctrine—in other words, allowing for the existence of hybrid status immigrant workers—promotes this shared aim.

IV. POLICY SOLUTIONS TO PROMOTE HYBRID STATUS

Part III demonstrated that expanded work law definitions of employment do not necessarily trigger a corresponding expansion in immigration law. Unauthorized immigrants can therefore be considered employees for the purposes of work law protections without automatically becoming employees subject to IRCA's verification requirements. But while existing law already allows immigrant workers in typical "misclassified" jobs to hold this hybrid status, policymakers intent on extending work law protections to these workers should consider further reforms to clarify the law.

This clarification may be necessary if many employers misunderstand their I-9 obligations, particularly those who have long been accustomed to hiring independent contractors. Employers affected by these work law reforms may reasonably assume that if they are now required to treat their workers as employees in one legal context, they must also do so for all others. The disharmonies described in this Article may not be intuitive to risk-averse employers—or even their attorneys—seeking in good faith to comply with the ABC test. These employers may conclude that the safest option in a changing legal landscape is to have all workers complete the I-9 verification process. As a result, their unauthorized employees may needlessly be forced to leave their jobs, or produce false documents to keep them. Without further clarification, then, work law reforms that aim to

[180] Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155 (2002) (Breyer, J. dissenting).

protect workers against misclassification may end up worsening unauthorized immigrants' economic and legal prospects.

Part IV outlines policy solutions at both the state and federal levels that can help avoid these unintended consequences. At a minimum, these reforms can clarify that "employment" has a distinct meaning in the work law and immigration law contexts. Some reforms, particularly through executive action, can also go further, creating legal precedent for treating certain jobs as independent contractor work under IRCA.

A. *State law solutions*

While states cannot directly affect how federal immigration law defines employment, they can clarify the intended scope of work law reform statutes. Legislatures drafting bills that adopt the ABC test can add provisions stating explicitly that the purpose of these bills is to alter the definition of employment solely in the state work law context. These provisions can state further that nothing in the bill is intended to alter how federal immigration authorities define "employee" or "independent contractor," nor the scope of the I-9 requirement. To set clear expectation for employers, lawmakers can include language indicating that any change under state work law does not impose an obligation to verify workers' authorization status. At the same time, these provisions can make clear that their intention is to adopt a broader definition of employment for state work law purposes than exists under federal immigration law. In drafting legislation, state lawmakers can explain that disharmonies between state work law and federal immigration law are an intentional feature of a misclassification reform bill, reflecting an aim to include unauthorized immigrants.

State bills can also use preambles or other declaratory provisions to provide context for the kinds of commonly misclassified jobs that it seeks to target.[181] For example, state governments can commission studies on the prevalence of misclassification in key industries such as construction, building services, landscaping, and taxi services, and reference these figures directly in the legislative text. Providing specific information about the industries and occupation types where misclassification is of particular concern can help clarify which workers are likely to be affected by changes in the law. Combined with effective outreach to workers, employers, employment attorneys, and other relevant stakeholders, these clarifications within the text of reform legislation can help to avoid unintended consequences for immigrant workers.

Several other kinds of state statutes can aid in promoting immigrant work opportunities. First, state lawmakers can pass bills modeled on a California law adopted in response to the Supreme Court's 2002 decision in

[181] *See, e.g.* 2019 Cal Stats. Ch. 296 §§ 1(b)-(c) (describing the problem of employee misclassification and its impact on the California economy).

Hoffman. California law states that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."[182] Additionally, this statute limits the ability of litigants to seek evidence of immigration status in an employment law dispute.[183] California courts have held that this declaration of equal rights for unauthorized workers is not preempted by federal law.[184]

This declaration of universal work law rights may not be strictly necessary to ensure that unauthorized workers are afforded their rights as "employees" under the expanded ABC definition. Case law since *Hoffman* has already established that unauthorized employees are entitled to most work law remedies.[185] However, these provisions may provide meaningful correction to certain trends in state case law. For example, some state court decisions upholding unauthorized immigrants' work law rights may be read to apply only to workers who have not used false documents to gain employment.[186] State statutes modeled after California's post-*Hoffman* law would foreclose this sort of limitation on the scope of work law protections.

Second, states can modify identity theft laws to remove penalties for the use of false documents solely for the purpose of seeking employment, and repeal other state statutes criminalizing violations of federal immigration law. Despite the state's relatively immigrant-friendly stance in other areas, California's criminal code contains a specific provision penalizing the use of false documents to conceal one's immigration status—a holdover of the state's 1994 anti-immigrant ballot initiative known as Proposition 187.[187]

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[182] Cal Labor Code § 1171.5(a).

[183] *Id.* § 1171.5(b).

[184] Reyes v. Van Elk, 148 Cal. App. 4th 604, 618-19 (2007).

[185] *See supra* Part III.A. The California statute itself acknowledges that it is merely "declaratory of existing law." Cal Labor Code § 1171.5(c).

[186] Namely, New York's highest court held that unauthorized workers were entitled to back pay remedies for lost wages under state work law. However, the court interpreted *Hoffman* to hold that "an undocumented alien *who provided fraudulent work papers in violation of federal law* could not be awarded back pay for work not performed as a result of an employer's unfair labor practice" Balbuena v. IDR Realty LLC, 6 N.Y.3d 338, 349 (2006) (emphasis added). In holding that the plaintiff was entitled to lost wages, the *Balbuena* court noted that there was no evidence in the record that he had submitted false documents, distinguishing the case from *Hoffman*. *Id.* at 362-63. This holding can be read to imply that unauthorized workers cannot recover under New York wage protection laws if they have used fraudulent papers. *Id. See also* Sanchez v. Eagle Alloy Inc., 254 Mich. App. 651, 672-73 (2003) (citing *Hoffman* in holding that a worker's use of false social security documents to obtain employment constituted "commission of a crime" that barred the worker from receiving benefits under Michigan's wage loss statute).

[187] Cal Pen Code § 114. Proposition 187 contained numerous immigration restriction measures, such as excluding undocumented immigrants' access to education and requiring law enforcement to report undocumented Californians to federal authorities, which a federal district court struck down as preempted by federal law in 1995. *See* League of United Latin Am. Citizens v. Wilson, 908 F.Supp. 755 (C.D. Cal. 1995). The California legislature

States seeking to promote immigrants' rights in the workplace should consider repealing such laws. Alternatively, state and local prosecutors can declare their intent not to charge these offenses.

Expanding the definition of employment to cover unauthorized immigrants who are currently misclassified as independent contractors will ideally reduce immigrants' incentive to claim employee status through fraudulent means. But it is unlikely to eliminate this incentive entirely, and so unauthorized immigrants will continue to seek work beyond the semi-formal economy of independent contracting. States seeking to enact inclusive policies for immigrants in the workplace are not obligated to enforce or duplicate within their own law federal prohibitions against using false documents in violation of IRCA.[188]

B. *Federal law solutions*

Federal policymakers have more options than their state counterparts to affect how immigration enforcement agencies respond to work law reforms. This section considers three such options.

i. Enforcement priorities

First, the Executive Branch can use its enforcement power to signal the position that changed work law definitions of employment do not alter employers' I-9 obligations. Most directly, it can make this clarification by revising the relevant section of the U.S. Citizenship and Immigration Services (USCIS) Handbook for Employers.[189] The Handbook currently instructs employers not to complete Form I-9 for "independent contractors."[190] USCIS can insert a note in this section of the Handbook explaining that the definition of "independent contractor" varies across state and federal law, and refer employers to the definition under the immigration regulations.[191] This note can specifically clarify that immigration law does not employ the ABC test. Most importantly, USCIS can state unambiguously that employers previously not subject to the I-9 requirement should not attempt to verify their workers' employment authorization because of changes to how other areas of law define independent contract work.

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officially repealed the invalidated statutes in 2014. 2014 Cal SB 396. The penalties for concealment of citizenship were not among the provisions challenged in *LULAC v. Wilson*, and were not included in the 2014 repeal.

[188] *See* 18 U.S.C. § 1546(b).

[189] U.S. CITIZENSHIP AND IMMIGRATION SERV., M-274, HANDBOOK FOR EMPLOYERS (2020), https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274 (last visited Dec. 5, 2022).

[190] *Id.* § 2.0.

[191] 8 C.F.R. § 274a.1(j).

Immigration enforcement agencies can signal not only their interpretation of the law, but also what priorities will guide enforcement actions. These agencies have broad discretion over how to enforce immigration law, and the Department of Homeland Security's (DHS) enforcement priority memoranda are important policy documents.[192] Under the Biden administration, DHS has already issued an enforcement memorandum regarding worksite enforcement.[193] This memorandum clarifies DHS's policy that worksite enforcement by Immigration and Customs Enforcement should "facilitate the important work of the Department of Labor and other government agencies to enforce wage protections, workplace safety, labor rights, and other laws and standards," rather than impede these protections.[194] DHS priorities for employer sanctions can go further, specifying that the agency will not consider businesses to be targets for enforcement for IRCA violations solely as a result of new work law definitions that designate their workers as employees. DHS can justify this policy as an extension of the current policy of facilitating the enforcement of work law.[195]

ii. OCAHO case law

The Attorney General has authority to issue decisions directly in employer sanctions cases, and can use this authority to reinforce OCAHO's case-by-case common law approach to defining employment and

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[192] On the development of Executive Branch discretionary power over immigration law, *see* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020). On the status of presidential enforcement priorities as binding sources of law in the preemption context, *see* Pratheepan Gulasekaram, *Immigration Enforcement Preemption*, 84 OHIO ST. L. J. _ (forthcoming 2023); Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691 (2014). The Supreme Court has heard oral arguments in a case that may nonetheless alter the scope of executive power to regulate immigration through enforcement discretion. *See* Texas v. United States, 2022 U.S. Dist. LEXIS 104521 (S.D. Tex. June 10, 2022) (holding that the Biden Administration's enforcement guidelines exceeded executive authority) (*stay denied by* Texas v. United States, 2022 U.S. App. LEXIS 18687 (5th Cir. Tex., July 6, 2022)) (*cert. granted* United States v. Texas, 2022 U.S. LEXIS 3279 (July 21, 2022)).

[193] U.S. DEP'T OF HOMELAND SEC., Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.

[194] *Id.*

[195] DHS has recently used the 2021 worksite enforcement memo as the basis for further action aimed at promoting immigrants' rights in the workplace. In January 2023, the agency issued a press release announcing a new policy allowing noncitizen workers who were victims of or witnesses to violations of labor law to request deferred action and work authorization. U.S. DEP'T OF HOMELAND SEC., DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations (January 13, 2023), https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations.

independent contracting.[196] Of course, if DHS issues and abides by the guidelines outlined above, there may be fewer opportunities to issue a decision in an IRCA case involving independent contractors. Nonetheless, should such a case arise, the Attorney General can issue a precedential decision that accomplishes several goals.

First, the decision should explicitly state that 8 C.F.R. § 274a.1(j)'s definition of independent contractor follows the common law approach, not the narrower ABC test. The Attorney General can clarify that ALJs are bound by regulation to proceed on a case-by-case basis, and have no mandate to seek to expand the immigration law definition of employment.[197]

Second, on a similar note, the Attorney General's decision should affirm OCAHO's authority to interpret the immigration definition of employment independently of other areas of law. In so doing, it should repudiate the language in *Robles* stating that this immigration law definition is identical to its labor law counterpart.[198] As discussed above, this statement is not supported by law to the extent that it implies that OCAHO must follow changes to labor law that diverge from the common law approach.[199] ALJs may look outside of immigration law for guidance as to how to interpret the definitions of employment and independent contracting, but may not adopt work law definitions that diverge from immigration regulations. Further, the decision can instruct ALJs not to rely on state work law at all in interpreting the immigration law definition of independent contractor.

Third, this decision can serve as an opportunity to articulate how immigrant workers' hybrid status works in practice. It can demonstrate how § 274a.1(f)'s common law test can define unauthorized workers as independent contractors for immigration purposes in occupations where the ABC test is likely to produce the opposite result. Most of OCAHO's existing published case law on independent contractor issues dates back to the early 1990s. An updated decision would therefore be a valuable opportunity to adapt agency doctrine to the reality of immigrant work in the twenty-first century.[200]

iii. Rulemaking outside the immigration context

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[196] 8 U.S.C. § 1324a(e)(7) (establishing the Attorney General's power to review, modify, and vacate ALJ orders); 8 C.F.R. § 1003.0 (creating OCAHO as a component agency of EOIR, within the Department of Justice); 8 OCAHO P.M. § 8.4 (outlining the procedure by which OCAHO cases may be referred directly to the Attorney General).

[197] 8 C.F.R. § 274a.1(j) ("Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis").

[198] United States v. Robles, 1991 OCAHO LEXIS 28, *12 (OCAHO 1991).

[199] *See supra* Part III.C.

[200] The agency's only binding case published in the current century that discusses the legal standard defining independent contractors in substantive detail is United States v. Siddikov, 2015 OCAHO LEXIS 18 (OCAHO 2015). Future cases can build on *Siddikov*'s discussion of the prevalence of misclassification in the contemporary economy. *Id.* at *18.

Finally, outside of immigration law itself, opportunities exist to clarify the distinction between immigration and work law definitions of employment and independent contracting. For example, the Department of Labor can include provisions in its policy documents and formal rules stating that its policies—particularly if it adopts a broader definition of employment such as the ABC test—are not intended to alter immigration law. Rulemaking along these lines can follow the principles outlined above in the context of state law solutions.[201]

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Together, these agency actions can provide clarification for key stakeholders as to how federal immigration agencies will respond to misclassification reforms. Particularly if they are publicized effectively through press releases and other official communications, DHS enforcement policy documents can help assure employers that despite changes to work law, they can continue their current practice with respect to I-9 verification without fear of federal sanction. Carefully crafted administrative decision can also enshrine the disharmonies between immigration and work law definitions of employment in OCAHO case law. Executive branch policymakers interested in ensuring that immigrant workers keep their jobs and enjoy the law's protections at work should consider these steps as part of a long-term strategy to promote and maintain the hybrid-status option.

V. HYBRID-STATUS WORKERS IN THE CONTEXT OF IMMIGRATION FEDERALISM

The current push to use state work law to combat employee misclassification has arisen during a time of intensifying conflict and debate over the power of states and localities to regulate immigration. Part V of this Article situates the preceding discussion of independent contract work and hybrid status within the contemporary immigration federalism context. First, it provides an account of the scholarly literature on immigration federalism and the stakes for current U.S. politics. Second, it traces the Supreme Court's case law on state authority to regulate noncitizens' rights in the workplace. Finally, it discusses the potential for hybrid-status work options as part of an inclusive state-level immigration policy approach, taking advantage of the disharmonies in the law.

A. *Immigration Federalism: A Brief Overview*

[201] *See supra* Part IV.A. So far, the Biden Administration has not adopted the ABC test through formal rulemaking, though it has indicated that there may be significant advantages to doing so. *See* Employee or Independent Contractor Classification under the Fair Labor Standards Act, 87 Fed. Reg. 62,218, 62,231 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. §§ 780, 788, 795).

It is often assumed that immigration is an exclusively federal area of law, largely due to over a century of case law affirming the federal government's exclusive or "plenary" power in the immigration sphere.[202] However, plenary power does not account for the whole story of how U.S. immigration law is made.[203] Early in U.S. history, many of the most important immigration regulations in were enacted not by Congress, but by the states.[204] Over the past three decades, scholars have detailed the importance of sub-federal entities in shaping the laws that govern noncitizens today.[205] For example, state family and criminal law can directly affect individuals' eligibility for immigration status, while sub-federal law enforcement agencies often elect or decline to assist in arresting and detaining immigrants for removal.[206] More broadly, states and localities and local policies have a wide range of policy options—such as the availability of driver's licenses, in-state college tuition, health and welfare benefits, and voting rights—to either expand or restrict the rights of noncitizens.[207]

In the contemporary political context, immigration federalism plays a prominent role in polarized partisan battles. Recent political science literature has highlighted the ways in which twenty-first-century U.S. political parties have tended to enlist state and local contests in battles over

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[202] Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889) (deriving the power to exclude immigrants from the federal government's authority to conduct foreign relations, in contrast to state authority over local matters); Chy Lung v. Freeman, 92 U.S. 275, 279-80 (1876); *see also* Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (describing modern applications of the plenary power doctrine).

[203] *See* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 575-76 (2008) (rejecting the foreign policy rationale for plenary federal power over immigration); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (challenging the notion that the Constitution's structure mandates federal exclusivity).

[204] *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

[205] *See* Chacón, *supra* note 19, at 1340-47 (summarizing the development scholarship on immigration federalism since the 1990s); Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L. J. 703 (2013) (describing the legal framework for immigration federalism in light of Arizona v. United States, 567 U.S. 387 (2012)); Rodríguez, *supra* note 203 (providing a functionalist account of federal-state management of immigration regulation); Peter Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (arguing in favor of immigration federalism as a "steam valve" that prevents nativist sentiment from taking hold at the national level).

[206] *See, e.g* Leticia Saucedo, *States of Desire: How Immigration Law Allows States to Attract Desired Immigrants*, 52 U.C.D. L. REV. 471, 482-504 (surveying state employment, law enforcement, family and refugee policy and its role within the national immigration system); Pratheepan Gulasekaram, Rick Su, & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 719 (2019) (discussing conflicts between state and local governments over municipal policies limiting cooperation with federal immigration enforcement).

[207] *See* ALLAN COLBERN & S. KARTHICK RAMAKRISHNAN, CITIZENSHIP REIMAGINED: A NEW FRAMEWORK FOR STATE RIGHTS IN THE UNITED STATES 60-69 (2021) (listing sub-federal policies indicating the inclusivity of "state citizenship").

nationwide political questions.[208] In other words, state and local politics increasingly reflect national contests between the two hyper-polarized parties.

Immigration reflects this dynamic: political partisanship is a major driver of the sub-federal immigration agenda. Pratheepan Gulasekaram and S. Karthick Ramakrishnan's empirical study has found that sub-federal laws restricting the rights of undocumented immigrants are not easily explained by prior patterns of migration or particular economic or social conditions. These laws do not necessarily emerge where there is a sudden change in demographics. rather, "restrictive legislation is significantly more likely in places where Republicans are predominant in the state or county."[209] Donald Trump's presidency raised the salience of immigration in national partisan politics, encouraging—in general—state- and local-level Republicans to enact restrictive policies, and Democrats to enact inclusive policies.[210]

Scholars disagree over whether the delegation of power over immigration to states and cities is a better model for immigrant inclusion than strict federal exclusivity. One point of view, expressed by proponents of "progressive federalism" such as Heather Gerken, is that sub-federal autonomy can empower minority groups in jurisdictions where they have more political influence than they do over national politics.[211] Progressive federalism might predict that immigrants have more political influence in the cities and states where they live than they do in Washington. On this reasoning, allowing those jurisdictions greater control of policies affecting immigration will give immigrant communities more opportunities to shape outcomes. A more minimalist defense of immigration federalism, advanced by Peter Spiro, is that allowing states to enact restrictive immigration measures may work as a "steam valve," reducing political pressure to adopt similar policies at the federal level.[212]

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[208] *See* JACOB GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS (2022).

[209] Gulasekaram & Ramakrishnan, *supra* note 19, at 74.

[210] Recent attempts by Republican governors to gain national media attention by sending asylum seekers by bus and plane to Democratic states exemplify how this dynamic has outlasted the Trump presidency. *See* Muzaffar Chishti & Julia Gelatt, *Busing and Flights of Migrants by GOP Governors Mark a New Twist in State Intervention on Immigration*, Migration Policy Institute (Sept. 28, 2022), https://www.migrationpolicy.org/article/migrant-asylum-seeker-busing. During Trump's term in office, Democrats at the local level often had political incentives to seek headlines by engaging in conflicts with the federal government over immigration issues. *See* John Byrne & Katherine Skiba, *In D.C., Emanuel Rips Trump on Sanctuary Cities, Infrastructure Plan*, CHI. TRIBUNE (Jan. 24, 2018), https://www.chicagotribune.com/politics/ct-met-rahm-emanuel-donald-trump-sanctuary-city-letters-20180124-story.html.

[211] Heather Gerken, *A New Progressive Federalism*, DEMOCRACY (Spring 2012), https://democracyjournal.org/magazine/24/a-new-progressive-federalism/.

[212] Spiro, *supra* note 205, at 1630-36.

In contrast, skeptics of immigration federalism tend to view state action as a vehicle for nativist discrimination.[213] For some scholars, federal preemption of state immigration laws is an important protection against state and local laws that harm immigrants. Hiroshi Motomura has observed that preemption "substitute[s] partially for equal protection," in many cases promoting norms of equality and immigrant inclusion.[214] The political scientist Jacob Grumbach also casts doubt on the idea that federalism empowers minority groups in the political process, observing that decentralization has actually facilitated democratic backsliding in several states.[215]

Resolving these debates is challenging for two reasons. First, for better or worse, immigration federalism is here to stay. Given the extreme difficulty at present of passing new immigration statutes through Congress—which might conceivably assert federal power over new policy areas affecting noncitizens—many important battles over immigration issues will continue to be fought at the state and local level. Second, not all immigration federalism questions can be answered in the same way. The balance of power between state and federal authority over immigration issues looks much different when it comes to detention and removal, for example, than when it comes to driver's licenses and in-state tuition. Rather than attempt a unifying theory of immigration federalism, the following sections sketch the contours of how this doctrine applies to the issue of immigrant workplace regulation in particular.

B. *Immigration Federalism and the Regulation of Work*

Before IRCA, there was no federal prohibition on employing noncitizens without work authorization, and the Supreme Court's understanding of state power to enact such prohibitions varied over the course of the twentieth century. In an early case, *Truax v. Raich*,[216] the Court rejected state restrictions of noncitizens' ability to work as preempted by the federal government's exclusive immigration power. Policies denying noncitizens the ability to work in the state effectively denied them the ability to settle there at all, making them impermissible regulations of immigration.[217] By the last quarter of the century, however, the Court adopted a more flexible

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[213] *See, e.g.* Michael A. Olivas, *Immigration-Related State and Local Ordinances: Premption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007).

[214] Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723, 1742 (2010); *see also* Elias, *supra* note 205, at 707 (arguing that the preemption decision in *Arizona* "limits states' and localities' ability to engage in immigrant-exclusionary lawmaking").

[215] Grumbach, *supra* note 207, at 197.

[216] 239 U.S. 33 (1915).

[217] *Id.* at 42 ("The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode").

understanding of the constitutional allocation of power between state and federal authority. In 1976, ten years before IRCA's enactment, it rejected a preemption challenge to California's state employer sanctions regime in *De Canas v. Bica.*[218]

De Canas involved principles of structural as well as statutory preemption. The decision affirmed earlier holdings that under the Constitution, "power to regulate immigration is unquestionably exclusively a federal power."[219] At the same time, it also acknowledged that this unquestionable federal exclusivity is not absolute: "The Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power."[220] Since IRCA had not yet been enacted, the Court could conclude that federal immigration law maintained only a "peripheral concern with employment of illegal entrants."[221] In contrast, states enjoyed "broad authority under their police powers to regulate the employment relationship to protect workers within the State."[222] Unlike in *Truax*, the Court found California's regulation of immigrant employment to be a valid exercise of state police power, which neither the Constitution nor the INA foreclosed.[223]

IRCA's passage in 1986 marked a significant assertion of federal power to regulate of noncitizens in the workplace, shifting future decisions into narrower discussions of statutory preemption. The bill included a provision explicitly preempting state employer sanction systems like the California law upheld in *De Canas*.[224] The *De Canas* Court had rejected the notion that state employer sanctions conflicted with "a comprehensive regulatory scheme," since no such federal scheme existed.[225] In contrast, after IRCA, the Court recognized that there was now "a comprehensive scheme prohibiting the employment of illegal aliens in the United States."[226]

In the early 2010s, the Court returned to the question of state power to regulate unauthorized immigrants' rights in the workplace. To what extent could states curtail these rights further than IRCA itself? On two occasions, restrictionist laws in Arizona served as test cases. The first was *Chamber of Commerce v. Whiting*[227] which upheld an Arizona "licensing" law against a

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[218] 424 U.S. 351 (1976).

[219] *Id.* at 354-55 (citing Passenger Cases, 7 How. 283 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876); Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

[220] *Id.* at 355.

[221] *Id.* at 360.

[222] *Id.* at 357.

[223] *Id.* at 356, 365.

[224] 8 U.S.C. § 1324a(h)(2) ("Preemption. The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens").

[225] *De Canas*, 424 U.S. at 353.

[226] *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002).

[227] 563 U.S. 582 (2011).

preemption challenge. The Legal Arizona Workers Act (LAWA) created procedures for Arizona authorities to investigate employers that hire unauthorized workers, and enabled state courts to "suspend all licenses" of employers found to be in violation.[228] Although IRCA preempts states from imposing "civil or criminal sanctions" for employing unauthorized workers, it makes an exception for such penalties "through licensing and similar laws."[229] The Court in *Whiting* held that LAWA fell within this savings clause and was therefore not preempted.[230]

Just one year after *Whiting*, however, the Court in *Arizona v. United States*[231] struck down another Arizona law making it a crime for immigrants without work authorization to seek employment. Arizona's SB 1070 made it a misdemeanor offense—punishable by a $2,500 fine and up to six months of incarceration—for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor."[232] This provision made all work by immigrants without federal authorization a criminal offense, with no exception for independent contractors.

In *Arizona*, the Court held that IRCA preempted this provision of SB 1070.[233] The Court could not rely on IRCA's explicit preemption, since IRCA makes no mention of state laws imposing penalties on immigrant workers rather than their employers.[234] Rather, the Court held that this provision interfered with IRCA's "comprehensive framework" for regulating noncitizens in the workplace, which "does not impose federal criminal sanctions on the employee side."[235] Because this interference presented "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the Court struck it down as preempted.[236]

Together, *Whiting* and *Arizona* clarify the scope of IRCA's preemptive power, but also leave certain alternatives available. IRCA forbids states from imposing direct criminal or civil penalties on either unauthorized

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[228] *Id.* at 591-93; Ariz. Ann. Rev. Stat. § 23-212.
[229] 8 U.S.C. § 1324a(h)(2).
[230] *Whiting*, 563 U.S. at 600.
[231] 567 U.S. 387 (2012).
[232] Ariz. Rev. Stat. Ann. § 13-2928(C).
[233] *Arizona*, 567 U.S. at 406.
[234] *See* 8 U.S.C. § 1324a(h)(2).
[235] *Arizona*, 567 U.S. at 404.
[236] *Id.* at 406. The Court's analysis finds that the fact of criminalizing unauthorized work alone constitutes an obstacle to the federal statutory scheme, and thus does not engage with the fact that the Arizona law applies to both employees and independent contractors. A post-*Arizona* Third Circuit decision struck down on obstacle preemption grounds a municipal ordinance in Hazelton, Pennsylvania, in part because it applied to both categories of workers, unlike the Congressional scheme. Lozano v. City of Hazelton, 724 F.3d 297, 306 (3d Cir. 2013). While the Hazelton ordinance involved civil employer sanctions rather than criminal penalties for workers, the *Lozano* decision suggests that this analysis applies to both contexts. *Id.* at 309.

workers or their employers for the mere fact of having formed an employment relationship. At the same time, it allows states to set up duplicate employer sanction regimes, so long as they construe them as "licensing" restrictions.[237] While enforcement of Arizona's LAWA sanctions has been scarce, *Whiting* held that it remains good law.[238] States therefore have a limited power to go beyond IRCA's comprehensive scheme and use civil penalties to restrict the work opportunities employers may offer to unauthorized immigrants.

Recently, the Supreme Court has also given its blessing to state attempts to work around *Arizona*'s preemption of direct criminal liability for unauthorized employees. In *Kansas v. Garcia*,[239] the Court rejected a preemption challenge against a Kansas identity theft statute, as applied to unauthorized immigrants who used false social security numbers to secure employment. The immigrants challenging their convictions in *Kansas* relied on two provisions of IRCA that they argued prohibit states from using I-9 forms and the information they contain for purposes other than immigration enforcement.[240] Justice Alito's majority opinion employed textual interpretation to dismiss the immigrants' express preemption claims relatively quickly before turning to their implied preemption arguments.[241]

Here, the Court defined the scope of federal law in ways that foreclose both field and obstacle preemption. Asking whether IRCA has occupied the field of "regulation of information that must be supplied as a precondition of employment," Justice Alito concluded that it has not.[242] Most importantly, the *Kansas* opinion made no mention of a "comprehensive framework" in its obstacle preemption analysis, even though this was central to the rationale for striking down the employment provisions in *Arizona*.[243] The Court did not seriously consider whether Kansas's prosecutions of immigrants seeking

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[237] Justice Breyer's dissent in *Whiting* treated the status of LAWA as a "licensing" law as mere semantics used to disguise civil penalties that ought to be preempted by IRCA. *See* Chamber of Commerce of the United States v. Whiting, 563 U.S. 582, 611-12 (2011) (Breyer, J. dissenting) ("The state law before us … imposes civil sanctions upon those who employ unauthorized aliens…. Arizona calls its state statute a 'licensing law,' and the statute uses the word 'licensing.' But the statute strays beyond the bounds of the federal licensing exception…. Congress did not intend its 'licensing' language to create so broad an exemption, for doing so would permit States to eviscerate the federal Act's preemption provision").

[238] *Id.* at 600; Lofstrom, et al., *supra* note 52.

[239] 140 S. Ct. 791 (2020).

[240] 8 U.S.C. §§ 1324a(b)(5) ("A form designated or established by the Attorney General under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this Act and [other specified sections of the United States Code]"); *id.* § 1324a(d)(2)(F) ("The system may not be used for law enforcement purposes, other than for enforcement of this Act or [same specified sections]"). The Court noted that the express preemption provision of IRCA at § 1324(h)(2) did not apply to this case. *Kansas*, 140 S Ct. at 798.

[241] *Id.* at 802-04.

[242] *Id.* at 805.

[243] *Id.* at 806-07; *cf.* Arizona v. United States, 567 U.S. 387, 406-07 (2012).

employment interfered with the federal scheme regulating immigrant work. Instead the majority treated these cases narrowly as state prosecutions of identity theft. As such, they overlapped with corresponding federal criminal prohibitions, but they did not impede upon them.[244]

The Court's ruling in *Kansas* revealed a limit of the employment preemption analysis in *Arizona*. While the Court did not overturn *Arizona*'s holding forbidding states from criminalizing unauthorized employment, it declined to extend its analysis of how the comprehensive federal immigration framework prohibits further state restrictions. As a result, while states cannot criminalize unauthorize employment outright, they are free to use indirect criminal penalties to criminalize the use of false documents that—as the Court itself has recognized—many unauthorized workers must use to access employment.[245]

C. *Restrictionist vs. inclusive approaches to unauthorized work and hybrid status*

The line of cases discussed in the section above outlines new tools to restrict noncitizen work options for states hostile to immigration. *Whiting* and *Kansas* both open the door for restrictionist state legislatures and prosecutors to penalize unauthorized workers despite what might otherwise appear to be solid preemption doctrine forbidding such state actions. As Pratheepan Gulasekaram writes, the *Kansas* decision opened "a new front in restrictionist policies, allowing interested state prosecutors to supplement and enhance workplace enforcement through application of identity fraud laws."[246]

Criminal prosecution of immigrant workers goes alongside numerous other steps states have taken to diminish immigrants' rights in the workplace. As we have seen, Tennessee has enacted statutes withholding certain work law benefits from unauthorized employees, which state courts have held not to be preempted by federal immigration law.[247] Meanwhile, in contrast to California's AB5 reform, several other states have recently passed laws seeking to preserve broad definitions of independent contracting.[248] Two such states, Georgia and Alabama, both had previously passed immigrant restriction laws modeled after Arizona's SB 1070.[249]

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[244] *Kansas*, 140 S. Ct. at 806-07.

[245] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 148 (2002) (discussing the necessity of either the unauthorized employee committing fraud or the employer violating IRCA in order for the employee to work).

[246] Gulasekaram, *supra* note 192, at *23.

[247] Tenn. Code Ann. § 50-6-207(3)(F); Sandoval v. Williamson, 2019 Tenn. LEXIS 153, *15 (Tenn. 2019).

[248] *See* 2022 Ga. HB 389; 2021 Al. HB 408.

[249] 2011 Ga. HB 87; 2011 Al. HB 56; *see also* Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012) (striking down several provisions of

Together, these policies can enable states to attempt to bring work law into harmony with federal immigration law, reinforcing and in some cases exceeding IRCA's prohibitions on unauthorized employment.[250] States seeking to pursue this restrictionist agenda have narrowed the scope of work law protections and benefits available to unauthorized immigrants through independent contract work. Meanwhile, they have developed new tools and arrest and prosecute those who seek better working conditions through formal employment.

Hybrid status offers an alternative approach, allowing states to exploit disharmony between immigration and work law to expand immigrants' rights in the workplace. As discussed above, state courts have consistently held that federal immigration law does not preempt state work law systems that extend benefits to unauthorized immigrants.[251] These cases often rely both on *De Canas*'s recognition that workplace regulation is a historic state police power,[252] and crucially, a finding that state laws do not conflict with IRCA because they ensure that the immigration statute's twin aims can coexist.[253] In other words, while IRCA's legal framework produces *disharmonies* between federal immigration and state work law, it does not produce a *conflict* between them. Despite IRCA's extensive regulation of immigrants' rights in the workplace, then, states retain an option for policies expanding unauthorized immigrants' workplace rights that are not preempted by federal immigration law.

By broadening the scope of employee rights, together with the state policy options discussed above in Part IV, states can strengthen the scope of work law protections for unauthorized workers as well as workers generally. If implemented successfully, state reforms aimed at preventing misclassification can ensure that workers in industries like construction, landscaping, building services, and taxi and delivery services are fully covered under wage and hour, antidiscrimination, worker's compensation, and other work law protections. Including unauthorized immigrants within these structures of the formal economy can potentially improve their working conditions and opportunities for economic stability, and in so doing, reduce their incentives to risk unauthorized employment by fraudulent means. As restrictionist states attempt to weaken immigrant

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Georgia's HB 87 in light of the *Arizona* decision); United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012) (affirming preliminary injunction against provisions of Alabama's HB 56).

[250] On the concept of "reinforcing" versus "regressive" and "progressive" approaches to immigrant inclusion at the sub-federal level, see Colbern & Ramakrishnan, *supra* note 207, at 56-60.

[251] *See supra* Part III.A.

[252] De Canas v. Bica, 424 U.S. 351, 356-57 (1976); *see, e.g.* Balbuena v. IDR Realty, LLC, 6 N.Y.3d 338, 356 (2006); Reyes v. Van Elk, Ltd., 148 Cal. App. 4th 604, 616 (2007).

[253] *See, e.g. Balbuena*, 6 N.Y.3d at 362-63; *Reyes*, 148 Cal. App. 4th at 617; *supra* Part III.D.

workers' rights, states inclined towards more inclusive policies should not hesitate to make full use of the hybrid-status option.

CONCLUSION

Despite the widespread attention employee misclassification has received from scholars, policymakers, and journalists, the impact of reform efforts on unauthorized immigrants has largely been missing from the discussion. Many unauthorized immigrants currently rely on independent contractor status as a low-risk work option given the narrow restrictions of federal immigration law. At the same time, unauthorized independent contractors are vulnerable to many forms of employer abuse, unprotected by the legal protections of the formal economy. How federal and state law define employment and independent contract work matters a great deal for immigrant workers.

Reform efforts to expand the scope of these protections can include unauthorized workers, and policymakers should seek to ensure that they do. To accomplish this aim, it is essential to understand how the law makes possible a hybrid status for immigrant workers: employees for work law purposes, and independent contractors for immigration law purposes. Promoting this hybrid status can become a powerful tool for state as well as federal policymakers seeking to create more inclusive conditions for immigrant workers.

As is so often the case in the immigration context, this approach has its dangers. One state's power to promote immigrant equality is another state's power to relegate immigrants deeper into the informal economy; one administration's agency actions may be undone by the next. But if policymakers at all levels are serious about addressing misclassification, the immigration dimensions of the problem cannot be ignored. Immigrants already form a significant portion of today's precarious workforce, and will be affected by any reform on this issue. The question remaining is whether these effects will harm or empower immigrant workers. As this Article has attempted to demonstrate, policy solutions to the misclassification problem need not choose between immigrants' rights and workers' rights. Hybrid status can allow both causes to support and reinforce one another.