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SERGIO LOPEZ, Plaintiff-Appellant, v. MARMIC LLC, and MIKE RUANE, individually, Defendants-Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 089632 CIVIL ACTION ON LEAVE TO APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-2391-22 SAT BELOW: Hon. Lisa Firko, J.A.D. Hon. Christine M. Vanek, J.A.D.

BRIEF OF PROPOSED AMICUS CURIAE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

Date Submitted: May 5, 2025

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PRELIMINARY STATEMENT

New Jersey's wage laws ensure that workers receive fair compensation for their time and labor. They are not only intended to prevent the mistreatment of individual workers, but to protect both law-abiding employers from unfair competition and the broader workforce from exploitative practices that undermine labor standards. Accomplishing these statutory goals requires robust enforcement of the State's wage laws for all employees. But the decisions below create carveouts to the State's laws that would excuse employers from paying wages owed to undocumented employees for work already performed. Not only would this carveout lead to widescale exploitation of these workers, but it would systematically disincentivize hiring workers with lawful work authorization. And it would give unscrupulous employers an unfair edge over their competitors. All of this would subvert the purposes of the State's wage laws, creating a race to the bottom that would injure workers and businesses alike.

In this case, a realty management company, Marmic LLC, and one of its owners, Mike Ruane, permitted Sergio Lopez to perform superintendent services for over three years in a building they owned, despite knowing that he could not provide a valid social security number to establish legal authorization to work. In exchange for Lopez's services, Marmic and Ruane provided Lopez with a rent-free apartment. Lopez ultimately sued them, alleging violations of the

minimum-wage and overtime requirements of the Wage and Hour Law (WHL), N.J.S.A. 34:11-56a1 to -56a41, and failure to pay timely wages in violation of the Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 to -4.15.

The Appellate Division foreclosed Lopez's claims based primarily on two independent legal holdings. First, the Appellate Division held that the federal Immigration Reform and Control Act of 1986 (IRCA) precluded Lopez, and any worker who lacks legal immigration status, from obtaining relief under the WHL and WPL. The panel emphasized that the IRCA bars employers from knowingly hiring undocumented persons and prohibits undocumented persons from using false documents or information to obtain work. In the court's view, it follows that the IRCA precludes undocumented workers from seeking damages for unpaid wages. Second, the Appellate Division held that Lopez's claims fail as a matter of state law, as he was not an "employee" protected by the WHL and WPL in the first place, but instead merely party to a "barter arrangement" that involved the exchange of in-kind compensation (namely, lodging) for superintendent services.

Both holdings contravened established law. As to the first, it is true that the IRCA precludes undocumented workers from recovering certain damages resulting from an unlawful termination—namely, the post-termination wages that such worker would have received but for being fired. But as numerous

courts across the country have reasoned, including prior Appellate Division panels, awarding damages for unpaid wages, on work that was actually performed prior to any termination, advances rather than hinders the IRCA's design. This Court should confirm that undocumented workers in New Jersey can recover unpaid wages for work they actually performed.

On the employment-status dispute, the Appellate Division's novel per se "barter" exception to employment under the WHL and WPL has no basis in law; in fact, New Jersey law expressly recognizes that employment can involve in-kind compensation. Instead, the Appellate Division should have applied the WHL's and WPL's standard for determining whether Lopez's arrangement with Marmic constituted an employment relationship—that is, whether Marmic "suffered or permitted" Lopez to work. This Court should affirm the WHL and WPL's broad coverage of employment and reject a so-called "barter arrangement" exception.

Finally, the Appellate Division committed a third error in its decision too. It affirmed the trial court's admission of evidence at trial regarding Lopez's use of a false social security number to initially obtain employment with Defendants, stating it was admissible extrinsic evidence under Rule 607. But neither decision addressed what constitutes permissible extrinsic evidence or otherwise

grappled with Rule 607's plain language. On remand, should these evidentiary issues arise again, the trial court should properly apply Rule 607.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Statutory Background.

This case involves the application of the WHL and WPL, two foundational statutes of New Jersey employment law. The WHL requires the payment of a minimum wage and, subject to certain exemptions, overtime pay for hours worked in excess of forty hours per week. N.J.S.A. 34:11-56a4. The Legislature enacted the WHL in 1965 to protect New Jersey workers, and employers, from the "unfair competition resulting from wage levels detrimental to [workers'] health, efficiency and well-being." In re Raymour & Flanigan Furniture, 405 N.J. Super. 367, 376 (App. Div. 2009) (quoting N.J.S.A. 34:11-56a); see Hargrove v. Sleepy's, LLC, 220 N.J. 289, 302 (2015) (WHL protects "employees from unfair wages and excessive hours" (internal citations omitted)). The WPL "governs the time and mode of payment of wages," assuring workers timely, regular, and fair payment earned through work. Musker v. Suuchi, Inc., 260 N.J. 178, 186 (2025) (quoting Hargrove, 220 N.J. at 302, 313). Under the WPL, employers must pay "the full amount of wages"

[1] These sections are combined for efficiency and the convenience of the Court.

due to an employee "at least twice a month" and "on regular paydays." N.J.SA. 34:11-4.2.

The WHL's and WPL's protections extend to all individuals who an employer "suffers or permits to work." N.J.S.A. 34:11-4.1(c), -56a1(f) ("to employ" includes "to suffer or permit to work"). This Court has recognized that such extension of coverage is "the broadest definition of employee among the statutes falling into the classification of social legislation." Hargrove, 220 N.J. at 310. Both statutes are "construed liberally to effectuate [their] remedial purpose." Hargrove, 220 N.J. at 303–04, 312.

Neither the WHL nor the WPL exclude undocumented workers from their coverage. No provision of either law makes any mention of citizenship or immigration status. See generally N.J.S.A. 34:11-4.1 to -4.14; N.J.S.A. 34:11-56a to -56a41. Pursuant to the Commissioner's overarching regulatory and enforcement authority, see N.J.S.A. 34:11-4.9, -56a6, NJDOL consistently enforces the WHL and WPL without regard to immigration status.[2]

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[2] See, e.g., My Work Rights, More Work Protections, Relief for Immigrant Workers, https://www.nj.gov/labor/myworkrights/worker-protections/immigrant_workers/ (last visited Apr. 18, 2025) ("NJDOL protects all New Jersey workers regardless of immigration status") (emphasis in original); Protecting the Rights of Immigrant Workers in NJ, https://www.nj.gov/labor/myworkrights/worker-protections/immigrant_workers/rights.shtml (last visited Apr. 18, 2025); (same); Wage and Hour Compliance FAQs (for Workers), Complaints and Investigations, https://nj.gov/labor/wageandhour/support/faqs

More broadly, the Legislature recently reaffirmed its commitment to protecting workers' rights and workplace safety regardless of immigration status. Last year, it enacted a law empowering the NJDOL Commissioner to assess penalties on employers who for "the purpose of concealing any violation of State wage, benefit and tax laws, disclosed or threatened to disclose to a public body an employee's immigration status." L. 2024, c. 51, § 1 (codified at N.J.S.A. 34:1A-1.20a(1)(a)). A committee statement accompanying the legislation noted that New Jersey's "employment laws provide broad protections for employees, regardless of an employee's immigration status." Senate Labor Comm. Statement to S. 2869 (May 6, 2024).

B. Factual Background.

In June 2015, Lopez was hired by Ruane to work as a superintendent for two buildings owned by the defendant Marmic LLC. (SCa5).[3] Under the terms of their agreement, Lopez would receive $1,600 per month and "would pay $800

/wageandhourworkerfaqs.shtml (last visited Apr. 18, 2025) ("The Division of Wage and Hour Compliance does not investigate or inquire into the legal status of any worker. The Division applies New Jersey's labor laws without regard to a worker's legal status.")

[3] "Pb" refers to Lopez's petition for certification. "SCa" refers to the appendix accompanying the petition for certification. When citing the Appellate Division's decision contained in that appendix, this brief uses the decision's internal pagination. "Pa" refers to Lopez's Appellate Division appendix. "1T" refers to the trial court transcript of March 3, 2023, included in the petition appendix. This brief uses the transcript's internal pagination as well. "Rb" refers to Defendants' opposition to certification brief.

per month for an apartment in the Marmic building." Ibid. As part of the hiring process, Lopez filled out a Form W-4 on which he entered an invalid social security number (SSN). (SCa6; SCa11). Marmic furnished the apartment to Lopez and paid him $400 per week for the first two weeks of work. See (SCa3; SCa6); (1T12).

Ruane then learned that the SSN Lopez provided was invalid and informed Lopez that Marmic "could not legally pay him." (SCa6-7); see (SCa12). But Ruane "offered [Lopez] an alternative barter arrangement for his continued employ at the buildings," under which Lopez would receive "the apartment rent and utility free in exchange for his part-time services as superintendent." (SCa7); see (SCa12). Lopez accepted the offer. Ibid.

Over the next three-and-a-half years, Lopez performed superintendent work for Marmic under that oral agreement. (SCa10). His "duties essentially remained the same" as those he performed in his first two weeks of work. (SCa7). Those duties generally "consisted of mopping the floors, taking out the garbage, and responding to the tenants' requests for 'minor repairs.'" (SCa12); (1T8); see also (1T7-8) (describing work responsibilities). Defendants did not require Lopez to "'track or report' his hours," (SCa12), or maintain such records themselves, see (SCa8–9).

Sometime in early 2018, Lopez filed an administrative complaint with NJDOL seeking unpaid wages from Marmic. (SCa9). NJDOL sent a letter to Marmic requesting, among other things, time and payroll records for Lopez. (SCa9; Pa73). Ruane responded on Marmic's behalf. He informed NJDOL that Marmic did not possess such records. (SCa9). He also explained that Marmic had provided Lopez an apartment and free utilities, which Marmic valued at $1,150 per month, "in lieu of an actual hourly rate to perform part-time duties for the buildings." Ibid.; see (Pa75). On October 2, 2018, NJDOL issued Marmic a $750 assessment in administrative penalties: $500 for failing to maintain records of hours worked and wages paid, pursuant to the WHL, N.J.S.A. 34:11-56a20, and $250 for failing to timely pay full wages, pursuant to the WPL, N.J.S.A. 34:11-4.2. (Pa76–77). Marmic resolved the assessment by paying NJDOL a reduced penalty of $250. (SCa9); (Pa78). NJDOL sent a letter to Marmic dated November 19, 2018, confirming the $250 settlement. Although NJDOL declined to pursue wages on behalf of Lopez in its administrative enforcement action, NJDOL made clear that "this settlement doesn't waive the employee(s) right to request a wage hearing for the balance of their claim if they so desire." (Pa78).[4]

[4] Although the Appellate Division stated that NJDOL's October 2, 2018 letter concluded that "no wages were due" to Lopez, this is simply incorrect. NJDOL

Sometime in late 2018, Ruane "terminate[d]" the arrangement with Lopez. (SCa10). Lopez stopped performing superintendent services and ultimately vacated the apartment. (SCa10-11).

C. This Case.

Lopez filed a complaint against Marmic in New Jersey Superior Court in September 2019, alleging violations of the overtime and minimum wage provisions of the WHL, N.J.S.A. 34:11-56a4, and failure to timely pay wages owed in violation of the WPL, N.J.S.A. 34:11-4.2. See (Pa9–21). Following a bench trial, the trial court issued an oral decision on March 3, 2023, dismissing the complaint with prejudice. See (Pa1).

The trial court identified multiple reasons for ruling against Lopez. First, it held the IRCA, a federal statute that makes it "unlawful to employ" immigrants who lack federal work authorization, bars Lopez from obtaining

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made no such statement. See (Pa76–77). Moreover, while NJDOL has authority "to investigate any claim for wages due an employee" and to recover unpaid wages, N.J.S.A. 34:11-58(c), it also possesses enforcement discretion about how to exercise that authority, see N.J.S.A. 34:1a-1.12(j) (authorizing NJDOL to settle an enforcement action on behalf of named or unnamed workers on terms acceptable to NJDOL). The discretionary decision not to pursue an enforcement action to recover unpaid wages in no way constitutes a finding that no wages were unpaid. Nor does NJDOL's decision about how to exercise its enforcement authority have any bearing on whether a plaintiff can pursue wage claims themselves. N.J.S.A. 34:11-56a25 (authorizing private cause of action under the WHL); Hargrove, 220 N.J. at 302–03 (recognizing a private cause of action under the WPL) (citing N.J.S.A. 34:11-4.7 and Winslow v. Corp. Express, Inc., 364 N.J. Super. 128, 136 (App. Div. 2003)).

relief on these employment claims. (SCa13) (quoting (1T15)).[5] As support for that holding, the trial court cited Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), which held, as the Appellate Division put it, that under the IRCA "an undocumented immigrant worker could not be awarded back pay." (SCa13–14). Second, the court found that Lopez "was subject to a barter arrangement," (SCa15), and had no "employment agreement" with Marmic on which to base any WHL or WPL claims, (SCa27).

In addition—apparently offering a third basis for its judgment—the trial court ruled that Lopez failed to meet his burden of proof on the merits of his claims. (1T25). Without records about the work Lopez performed for Marmic, the trial court had to "rely upon the veracity" of Lopez's testimony regarding when he worked and for how long. (1T20). But the court found Lopez was not "credible or believable" because he had knowingly provided a false SSN to Ruane in June 2015, and the court relied on this "lack of credibility" alone in concluding that Lopez did not meet his burden of proof. See (1T20, 1T24).

[5] The trial court appeared to infer from Lopez's lack of a valid SSN that he lacked lawful immigration status and referred to Lopez as "undocumented." See (1T16–17, 21–20). While Lopez contests the admissibility of evidence regarding his use of a false SSN, see infra at 30–34, he also describes himself in briefing as undocumented. See, e.g., (Pb3). NJDOL therefore does the same for purposes of this brief.

The Appellate Division affirmed, largely endorsing the trial court's rulings. To begin, the panel held that because Lopez was not legally "eligible to work" under the IRCA, there "could be no employee-employer relationship between the parties," and Lopez was therefore "precluded" as a matter of law "from recovering damages." (SCa18–19). Like the trial court, the Appellate Division relied on Hoffman Plastic in its discussion of the IRCA. The IRCA, it explained, created a "comprehensive scheme prohibiting the employment of illegal aliens" and made "combating" such employment "central to the policy of immigration law." (SCa16–17) (quoting 535 U.S. at 147). To that end, the IRCA required employers to "discharge" a worker "upon discovery of the worker's undocumented status." (SCa17) (quoting 535 U.S. at 148).

As a result, the panel went on, undocumented immigrants fired from their jobs in violation of federal labor law could not pursue "reinstate[ment]" and "backpay"—i.e., wages lost due to the employee's termination—because those remedies, when awarded to undocumented workers, would "conflict[] with the IRCA." (SCa17) (discussing Hoffman Plastic, 535 U.S. at 140–41, 147). At the same time, the panel cited several cases, including Appellate Division precedent, that distinguished Hoffman Plastic and permitted undocumented workers to pursue other claims and forms of relief—including payment "for work already

performed." See (SCa18–19) (collecting cases). Despite these precedents, the panel concluded that Lopez's damages claims were barred.

The Appellate Division also held that Lopez could not pursue claims for violations of New Jersey's employment laws because he only had a "barter arrangement," not an employment relationship, with Marmic. See (SCa27–29). Lopez argued that he remained Marmic's employee even after Ruane discovered that Lopez's SSN was invalid, and that the legal standard for analyzing whether someone is an employee is supplied by New Jersey's ABC Test, codified at N.J.S.A. 43:21-19(i)(6). (SCa28). But the Appellate Division held the ABC Test "is inapplicable here" because that test is solely "used to determine whether a person is an employee or an independent contractor," and—given the finding of a "barter arrangement"—Lopez was neither. (SCa29) (emphasis added).

The Appellate Division also held that the admission of evidence regarding Lopez's use of a false SSN was relevant under New Jersey Rule of Evidence 401, and that the trial court did not abuse its discretion in admitting the evidence under Rule 607, which allows "extrinsic evidence to be introduced if relevant to a witness's credibility." (SCa26).

This Court granted Lopez's petition for certification.

ARGUMENT

POINT I

U.S. LAW DOES NOT PREEMPT STATE LAWS ALLOWING WORKERS TO OBTAIN DAMAGES FOR WORK THEY ALREADY PERFORMED REGARDLESS OF IMMIGRATION STATUS.

The panel erred in holding that Lopez's immigration status precludes him, as a matter of law, from pursuing claims for unpaid wages under the WHL and WPL. Lopez seeks damages arising from work he actually performed for Marmic between 2015 and 2018, alleging he was not paid the minimum wage or overtime as required by the WHL, and was not paid in a timely manner as required by the WPL. See supra at 8–9, 11. But nothing in the IRCA—or in Hoffman Plastic, on which Defendants principally rely—precludes workers from recovering unpaid wages for work already performed. Courts across the country, including in New Jersey, have reached the same conclusions regarding comparable federal and state wage and hour laws. This Court should join that chorus and hold that the Appellate Division's contrary holding was error.

As an initial matter, the decisions below contravene the plain language of the WHL and WPL. The WHL defines "employee" as a person who is "suffered or permitted to work," subject only to certain exceptions unrelated to immigration status. N.J.S.A. 34:11-56a1(f) (defining "employ" to include "to suffer or permit to work"). The WPL defines "employee" in equally broad terms

as someone who is "suffer[ed] or . . . permit[ted] to work." N.J.S.A. 34:11-4.1(c). Both clearly extend to all workers regardless of their immigration status and authorization to work. As explained above, no provision of either law makes any mention of citizenship or immigration status at all. See generally N.J.S.A. 34:11-4.1 to -4.14; N.J.S.A. 34:11-56a to -56a41. Pursuant to the Commissioner's overarching regulatory and enforcement authority, see N.J.S.A. 34:11-4.9, -56a6, NJDOL consistently enforces the WHL and WPL without regard to immigration status. See supra at 5–6. Whenever individuals perform services for remuneration, the WHL and WPL ensure that they receive the compensation they are owed—and on the schedule they are owed it. Defendants do not contend that the WHL or WPL carve workers out from their protections based on their immigration status. Instead, Defendants argue that these laws are contrary to federal law, which they contend prohibits awarding payment to those without lawful work authorization. (Rb12–14).

Defendants come nowhere close to meeting the high bar necessary for what is, in effect, a preemption argument.[6] Federal courts and this Court alike have long recognized a "presumption against preemption" of state laws: the

[6] Although neither the parties nor the Appellate Division have expressly framed the issue as one of preemption, that is the doctrinal framework for assessing whether federal law precludes the application of state law. See Kansas v. Garcia, 589 U.S. 191, 202 (2020) (describing preemption doctrine); Matter of Altice USA, Inc., 253 N.J. 406, 416–17 (2023) (same).

bedrock "assumption that the historic police powers of the States are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress." Matter of Altice USA, Inc., 253 N.J. 406, 416 (2023) (cleaned up) (quoting Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008)); see Sikkelee v. Precision Airmotive Corp., 822 F.3d 680, 687 (3d Cir. 2016) (same, and noting "duty to accept the reading [of federal law] that disfavors pre-emption"). States' historic police powers include the regulation of workers. "Many employment regulations, such as the wage laws at issue here, seek to ensure workers receive fair pay. Because they protect workers, they are within New Jersey's police power, and the presumption against preemption by federal law applies." Bedoya v. American Eagle Express Inc., 914 F.3d 812, 818 (3d Cir. 2019) (finding that a federal law did not preempt the WHL or WPL); see also Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) (agreeing that "the establishment of labor standards falls within the traditional police power of the State").

The IRCA does not in any way preempt the application of the WHL and WPL in this case. None of the three forms of federal preemption apply, let alone overcome the presumption against preemption. See Altice, 253 N.J. at 417 (discussing express preemption, where the federal law "explicitly preempts" the relevant state laws; field preemption, where a federal law is "intended to occupy" the whole "field" of regulation; and conflict preemption). No provision

of the IRCA "explicitly preempts" the WHL or WPL, and Defendants do not contend otherwise. See Salas v. Sierra Chem. Co., 327 P.3d 797, 805 (Cal. 2014) (noting limits of the IRCA's express preemption provision). Defendants do not cite any case suggesting that the IRCA "intended to occupy" the "field" of employment remedies for work performed by undocumented immigrants "exclusively." Id. at 806 (finding no "evidence of a clear and manifest purpose by Congress to occupy the field of immigration regulation so completely as to preclude the states from applying to unauthorized aliens the states' own worker protection labor and employment laws" and noting a contrary conclusion "would dramatically affect state laws such as those regulating workers' compensation, minimum wages, working hour limits, and worker safety"). That leaves only the claim that the IRCA preempts the WHL and WPL because application of these labor "law[s] actually conflict[] with [that] federal law." Altice, 253 N.J. at 417.

But the key case on which Defendants rely—Hoffman Plastic—in no way supports that preemption theory. There, an undocumented worker, Castro, was illegally terminated for participating in a union organizing drive. 535 U.S. at 150–52. The National Labor Relations Board (NLRB) required the employer to offer Castro "backpay"—the wages that Castro would have earned had he not been unlawfully terminated—calculated "from the date of Castro's termination to the date" the employer later "learned of Castro's undocumented status." Id.

at 141–42. The U.S. Supreme Court overturned the NLRB's award of backpay, holding the NLRB's "chosen remedy" must "yield" because it ran "counter to policies underlying IRCA," which prohibits the employment of undocumented immigrants. Id. at 149; see also 8 U.S.C. §§ 1324a(a)(1)–(2), 1324c(a). The reason the majority gave was clear and cabined: the NLRB, a federal agency, could not order backpay for the unlawful termination of an undocumented worker because it would mean awarding backpay "for years of work not performed, for wages that could not lawfully have been earned." Hoffman Plastic, 535 U.S. at 149 (emphasis added). Indeed, to satisfy their duty to "mitigate damages" for unlawful termination by seeking new employment, that undocumented worker would have to violate the IRCA. Id. at 150. The Court therefore concluded that "awarding backpay in a case like this . . . condones and encourages future violations" of immigration law. Ibid. Once an undocumented worker had been fired, no damages were available for loss of a job they were not allowed to have.

Hoffman Plastic has no application here. Although its rationale extends to backpay awards for unlawful termination, courts in New Jersey and across the country have overwhelmingly reasoned that Hoffman Plastic does not apply to damages claims predicated on work already performed. See, e.g., Patel v. Quality Inn South, 846 F.2d 700, 706 (11th Cir. 1988) ("Nothing in the [Fair

Labor Standards Act ("FLSA")] suggests that undocumented aliens cannot recover unpaid minimum wages and overtime under the act, and we can conceive of no other reason to adopt such a rule.");[7] Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1308 (11th Cir. 2013) (holding that Patel survived Hoffman Plastic); Lucas v. Jerusalem I, LLC, 721 F.3d 927, 933 (8th Cir. 2013) (agreeing with Patel); Solis v. SCA Rest. Corp., 938 F. Supp. 2d 380, 400 (E.D.N.Y. 2013) (noting argument Hoffman Plastic "should be extended to foreclose" undocumented workers from obtaining any type of relief rejected by all but one district court); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, 192–93 (S.D.N.Y. 2002); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 325 (D.N.J. 2005); see also Salas v. Sierra Chem. Co., 327 P.3d 797, 807–09 (Cal. 2014) (holding that while federal immigration law preempts "any state law award that compensates an unauthorized alien worker for loss of employment" after the employer discovers the worker's ineligibility to work, it does not preempt "the remedy of prediscovery period lost wages" (emphasis in Salas)).[8]

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[7] Our courts are regularly guided by federal jurisprudence interpreting the FLSA. See Garcia v. Freedom Morte. Corp., 790 F. Supp. 2d 283, 288 n.7 (D.N.J. 2011) ("The NJWHL is patterned after the FLSA, and New Jersey courts look to the FLSA regulations for guidance." (citing Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, 309 (App. Div. 2005)).

[8] The U.S. Department of Labor also adopted this position following Hoffman Plastic. See Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastic decision on laws enforced by the Wage and

Until the decision below, New Jersey courts were in accord. For instance, in Crespo v. Evergo Corp., the Appellate Division held that while claims that "arise solely from" an undocumented employee's "termination" are barred, claims under the Law Against Discrimination that implicate only an employer's "treatment" of an employee "during the course of her employment" likely would not be similarly prohibited. 366 N.J. Super. 391, 398, 401 (App. Div. 2004) (emphasis added). In support, Crespo cited an array of cases from several jurisdictions distinguishing Hoffman Plastic and indicating that the IRCA does not bar undocumented workers' claims arising from work actually performed or from employment conditions, including claims under the FLSA and for workers' compensation benefits. 366 N.J. Super. at 398–99. Likewise, in Serrano v. Underground Utils. Corp., the Appellate Division again held that "undocumented workers can recover damages arising out of statutory violations for 'work already performed,' such as wage claims under the FLSA" and workers' compensation benefits. 407 N.J. Super. 253, 270 (App. Div. 2009) (internal citation omitted).

Hour Division, available at https://www.dol.gov/agencies/whd/fact-sheets/48-hoffman-plastics (Rev. July 2008) (interpreting Hoffman Plastic to be limited to claims for backpay, and not to affect overtime and minimum wage claims brought by or on behalf of undocumented workers under the FLSA for "work actually performed").

There are good reasons why courts have so overwhelmingly distinguished between claims for backpay from unlawful termination (i.e., Hoffman Plastic) and claims for unpaid wages for work performed or based on any employment discrimination or workplace conditions during the course of employment: the purposes and implications of these remedies are distinct. Backpay for unlawful termination compensates a wrongfully terminated employee for work they have not actually performed on the theory that, but for the termination, the plaintiff would have been earning wages from gainful employment. But applying that premise to undocumented workers implicates Hoffman Plastic's concern: immigration laws legally bar them from such employment. Compensating an undocumented worker for termination thus risks contravening the IRCA, which "effectively require[s]" the termination of undocumented workers. Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 244 (2d Cir. 2006).

Unpaid wages are entirely different. A worker who is seeking unpaid wages does not seek relief "for being unlawfully deprived of a job that he could never have lawfully performed," but simply seeks relief "for work already performed." Lamonica, 711 F.3d at 1308 (emphasis in original). Ensuring that undocumented workers can obtain such relief would thus advance, rather than impede, the IRCA's goals of reducing unlawful employment. In cases seeking recovery for work performed, "the immigration law violation has already

occurred," and ensuring recovery of the unpaid wages "does not itself condone the violation or continue it," but "ensures that the employer does not take advantage" of it. Madeira, 469 F.3d at 243; see Lucas, 721 F.3d at (holding employers liable for violating wage and hour laws "advances the purpose of federal immigration policy by 'offset[ting] what is perhaps the most attractive feature of [unauthorized] workers—their willingness to work for less than the minimum wage'") (quoting Patel, 846 F.2d at 704) (alterations in original).

Prior appellate panels have embraced this view as well:

> If employers know that they will not only be subject to civil penalties[] . . . and criminal prosecution[] . . . when they hire illegal aliens, but they will also be required to pay them at the same rates as legal workers for work actually performed, there are virtually no incentives left for an employer to hire an undocumented alien in the first instance.
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> [Serrano, 407 N.J. Super. at 271 (quoting Flores v. Amigon, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002)).]

In other words, if employers faced no liability for paying undocumented workers for the work they performed, they would have "a strong incentive to 'look the other way' and exploit a black market for illegal labor," directly undermining the IRCA's purposes. Salas, 327 P.3d at 808 (collecting cases).

In sum, the IRCA does not foreclose workers from recovering damages for work already performed, regardless of work authorization or status. Rather, allowing Lopez's WHL and WPL claims to proceed would advance the federal

objectives underlying the IRCA, by disincentivizing employers from illegally hiring workers who lack recourse when they are not paid or are underpaid, as well as the "remedial purposes" of the WHL and WPL. See, e.g., Hargrove, 220 N.J. at 303–04, 312; Kas Oriental Rugs, Inc. v. Ellman, 407 N.J. Super. 538, 564 (App. Div. 2009). And it would reflect the Legislature's broad policies of protecting New Jersey workers regardless of immigration status, and NJDOL's policy of enforcing the State's wage laws without regard to a worker's immigration status. See, e.g., N.J.S.A. 34:11-56a (articulating purposes of the WHL); supra at 5–6. Nothing in Hoffman Plastic, which dealt only with backpay for unlawful termination and the unique interplay that remedy had with the IRCA, is to the contrary.

POINT II

THE WHL AND WPL DO NOT EXCLUDE FROM THEIR COVERAGE WORK PERFORMED PURSUANT TO A SO-CALLED "BARTER ARRANGEMENT".

The Appellate Division also erred in holding that a so-called barter arrangement cannot constitute an employment relationship under the WHL and WPL. Both statutes define an employee as one who is "suffered or permitted to work." N.J.S.A. 34:11-4.1(b), -56a1(f). Once that capacious standard is satisfied, an employee is entitled to the statutes' protections, subject only to certain discrete exceptions. See, e.g., Hargrove, 220 N.J. at 307–16 (addressing

exception for independent contractors). Nothing about a "barter arrangement" per se excludes it from the scope of the "suffer or permit" standard. Nor do the WHL or WPL include exceptions for "barter arrangements." To the contrary, the WHL expressly recognizes that an employment relationship can involve payment in kind rather than in cash. See N.J.S.A. 34:11-56a1(d) (defining "wages" to include the fair market value of meals and lodgings). Simply put, barter arrangements are not exempt from coverage under the WHL and WPL.

The "suffer or permit to work" standard used in the WHL and WPL has deep roots in New Jersey's labor laws, dating back at least to early twentieth-century child labor law. See N.J.S.A. 34:2-21.2 (Child Labor Law, originally enacted as the Factory Law, P.L. 1904, p. 152, providing that, as a general matter, no minor under 16 "shall be . . . permitted, or suffered to work in, about, or in connection with any gainful occupation at any time").[9] Precedent from New Jersey and elsewhere makes clear that the "suffer or permit" standard is generally satisfied by an employer's knowledge of, or acquiescence to, the work performed. See, e.g., Gabin v. Skyline Cabana Club, 54 N.J. 550, 554–55 (1969) (holding that a minor could have been suffered or permitted to work by an

[9] The federal FLSA also adopted "suffer or permit" from preexisting state child labor laws. Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 & n.7 (1947) (noting that at the time of the FLSA's enactment, this language appeared in the child labor laws of the majority of States).

employer who observed him, but did not prevent him from, cleaning the employer's machine); Hetzel v. Wasson Piston Ring Co., 89 N.J.L. 205, 206–07 (1916) (observing that both the factory owner and the father of a minor violated the Child Labor Law by allowing the minor to perform work in the factory).

As courts in other jurisdictions have put it, "suffer or permit to work . . . sweeps in almost any work done on the employer's premises" and "potentially any work done for the employer's benefit or with the employer's acquiescence." Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J. concurring); see Martinez v. Combs, 231 P.3d 259, 282 (Cal. 2010) (explaining that the standard "reach[es] irregular working arrangements the proprietor of a business might otherwise disavow with impunity" by focusing on "the defendant's knowledge of and failure to prevent the work from occurring"); Sheffield Farms-Slawson-Decker Co., 121 N.E. 474 (N.Y. 1918) (Cardozo, J.) (providing that "[s]ufferance" in child labor here "implies knowledge or the opportunity through reasonable diligence to acquire knowledge"). This Court has, accordingly, aptly characterized the "suffer or permit" standard in the WHL and WPL as "the broadest definition of employee among the statutes falling into the classification of social legislation." Hargrove, 220 N.J. at 310; see also Gabin, 54 N.J. at 554–55 (recognizing "broad scope" of the "suffer or permit" language in the context of the Child Labor Law).

The Appellate Division's ruling that a covered employment relationship categorically does not exist where there is a so-called "barter arrangement" is contrary to the plain language of the WHL and WPL and the case law in which that language is rooted. Given the "striking breadth" of the "suffer or permit" language, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (interpreting the FLSA), there can be no dispute that it encompasses work performed pursuant to what the decision below characterized as a "barter arrangement." If a business is aware of the work performed, then they suffered or permitted it, see Martinez, 231 P.3d at 282; Gabin, 54 N.J. at 554–55, no matter whether the compensation provided for that work is monetary or in kind.

The WHL could hardly be clearer on this score, defining "wages" expressly to include not only "any moneys due an employee from an employer for services rendered," but also "the fair value of any food or lodgings supplied by an employer to an employee." N.J.S.A. 34:11-56a1(d). For decades, NJDOL has provided guidance to employers on how to calculate the value of lodging in complying with the WHL's minimum wage and overtime requirements. See N.J.A.C. 12:56-8.6 (instructing employers how to compute the fair market value of lodgings to factor into hourly wage calculations for lawful minimum wage and overtime rates); N.J.A.C. 12:56-8.8 (providing illustrative examples); cf. N.J.S.A. 43:21-19(p) (defining "remuneration" for purposes of determining

employment under the Unemployment Compensation Law to cover "all compensation for personal services, including commission and bonuses and the cash value of all compensation in any medium other than cash"). Certainly, providing in-kind remuneration in the form of lodging, rather than money, can be a means of satisfying an employer's obligations. But it cannot be a means of avoiding them.

Indeed, were the rule otherwise, our law would create an immense loophole that would enable businesses to evade otherwise-applicable wage laws by simply entering into a contract that substituted in-kind services for equivalent monetary remuneration and calling it a "barter arrangement" instead of an employment relationship. This is precisely what the broad "suffer or permit" standard is intended to foreclose. See New York v. Scalia, 490 F. Supp. 3d 748, 778–80 & n.16 (S.D.N.Y. 2020) ("The words 'suffer or permit to work' were designed to comprehend . . . the relationships which entities had used to avoid being classified as employers.").

The lower courts' novel barter-arrangement loophole is also inconsistent with the Legislature's careful decisions to carve out narrow and discrete exceptions to the WHL and WPL, none of which turn on whether a worker is paid in kind versus in cash. See N.J.S.A. 34:11-4.1(b) (exempting independent contractors from the WPL); Hargrove, 220 N.J. at 314 (recognizing independent

contractor exemption from the WHL); N.J.S.A. 34:11-56a4.1 (excluding from the WHL, to some extent, "summer camps, conferences and retreats operated by any nonprofit or religious corporation or association"); N.J.S.A. 45:15-3.2 (excluding real estate brokers and salespersons from the WHL and WPL); see also N.J.A.C. 12:56-18.1 to -18.2 (regulations exempting student learners from WHL only where all eight enumerated conditions "shall be met"). Given the laws' remedial purposes and "broadest" formulation of employment, Hargrove, 220 N.J. at 313, those express exceptions must be construed narrowly, Marx v. Friendly Ice Cream Corp., 380 N.J. Super. 302, 310 (App. Div. 2005); Yellow Cab Co. v. State, 126 N.J. Super. 81, 86 (App. Div. 1973), and novel exceptions cannot be so easily inferred.

Moreover, the categorical exception created by the Appellate Division lacks any discernable legal standard. The panel below provided no guidance as to what facts are sufficient to establish a barter arrangement. Such a vague and undefined exception is inconsistent with the purposes of the WHL and WPL. Further, the circular, question-begging approach endorsed by the Appellate Division fails to provide any predictability to employers and workers. See Hargrove, 220 N.J. at 314–15 (adopting the ABC test for independent contractor disputes because it "provide[s] more predictability" and "fosters the provision of greater income security for workers" in furtherance of the statutes' purpose).

And it risks depriving Lopez and others like him the opportunity to receive the protections of the WHL and WPL—contrary to those statutes' broad remedial purposes, which require a liberal construction of their scope. See Hargrove, 220 N.J. at 303–04, 312.

In sum, under the WHL and WPL, a claimant who establishes that they were "suffered or permitted to work" is an employee covered by those statutes, unless the putative employer establishes that one of the narrow exceptions to employment status applies. But as discussed above, there is no categorical exception for barter arrangements. See supra at 24–27. To be sure, Defendants were free to argue that Lopez was subject one of the exceptions to employment status under the WHL and WPL, such as for independent contractors or volunteers. But the form of remuneration that Lopez received would not be determinative of whether those exceptions applied. Cf., e.g., E. Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev., 251 N.J. 477, 496 (2022) (instructing courts evaluating an independent contractor defense under the Unemployment Compensation Law to look to "the substance, not the form, of the relationship," and specifically to "look beyond the employment contract and the payment method to determine the true nature of the relationship"); Tony & Susan Alamo Found. v. Sec'y of Lab., 471 U.S. 290, 301 (1985) (rejecting contention that workers were exempt from the FLSA as volunteers, reasoning that "the fact that

the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are . . . wages in another form.").[10]

In this case, the undisputed facts indicate that Defendants "suffered or permitted" Lopez to work. Defendants initially hired Lopez to provide superintendent services, requiring Lopez to complete a Form W-4, a form the Internal Revenue Service requires employees to complete and submit to their employers. (SCa6); supra at 6–7. Defendants further agreed to remunerate Lopez by providing him with both an apartment and an additional weekly cash salary in exchange for his services. (SCa4). Lopez began to provide those services, but Defendants subsequently modified the agreement, informing Lopez they would no longer pay him in cash but would instead provide him with a rent-free apartment and utilities in exchange for his continued services. Id. at 7. Defendants believed that this arrangement "would allow Lopez to continue to work at the buildings" despite not having a Form W-4 with a valid SSN as required by the IRCA. Id. at 7, 12 (emphasis added). Even after purporting to

[10] The Appellate Division noted that the question of whether Lopez was an independent contractor was not at issue, and thus there was no need to apply the ABC Test that governs such determinations. (SCa28–29). But this elided the threshold question: whether Lopez was presumptively an employee because he was suffered or permitted to work. Instead, the court appeared to accept as a given that Lopez could not have been an employee because he was party to a barter arrangement. That unsupported assumption was wrong for all the reasons explained here.

terminate his employment, Defendants permitted Lopez to continue fulfilling his role as a superintendent in exchange for a rent-free apartment. Given these facts, it is clear that Defendants suffered or permitted Lopez to work for purposes of the WHL and WPL. And because Defendants do not claim that any of the discrete exceptions to employment status under the WHL and WPL otherwise exempt Lopez from the scope of those statutes' coverage, the courts below erred in concluding that he was not an employee.[11]

Accordingly, this Court should reverse the decision below.

POINT III

THE ADMISSION OF IMPEACHMENT EVIDENCE UNDER N.J.R.E. 607 WAS ERROR.

In addition to the two legal errors discussed above, the Appellate Division's affirmance of certain evidentiary rulings by the trial court warrants reversal. As noted, in addition to erroneously concluding that two threshold

[11] That Lopez and Defendants agreed upon the barter arrangement is of no moment for this analysis; parties cannot contract around state labor laws by creatively labeling their employment relationship as something else. See, e.g., N.J.S.A. 34:11-4.7 (providing that penalties for violating the WPL "may be enforced notwithstanding [an] agreement" governing payment of an employee by an employer that is otherwise precluded by the WPL). Nor can parties contract around the IRCA through a barter arrangement. See 8 U.S.C. § 1324a(1), (4) (prohibiting, in addition to knowingly hiring an unauthorized alien, knowingly "us[ing] a contract . . . to obtain the labor of an alien"). In other words, nothing about the parties' so-called "barter arrangement" in this case would have brought Defendants into compliance with the IRCA if they would have otherwise violated the IRCA by directly paying Lopez.

legal defects were fatal to Lopez's suit, the trial court also held that Lopez failed to carry his burden to demonstrate that he had performed work for which he was not compensated, as required by the WHL and WPL. Supra at 10. That legal conclusion was based on the trial court's finding that Lopez was not a credible witness, and that credibility finding was in turn based on evidence that the court admitted over Lopez's objection—namely, Lopez's use of a false SSN when he first sought employment with Defendants in 2015. (1T22–23); supra at 10. Although a trial court's rulings regarding the admission of evidence are reviewed for abuse of discretion, that "discretion is not unbounded," and is "guided by legal principles" and, of course, the plain language of the Rules of Evidence themselves. State v. J.M., Jr., 225 N.J. 146, 157 (2016). This Court need "not defer to the legal conclusions reached by either the trial court or Appellate Division because [its] review of the law is de novo." State v. K.W., 214 N.J. 499, 507 (2019); see also Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (noting that "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference").

To understand how these issues arose below, it is helpful to explain the burden-shifting framework that applies to WHL and WPL claims. An employee generally carries the burden to prove a claim for unpaid wages under the WHL

and WPL. See Rosano v. Twp. of Teaneck, 754 F.3d 177, 188 (3d. Cir. 2014) (citing Anderson v. Mt. Clemens Potter Co. ("Mt. Clemens"), 328 U.S. 680, 687 (1946)) (applying the FLSA). But where, as here, an employer fails to maintain statutorily required records under the WHL, pursuant to N.J.S.A. 34:11-56a20, the burden falls, in the first instance, on the employee to make out their prima facie case, which generally requires that the employee "prove that he has in fact performed work for which he was improperly compensated and . . . produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Mt. Clemens, 328 U.S. at 687; see also N.J.S.A. 34:11-58(d) (codifying the burden-shifting framework where an employer fails to maintain records in an administrative wage collection proceeding). In such circumstances, the employee's prima facie case may rely entirely on employee testimony. Mt. Clemens, 328 U.S. at 687–88; Sherman v. Coastal Cities Coach Co., 4 N.J. Super. 283, 289 (App. Div. 1949) (citing Porter v. Poindexter, 158 F.2d 759 (10 Cir. 1947)). Here, the trial court concluded that Lopez failed to carry his burden to establish "when he worked, for what amount of time he worked . . . and what days he worked," because his use of a false SSN, in and of itself, rendered him not "credible or believable." (1T19–1T20).

The admission of this evidence, and the Appellate Division's unreasoned conclusion that the "trial judge did not abuse his discretion in admitting

plaintiff's testimony on this issue," were error. According to the Appellate Division, "cross-examination regarding [Lopez's] intentionally providing an invalid Social Security number on his W-4 form" was, "under Rule 607," admissible "extrinsic evidence" relevant to his credibility. (SCa26). But neither the Appellate Division nor the trial court addressed what constitutes permissible extrinsic evidence or otherwise grappled with Rule 607's plain language.

Rule 607(a) provides that for "the purpose of attacking or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, subject to the exceptions in (a)(1) and (2)." N.J.R.E. 607(a). Subsection (a)(1), in turn, provides that Rule 607(a) "is subject to Rules 405 and 608." Ibid. And Rule 608(c), with exceptions not relevant here, states that "extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness." N.J.R.E. 608(c) (emphasis added). Thus, admitting evidence of specific instances of Lopez's conduct without acknowledging, let alone analyzing, the application of Rule 608(c), was an abuse of discretion. See, e.g., State v. J.M., Jr., 438 N.J. Super. 215, 222 (App. Div. 2014) (merely "invoking" the relevant standard for admissibility—more than the decisions below did here—does not automatically "demonstrate or persuade" that the standard is satisfied), aff'd as

modified, 225 N.J. 146 (2016); cf. State v. Reddish, 181 N.J. 553, 609 (2004) (finding that "[t]he trial court failed to analyze" admissibility of evidence under the correct standard, this Court undertook "plenary review"). The end result is a case that ultimately undermines the overarching goal of our State's labor laws.

On remand, if similar questions of credibility arise again, the trial court must apply the commands of both Rules 607 and 608.[12]

CONCLUSION

This Court should reverse the decision below and remand to the trial court for further proceedings.

Respectfully submitted,

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[12] In addition, the trial court should engage on remand in a fulsome analysis of any objections to the admission of evidence regarding Lopez's submission of a false SSN under the balancing test of Rule 403, should they arise again. See N.J.R.E. 403 (providing in relevant part that "relevant evidence may be excluded if its probative value is substantially outweighed by the risk" of "[u]ndue prejudice, confusion of issues, or misleading the jury."). That is especially appropriate given the logical connection between evidence of a plaintiff's immigration status, which often carries a substantial risk of prejudice, see, e.g., State v. Sanchez-Medina, 231 N.J. 452, 462 (2018); Serrano, 407 N.J. Super. at 273, and evidence of a plaintiff's misrepresentations about their authorization to work, see, e.g., Cabrera v. Schafer, 178 F. Supp. 3d 69, 74 (E.D.N.Y. 2016).