

Undocumented Workers’ Employment Rights

YOUR LEGAL RIGHTS

1. What legal rights do I have as an undocumented worker?

With a few exceptions, undocumented workers enjoy the legal rights and remedies provided by both Federal and California law. (The exceptions to this general rule, mainly in the areas of union organizing and unemployment benefits, are discussed below.)

2. As an undocumented worker, what are my rights under wage and hour laws?

Federal and California wage and hour laws define how you should be paid. These laws establish your right to minimum wage, overtime pay, breaks, tips, and other forms of wages. *Undocumented workers generally have the same wage and hour rights as other workers.* For example, an employer cannot refuse to pay you by saying that you should not have been working in the first place because you have no “papers.” (However, if you have been *fired* because you have a wage complaint, it’s less clear whether you can recover the income you lost due to being fired.)

Filing a Wage Claim: If you choose to file a wage claim, you can either file with the California Division of Labor Standards Enforcement (also known as the “Labor Commissioner”) or sue your employer in court. You can also contact the U.S. Department of Labor (DOL). Neither of these agencies should question you about your immigration status nor report your lack of status if it is somehow revealed.

For further information, see the Wage and Hour Fact Sheets published by the Legal Aid Society – Employment Law Center.

3. As an undocumented worker, can I receive workers’ compensation benefits?

Yes. All workers who are injured on the job, *including undocumented workers*, are eligible for workers’ compensation benefits in California to cover the cost of medical treatment and, in some cases, lost wages. However, undocumented employees may not be eligible for some job retraining benefits. In addition, if you have been fired because you have a workers’ compensation claim, it’s less clear whether you can recover the income you lost due to being fired.

Filing a Workers' Compensation Claim: If you choose to file a workers' compensation claim, you should contact the employer to get and file a claim form. If your employer refuses to give you a claim form, then you should contact the state Workers' Compensation Appeals Board (WCAB). If your claim is approved, you may be entitled to reasonable medical expenses, disability benefits, and rehabilitation benefits.

For more information, see the Workers' Compensation Fact Sheets published by the Legal Aid Society – Employment Law Center.

4. As an undocumented worker, what are my rights under health and safety laws?

Health and safety laws protect all employees regardless of their immigration status. Therefore, undocumented workers have rights to information regarding their health and safety rights. They have the right to refuse unsafe work if they reasonably believe it would create a real and apparent hazard to them or their co-workers. They also can file health and safety complaints with the California Occupational Safety and Health Administration (Cal/OSHA).

Filing a Health and Safety Claim: If you choose to file a health and safety claim, you should contact Cal/OSHA. The agency will then investigate for health and safety violations and your employer may be forced to stop his illegal practices. Cal/OSHA should not question you about your immigration status or report your lack of status if it is somehow revealed.

5. As an undocumented worker, can I organize or participate in a union?

Yes. If you are an undocumented worker who doesn't work for the government, the National Labor Relations Act (NLRA) protects your right to organize a union, elect a union, and collectively bargain with employers. It also allows you to engage in a “*concerted effort*” to improve working conditions for all employees even if there is no union yet. A concerted effort occurs when two or more employees act, with their employer's knowledge, to improve working conditions on behalf of all employees.

If your employer violates the NLRA by retaliating against you for your union activity or by committing another unlawful labor practice, however, your remedies will be limited because of your immigration status. For example, if you were unlawfully fired, you will not be entitled to “backpay” (your wages for the time you were unemployed because of the firing). Also, in general, if you are unlawfully fired you will not be able to get your job back because, as an undocumented worker, you do not have legal work authorization.

Filing a Union Activity Claim: If you choose to file a union activity claim, you should contact the National Labor Relations Board (NLRB). The NLRB should not question you about your immigration status or report your immigration status if it is somehow revealed.

For more information on your right to organize a union see, *Union Activity: The Right to Organize*, published by the Legal Aid Society - Employment Law Center.

6. As an undocumented worker, can I collect unemployment insurance?

No. To collect unemployment insurance, workers must be both “able to work” and “available for work”. The California Employment Development Department (EDD), the agency that decides who has the right to unemployment insurance, has determined that undocumented workers are not, “available for work,” because they are not legally eligible for work. Therefore, undocumented workers normally cannot collect unemployment insurance.

7. As an undocumented worker, can I collect State Disability Insurance?

Yes. The California State Disability Insurance (SDI) system is funded by employee contributions and is designed to protect unemployed and disabled persons against loss of wages when they are unable to perform their normal work because of illness or injury. Employees, including undocumented employees, have the right to benefit from the money they have contributed. Undocumented workers who have suffered from a non-work related disability, and who have paid into the state disability system, may be entitled to receive at least as much as they put into the system.

To determine if you have paid into the system, you should look to see if SDI insurance was deducted from your pay stub. If you were paid in cash and not given a pay stub, then you probably are not eligible for SDI because it is unlikely that any deductions were made from your wages. Unlike unemployment insurance, a worker does not have to be available for work to receive SDI.

Filing a State Disability Insurance claim: If you choose to file a state disability claim, you should contact the California Employment Development Department (EDD). The EDD should not question you about your immigration status or report your lack of status if it is somehow revealed.

8. Do anti-discrimination laws protect undocumented workers?

Under Federal and California anti-discrimination laws, employers cannot illegally discriminate against any worker, *including undocumented workers*. Therefore, if you are an undocumented worker, your employer cannot fire you, refuse to hire you, harass you, or take other action against you because of your national origin (including your English language capabilities), race, color, sex, pregnancy, religion, age, or disability, or (under California law) for other reasons such as your sexual orientation, gender identity (e.g. transgender status) marital status, and political beliefs. However, if you were fired by your employer as part of the discrimination, it’s less clear whether you can recover the income you lost because you were fired.

Filing a Claim: If you choose to file a discrimination claim, you should contact the federal Equal Employment Opportunity Commission (EEOC), or the California Department of Fair Employment and Housing (DFEH), depending on the nature of your claim. If your claim is successful, your employer may have to stop its illegal practices and you may be eligible for remedies, possibly including certain monetary damages.

For more information about your rights to be free from discrimination in the workplace, see *Employment Discrimination: Protections Against Discrimination and Harassment* published by the Legal Aid Society – Employment Law Center.

9. Can my employer discriminate against me *because I am undocumented?*

The Immigration Reform and Control Act of 1986 (IRCA) makes it illegal for employers to knowingly hire or continue to employ undocumented workers. Therefore, when an employee is hired, her employer is required to ask for documents that show her identity as well as her authorization to work in the U.S., and those documents must “reasonably appear to be genuine.” Employers must refuse to hire, or terminate, an undocumented worker once they learn of her lack of work authorization.

Sometimes, however, employers will fire workers using the excuse that they were undocumented, when their real reason for doing so was actually something else. For instance, an employer may say that it fired someone due to her lack of documentation because it does not want to admit it fired her because she became pregnant, is a Latina, or because she complained about being sexually harassed. In those cases, because undocumented workers are still covered by the general laws against employment discrimination, the employer is still breaking the law.

Likewise, your employer cannot use your lack of status as an excuse to fire you because you complained about nonpayment of wages, a workplace injury, or tried to help organize a union in your workplace. In those cases, because undocumented workers are still covered by laws that prohibit employers from retaliating against workers who assert their legal rights, the employer is still breaking the law.

10. As an undocumented worker, do I run any risks if I choose to file a claim against my employer?

Yes. The greatest risk in filing an employment claim as an undocumented worker is that your employer may *retaliate* against you. Retaliation means that your employer takes or threatens to take some employment action against you, or reports or threatens to report you to the INS (now “the Department of Homeland Security”), because you filed a claim against the employer. Retaliation is illegal, however. In fact, employers who retaliate against you because you complained about their unlawful working conditions are breaking the law a second time.

The risk of retaliation is one faced by all employees, documented and undocumented, who raise a legal complaint against their employer. Depending on the law your complaint falls under, you can file a retaliation claim with the Federal or California agency that administers the law, or bring a lawsuit against that retaliation in court.

However, undocumented workers face an even greater risk when their employers retaliate against them by reporting them to the INS. Even if you file a retaliation claim against your employer for reporting you to the INS, you are not protected from the INS, since in general the INS is allowed to follow up on the employer's report. If the INS does follow up, it can try to deport you. Worse, if you used false information or papers when you applied for your job, you may be charged criminally, fined, deported, and/or prevented from ever returning to live and work in the U.S. These serious penalties may apply even if you are married to a U.S. citizen, have U.S. citizen children, or have lived in the U.S. for many years.

The choice of whether to go ahead with a complaint against your employer is, in the case of undocumented workers, one that you must make only after very careful thought, and after obtaining competent legal advice from attorneys knowledgeable about both employment law and immigration law. Many undocumented workers, given the serious possible consequences of being reported to the immigration authorities, or of having to disclose their lack of status in the litigation process, quite understandably choose not to complain about their working conditions.

11. If I am thinking about filing a discrimination, state disability, workers' compensation, labor, health and safety, or wage claim, what should I do to protect myself?

Before you file a claim, you should call the Workers' Rights Clinic or a community legal based organization that works with undocumented immigrants. These organizations will have, or know of, advocates who can properly assist you in your decision to file a claim, and in making a claim should you choose to do so. As noted above, you should receive competent legal advice from attorneys who are expert in both employment law and immigration law before you make a decision to go ahead with a claim.

Because you are at risk of employer retaliation, you should consider certain factors in making a decision to file a claim. These include: whether you have ever received threats from your employer; whether your employer knows that you are undocumented; whether your employer has ever reported or threatened to report any of your co-workers who enforced their rights or disagreed with the employer; and whether you believe that your employer may be vindictive enough to report you.

In any case, you should never discuss your immigration status at work or carry any false documents with you. Also, you should seek legal advice before disclosing to anyone whether your documents are false.

12. What rights do I have if my employer tells me that the Social Security Administration found a problem with my Social Security Number?

In recent years, employers have increasingly suspended or terminated workers because of information received from the Social Security Administration (SSA) that there is a problem, or “discrepancy,” with their Social Security Number. The most common way this problem has come up is by employers receiving “no match” letters from SSA. You may have certain rights if your employer takes action against you based on an SSA no match letter.

Technically, an SSA no match letter is a private matter between the SSA and each individual employee, because the letter is sent by SSA to make sure that workers receive proper credit for their earnings, which can affect future retirement or disability benefits administered by SSA. Employers, however, confuse SSA no match letters for information concerning workers’ immigration status. Some employers even use the letters to intimidate vulnerable workers, including immigrant workers, who are involved in labor organizing campaigns.

If the employer has received information from SSA, the employer must treat all workers the same. That means that if the employer only fired *some* (but not all) workers for whom they received SSA no match letters, the employer may be discriminating against those workers it suspended or terminated. An employer may also be breaking the law if it uses the letter to retaliate against a group of workers. If your employer tells you that SSA sent notification about a problem with your Social Security Number, you should talk to an employment or immigration attorney to help understand your rights before speaking with your employer regarding your Social Security Number, your work authorization, or your documented/undocumented status.

Because wrongful conduct by employers in relation to SSA no match letters is a complicated issue, you can contact the National Immigration Law Center 510-663-8282. You can also read more about your rights at http://www.nilc.org/immsemploymnt/SSA-NM_Toolkit/index.htm.

13. How do I pay my income taxes if I do not have a Social Security Number?

All workers, including undocumented workers, are required to report their income to the federal Internal Revenue Service (IRS) and to the state. Even if you are paid in cash, you are required to report your income. Also, if you fail to pay your income taxes, you may be turned down for certain benefits that are paid for by your tax dollars (e.g., State Disability Insurance). In addition, immigrants need to show that they have paid taxes in order to be eligible for most immigration relief and benefits for obtaining lawful immigration status.

If you do not have a Social Security Number to report your taxes, and if you cannot get one because you are undocumented, you can use an Individual Taxpayer Identification Number (ITIN) to properly report your income. The Internal Revenue Service can issue an ITIN to any individual who earns income in the United States but is not eligible to receive a Social Security Number. As a side benefit, an ITIN usually can be used to open a bank account with certain financial institutions.

Workers should never give their ITINs to their employers. Instead, workers should use ITINs to file their own tax returns directly with the IRS.

Applying for an ITIN: If you want to apply for an ITIN, contact the Internal Revenue Service and request Form W-7. You can also ask the IRS for information about “Acceptance Agents,” who are authorized by IRS to help people apply for an ITIN. The IRS can normally process your application within 6-8 weeks, but it may take as long as 12 weeks or longer. The IRS should keep confidential tax returns that are filed with ITINs, which means that they should not use them to turn people over to immigration authorities. However, there have been some incidents, although limited, where immigrants who filed their tax returns using ITINs were brought to the attention of immigration authorities.

This fact sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society - Employment Law Center cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.

Thanks to the National Immigration Law Center for its assistance in the drafting and publication of this fact sheet.

For further information about your employment rights, please call:

The Workers’ Rights Clinic

415-864-8208 (SF Bay Area) or **866-864-8208** (Toll Free in CA)

The Workers’ Rights Clinic is a project of The Legal Aid Society - Employment Law Center, a non-profit organization focusing on the employment-related legal rights of low-income workers and providing free legal information on a wide range of employment-related problems.

