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OPINIONS AND ORDERS

STATUTORY PROVISIONS

OPINION, SUPREME COURT OF NEW JERSEY (MARCH 19, 2026)

SUPREME COURT OF NEW JERSEY

SERGIO LOPEZ,

Plaintiff-Appellant,

v.

MARMIC LLC, and MIKE RUANE, individually,

Defendants-Respondents.

No. 089632
A-27 September Term 2024

On certification to the Superior Court,
Appellate Division

Before: RABNER, Chief Justice, PATTERSON, PIERRE-LOUIS, WAINER APTER, FASCIALE, NORIEGA, and HOFFMAN, Justices.

CHIEF JUSTICE RABNER delivered the opinion of the Court.

This appeal involves the interplay between two sets of legal requirements. Federal law bars employers from hiring and continuing to employ undocumented individuals who are not lawfully admitted or authorized to work in the United States. 8 U.S.C. § 1324a(a)(1)(A), (a)(2). And State wage and hour laws require employers to pay minimum wages and overtime to employees. N.J.S.A. 34:11-56a4(a), (b)(1).

Like the many other courts that have considered the question, we find the different sets of laws do not conflict in this regard: if an employer hires an undocumented worker in violation of federal law, the employer is required to compensate the person in a manner consistent with state law for work they actually perform. Otherwise, certain employers would be incentivized to hire undocumented workers—which is precisely the opposite of what federal law seeks to accomplish—and pay them less than the law requires.

In this case, it is undisputed that an undocumented individual worked for a realty management company as a superintendent. The company paid him by way of a barter arrangement—a rent-free apartment in exchange for his labor—instead of paying hourly wages and overtime. As a general rule, that type of barter arrangement does not satisfy New Jersey's wage and hour laws, aside from limited exceptions.

After several years, the employee brought a claim for wages and overtime against his employer for hours he had already worked. The trial court dismissed the claim. Among other things, the court found the employee was not credible because of his use of an invalid Social Security number (SSN) when he first applied for the job. The court also faulted the employee for failing to produce sufficient evidence of the number of hours he had worked.

The Appellate Division affirmed the judgment of the trial court. We reverse. For his services as a superintendent, the undocumented worker was considered an employee under the broad scope of state law.

N.J.S.A. 34:11-4.1(b), -56a1(f), (h). He was therefore entitled to appropriate wages for work he had already performed. Neither his immigration status nor the barter arrangement with his employer provided grounds to deny his wage claim for work already performed.

In addition, employers, not employees, have an obligation under state law to keep records of hours worked and wages paid to their employees. N.J.S.A. 34:11-4.6(e), -56a20. When employers fail to do so, a rebuttable presumption applies against them in wage claim cases. N.J.S.A. 34:11-58(d).

We also conclude it was error to consider evidence of the employee's use of an invalid SSN in the manner the trial court did. Because the use of an invalid SSN can serve as a proxy for a person's immigration status, we offer guidance about how to assess the admissibility of such evidence in wage and hour cases going forward.

We remand the matter to the Law Division to determine the appropriate amount of damages due.

I.

A.

We draw the following facts from the parties' testimony at a bench trial.

Defendant Mike Ruane owned defendant Marmic LLC, a residential and commercial realty management company. In June 2015, Ruane hired plaintiff Sergio Lopez to work as the superintendent of two buildings Marmic owned in Newark. The buildings had commercial and residential units.

When Lopez applied for the job, he provided an invalid SSN on a W-4 form. Employees are required to "furnish [their] employer with a signed" W-4 form on or before the date they begin employment. 26 C.F.R. § 31.3402(f)(2)-1(a)(1). "Every individual to whom a social security number has been assigned must include [the] number on" the W-4 form. *Id.* at-1(f)(2). A person's SSN establishes their legal authorization to work in the United States. *See* 8 C.F.R. § 274a.2(b)(1)(v)(C)(1).

Ruane testified that he initially offered Lopez $1,600 per month in salary—or $400 per week—as well as an apartment. Lopez was to "reimburse" Ruane $800 per month for the value of the basement apartment.

Lopez was paid $400 per week for the first two weeks. Ruane testified that after he discovered the SSN was invalid, he told Lopez he could not pay him because that would be "against the law." Instead, Ruane offered to let Lopez live in the apartment rent-free, without having to pay the cost of utilities, for "perform[ing] the duties . . . we asked him to do, in return."

Lopez continued to work and live in the apartment. He testified that when he complained about not being paid wages, Ruane responded that Lopez "needed to fix [his] documents so that" he could be paid. The parties did not enter into a written employment or lease agreement.

Lopez testified he worked as a superintendent from June 15, 2015 until December 2018 and performed various maintenance tasks. He testified that he cleaned common areas, picked up garbage, removed snow and leaves, swept and mopped floors inside the building, painted apartments when tenants moved out, fixed leaks and broken pipes, helped tenants when repairs were needed, and cleaned dryers and unclogged washing machines for commercial tenants, among other things. Lopez testified that he performed those tasks alone.

Ruane heard Lopez testify. When questioned afterward, Ruane agreed that Lopez performed the tasks he had testified about.

Lopez also testified that the hours he worked alternated between "long" and "short" weeks. For long weeks, he worked about 60 hours; for short weeks, he averaged 37 hours. Ruane testified he did not require Lopez to work a specific number of hours per week and never directed him to work more than 60 hours in a week. Ruane did not keep track of the number of hours Lopez worked, and neither party presented any written records at trial about his hours. Marmic maintained no records relating to Lopez's employment.

B.

Lopez filed a claim for unpaid wages with the Department of Labor in 2018. The Department reviewed the claim and leveled a $750 penalty for the following violations: "Records-No Records Provided" and "Unpaid Wages/Late Payment." Ruane contested the penalty, and the matter was settled in November 2018 for $250. The Department noted that Lopez could request a wage hearing for the balance of his claim. Marmic fired Lopez in December 2018.

Lopez filed a three-count complaint against Marmic and Ruane in September 2019. The complaint alleged (1) violations of the overtime and minimum wage provisions, contrary to N.J.S.A. 34:11-56a4, and

(2) failure to pay full wages on a timely basis, contrary to N.J.S.A. 34:11-4.2.

The trial court conducted a bench trial on August 18, 2022. Lopez and Ruane both testified, and part of their testimony is summarized above. During the hearing, the court allowed testimony about Lopez's use of an invalid SSN but did not permit cross-examination about his immigration status.

The trial court dismissed Lopez's claims with prejudice in an oral ruling in March 2023. In recounting the facts, the court acknowledged the nature of the parties' barter agreement. It went on to identify several bases for concluding that Lopez had not "met [his] burden of proof." First, the court did not find Lopez "credible or believable." The court explained that he "admitted . . . he lied" when he listed an SSN on the W-4 form that "[h]e knew at the time . . . wasn't valid." The court also found that Lopez "waffled" when he was asked questions about the form on cross-examination.

Second, the court determined that, although Lopez "ultimately [had] the burden of proof" to show he was entitled to recovery, he did not "articulate[]" with "any specificity" the "total number of hours worked." Nor did he attempt to "reconstruct[]" the hours he worked from messages from tenants "he might have had in his phone." The number of hours worked, the court stated, was "a matter of complete speculation."

The court also observed that Lopez "knew full well he wasn't qualified to earn those—be paid those wages legally because he . . . was an undocumented alien."

The Appellate Division affirmed the trial court's judgment. The appellate court agreed that because Lopez "is an undocumented alien" and "was not eligible to work" under federal law, "there could be no employee-employer relationship between the parties." As a result, the court found that Lopez "was barred from relief and was precluded from recovering damages." In that context, the court referenced "the trial judge's determination that [Lopez] 'lied' when he completed and signed the W-4 form."

The Appellate Division noted that, under *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253, 269-70 (App. Div. 2009), an undocumented worker is permitted to recover damages for work already performed. The appellate court nonetheless concluded that Lopez failed to satisfy his burden of proof to recover damages because he "failed to proffer any time sheets or other documents supporting the hours he worked." The court declined to apply the burden-shifting approach set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which it explained "only applies where damages are certain."

The Appellate Division also found that testimony about Lopez's use of an invalid SSN was relevant under N.J.R.E. 401, and that the trial court did not abuse its discretion under N.J.R.E. 607 in admitting the evidence for impeachment purposes.

Finally, the Appellate Division agreed with the trial court that "a barter arrangement was created after defendants discovered" that Lopez had provided an invalid SSN. The appellate court did not accept Lopez's "attempt[] to argue that an employer-employee relationship continued to exist" afterward.

C.

We granted Lopez's petition for certification. 260 N.J. 4 (2025). We also granted the following entities leave to appear as friends of the court: the New Jersey Department of Labor and Workforce Development; Make the Road New Jersey, Legal Aid at Work, National Employment Law Project, American Civil Liberties Union of New Jersey, Comité de Apoyo a los Trabajadores Agrícolas, Laborers Eastern Region Organizing Fund, Laundry Workers Center, Legal Services of New Jersey, New Jersey Alliance for Immigrant Justice, New Labor, Service Employees International Union Local 32BJ, and Volunteer Lawyers for Justice (collectively, Make the Road); the New Jersey Association for Justice; Seton Hall University School of Law Center for Social Justice (Seton Hall); and Law and Labor Professors (Professors).

II.

A.

Several statutes lie at the heart of this appeal. We summarize certain parts of the laws here to provide a backdrop for what follows. We review questions of statutory interpretation de novo. *Krug v. State Parole Bd.*, 261 N.J. 477, 485-86 (2025).

New Jersey's Wage and Hour Law (WHL), N.J.S.A. 34:11-56a to-56a43, "protect[s] employees from unfair wages and excessive hours." *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 304 (2015) (quotation omitted). The law also protects employees and employers alike from "unfair competition resulting from wage levels detrimental to [one's] . . . well-being."

N.J.S.A. 34:11-56a. The statute requires employers to pay the minimum wage established by law. N.J.S.A. 34:11-56a4(a). It also directs employers to pay overtime "for each hour of working time in excess of 40 hours in any week." *Id.* at (b)(1).

New Jersey's Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 to-4.15, "governs the time and mode of payment of wages due to employees." *Musker v. Suuchi, Inc.*, 260 N.J. 178, 186 (2025) (quoting *Maia v. IEW Constr. Grp.*, 257 N.J. 330, 344 (2024)). Under the statute, employers must "pay the full amount of wages due" an employee "at least twice" each "month, on regular paydays" fixed in advance. N.J.S.A. 34:11-4.2.

Both statutes are remedial and should be liberally construed. *See Hargrove*, 220 N.J. at 303-04. Both also extend broadly to anyone "suffered or permitted to work by an employer." N.J.S.A. 34:11-4.1(b) (WPL),-56a1(f) (WHL) (using parallel language). Neither law excludes undocumented workers from its reach. The Department of Labor represents that it "consistently enforces the WHL and WPL without regard to immigration status."

We also draw on case law that interprets the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 to 219. All three statutes-the FLSA, WHL, and WPL—"address . . . fundamental terms of the employment relationship." *Hargrove*, 220 N.J. at 313; *see also Garcia v. Freedom Mortg. 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))).

B.

The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1101 et seq., is designed, in part, to "prohibit[] the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002). To that end, IRCA states that "[i]t is unlawful . . . to hire . . . for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment." 8 U.S.C. § 1324a(a)(1)(A). The phrase "unauthorized alien" refers to individuals not "lawfully admitted for permanent residence" or "authorized to be . . . employed by this chapter or by the Attorney General." *Id.* at (h)(3).

Among other provisions, IRCA also makes it unlawful "to continue to employ [an] alien" knowing the person "is (or has become) an unauthorized alien." *Id.* at (a)(2). The statute, however, does not expressly bar paying wages to undocumented workers for work they have already performed.

III.

Lopez maintains that he and Marmic had an employee-employer relationship under the WHL and WPL. He contends that his undocumented status did not nullify that relationship, and that IRCA does not bar "wage claims by undocumented workers for labor [they] already provided." Lopez also argues that his barter arrangement with Marmic did not change the nature of their relationship. Finally, Lopez contends it was error for the trial court to permit testimony about his knowing use of an invalid SSN, which served as a proxy for his immigration status.

Marmic disputes that it had any employment relationship with Lopez. Marmic cites to the Appellate Division's ruling and maintains that, because Lopez was "an undocumented alien" under IRCA, there could not be an "employee-employer relationship between the parties." Marmic contends that its barter arrangement with Lopez was a "legally distinct . . . relationship." In any event, Marmic submits that Lopez's wage claim cannot prevail in light of *Hoffman Plastic*.

Marmic also maintains that the trial court did not err in allowing testimony about Lopez's "knowingly lying in completing the W-4 form," which Marmic claims had "nothing to do with his immigration status."

All of the amici argue in support of Lopez. The Department of Labor, Make the Road, Seton Hall, and the Professors contend that IRCA does not foreclose Lopez's ability to recover unpaid wages for work he already performed. All amici also note that the WPL and WHL broadly define "employee" without regard to whether an employee and employer have entered into a barter agreement.

Several amici maintain it was error to consider evidence of Lopez's use of an invalid SSN, which they contend served as a proxy for his undocumented status. They submit that a rule allowing such evidence would dissuade others from filing legitimate wage and hour claims.

IV.

Marmic argues that federal law precludes recovery here. At the same time, Marmic states it is not relying on the doctrine of federal preemption. We briefly address federal preemption for the sake of clarity and completeness.

A.

Under the United States Constitution, federal law "shall be the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and shall prevail "if there is any conflict [with] state law," *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). But "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." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (first alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The latter principle "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Ibid.* And a state's authority to enact wage laws that regulate and protect workers falls within its historic police powers. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987); *Bedoya v. Am. Eagle Express Inc.*, 914 F.3d 812, 818 (3d Cir. 2019).

Acts of Congress preempt state law under the Supremacy Clause in three situations, *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990), none of which apply here. Federal law does not expressly preempt the WHL and WPL. *See ibid.* Federal law is not meant to occupy the field of state employment laws like the WHL and WPL. *See id.* at 79; *Fort Halifax*, 482 U.S. at 21. And federal law does not actually conflict with New Jersey's wage and hour laws. *See English*, 496 U.S. at 79. As we discuss further below, it is not "impossible . . . to comply with" the WHL and WPL and also with IRCA. *See ibid.* The New Jersey statutes do not "stand[] as an obstacle" to Congress' objectives. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963) (quotation omitted) (upholding a state agricultural regulation against Supremacy Clause challenge).

Other jurisdictions have similarly found that IRCA does not preempt state workers' compensation and labor laws. *See*, *e.g.*, *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 249 (2d Cir. 2006) (finding that IRCA does not preempt claims by undocumented workers under New York's workers' compensation law); *Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 276 (Minn. 2017) (Minnesota statute); *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 830 (Md. 2005) (Maryland statute); *Dowling v. Slotnik*, 712 A.2d 396, 405 (Conn. 1998) (Connecticut statute); *Cont'l PET Techs., Inc. v. Palacias*, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004) (Georgia statute); *Coma Corp. v. Kan. Dep't of Labor*, 154 P.3d 1080, 1087 (Kan. 2007) (Kansas statute).

The opposite conclusion—that IRCA preempts state wage and hour protections—would incentivize employers to hire undocumented immigrants and pay reduced wages despite laws to the contrary. As other courts have observed, such an outcome would undermine IRCA's primary goal to prevent the hiring of undocumented immigrants. *See*, *e.g.*, *Lucas v. Jerusalem, LLC*, 721 F.3d 927, 936 (8th Cir. 2013) (explaining that "the purpose of federal immigration policy" is "advance[d]" by eliminating the payment of wages below minimum wage); *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) ("[T]he FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it. . . . If the

FLSA did not cover undocumented aliens, employers would have an incentive to hire them."); *Salas v. Sierra Chem. Co.*, 327 P.3d 797, 808 (Cal. 2014) ("It would frustrate rather than advance the policies underlying federal immigration law to leave unauthorized alien workers so bereft of state labor law protections that employers have a strong incentive to 'look the other way' and exploit a black market for illegal labor."); *Serrano*, 407 N.J. Super. at 271 ("[R]equiring employers to pay proper wages to undocumented aliens when the work had been performed actually furthers the goal of the IRCA" by leaving "virtually no incentives . . . for an employer to hire an undocumented alien in the first instance." (quoting *Flores v. Amigon*, 233 F. Supp. 2d 462, 464 (E.D.N.Y. 2002))).

B.

Marmic relies on *Hoffman Plastic* in support of its position that IRCA bars Lopez's wage claim. *Hoffman Plastic* involved an undocumented immigrant, Jose Castro, who was laid off after he engaged in union organizing activities. 535 U.S. at 140. The National Labor Relations Board later found that his employer, Hoffman Plastic Compounds, had violated the National Labor Relations Act (NLRA) by "rid[ding] itself of known union supporters." *Ibid.* As part of its award, the Board ordered Hoffman to reinstate Castro and pay him backpay. *Id.* at 140-41.

At a compliance hearing before an Administrative Law Judge (ALJ), Castro admitted he was not born, or authorized to work, in the United States. *Id.* at 141. As a result, the ALJ concluded the relief awarded conflicted with IRCA. *Ibid.* Four years later, the Board reversed and found that Castro was entitled to backpay plus interest. *Id.* at 141-42. The Board calculated the "backpay award from the date of Castro's termination to the date Hoffman first learned of Castro's undocumented status." *Id.* at 142.

The United States Supreme Court reversed. It noted "[t]he Board asks that we . . . award backpay to an illegal alien for years of work not performed [and] for wages that could not lawfully have been earned." *Id.* at 148-49 (emphases added). In response, the Court found "that awarding backpay to illegal aliens runs counter to policies underlying IRCA." *Id.* at 149. The Court added that "awarding backpay in a case like this not only trivializes the immigration laws, it also condones and encourages future violations." *Id.* at 150.

Notably, *Hoffman Plastic* did not focus on an award of wages for work that had already been performed. The opinion instead reversed an award for wages an employee would have earned had he not been terminated unlawfully. But Castro, the Supreme Court noted, could not continue to work "without triggering new IRCA violations." *Id.* at 151.

We read *Hoffman Plastic* in the same way many other courts have read the decision. Its rationale applies to backpay—payment for work that has not actually been performed[1]—not to the payment of

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[1] "Back pay seeks to make an employee whole by awarding wages that would have been earned but for an unlawful firing." *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604 (S.D. Fla. 2002) (emphasis added); *see also* 11 Employment Coordinator Labor Relations § 43:59 (Dec. 2025 update) ("Backpay is most often awarded when an employer unlawfully discharges an employee," with the goal of "reimbursing the employee for earnings lost by reason of the wrongful termination."); 5 Larson on Employment Discrimination § 92.06 (2025) (noting that an award of backpay

minimum wages or overtime for work that employees have already performed. *See*, *e.g.*, *Lucas*, 721 F.3d at 933 ("[A]liens, authorized to work or not, may recover unpaid and underpaid wages under the FLSA."); *Patel*, 846 F.2d at 705-06 (distinguishing an "attempt[] to recover back pay for being unlawfully deprived of a job" from "seek[ing] to recover unpaid minimum wages and overtime for work <u>already</u> performed" and noting that "[n]othing in the FLSA suggests that undocumented aliens cannot recover unpaid minimum wages and overtime under the act"); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1307-08 (11th Cir. 2013) (reaffirming the holding in Patel after *Hoffman Plastic*); *Madeira*, 469 F.3d at 243 & n.23 (citing rulings from United States District Courts in six districts that "concluded, even after *Hoffman Plastic*, that IRCA does not preclude . . . FLSA awards" "for labor actually and already performed" by undocumented workers).

Unlike an award of backpay for work not yet performed, payment for work already completed "does not itself condone . . . or continue" an IRCA violation; it instead "ensures that the employer does not take advantage of the violation." *Madeira*, 469 F.3d at 243.

The Appellate Division has applied the same principle. In *Serrano*, the appellate court recognized that "undocumented workers can recover damages arising out of statutory violations for 'work already

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is ordinarily "based on the amount which, but for the discrimination, <u>would have been earned</u>" (emphasis added)); *Zanetich v. Wal-Mart Stores E., Inc.*, 123 F.4th 128, 152 (3d Cir. 2024) (Freeman, J., concurring in part and dissenting in part) ("Back pay is measured from the date of [an employee's] discharge to the date of the verdict." (quotation omitted)).

performed,' such as wage claims under the FLSA." 407 N.J. Super. at 269-70 (quoting *Crespo v. Evergo Corp.*, 366 N.J. Super. 391, 398 (App. Div. 2004)). *Crespo* involved a claim under the state's Law Against Discrimination. In that case, the Appellate Division held that undocumented workers could not recover backpay or prospective damages that stemmed from their termination, pursuant to *Hoffman Plastic*. 366 N.J. Super. at 401-02. *Crespo* distinguished its holding from claims relating to work already performed, including FLSA claims for wages. *Id.* at 398 (citing cases).

For all those reasons, we conclude that *Hoffman Plastic* does not preclude Lopez's claim for unpaid wages. We therefore turn to his claim.

V.

A.

Marmic raises a threshold question here as well. It contends that the parties' barter agreement—a rent-free apartment in exchange for labor—established a "legally distinct . . . relationship" outside of the employee-employer relationship contemplated by the WPL and WHL. As a result, Marmic maintains that the Appellate Division correctly found "there could be no employee-employer relationship between the parties."

Marmic's argument finds no support in the law. The type of arrangement Marmic and Lopez had neither satisfied nor voided the State's wage and hour laws.

The WPL and WHL apply broadly to anyone "suffered or permitted to work by an employer." N.J.S.A. 34:11-4.1(b) (WPL),-56a1(f) (WHL) (using parallel language). That standard provides "the broadest definition of 'employee' among the various pieces of social legislation." *Hargrove*, 220 N.J. at 313; *see also Sec'y of Labor v. Lauritzen*, 835 F.2d 1529, 1543 (7th Cir. 1987) (Easterbrook, J., concurring) ("'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"). Under the facts of this case, Marmic plainly "suffered or permitted" Lopez to work as a superintendent at its buildings.

New Jersey statutes also restrict the use of alternative arrangements. The WPL, for example, makes clear that barter arrangements cannot substitute for the statute's requirements:

> It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such employee otherwise than as provided in this act . . . . Every agreement made in violation of this section shall be deemed to be null and void . . . .
>
> [N.J.S.A. 34:11-4.7.]

The WHL similarly notes that "any contract, agreement or understanding for" employment "at an oppressive and unreasonable wage . . . shall be void." N.J.S.A. 34:11-56a3.

The law does permit other forms of payment. The WHL, for example, allows "the fair value of any food or lodging supplied by an employer" to be counted toward wages. N.J.S.A. 34:11-56a1(d); *see also* N.J.A.C. 12:56-8.6 (regarding the computation of fair market value), -8.8 (providing examples). But those in-kind payments are a way to satisfy an employer's obligation to pay appropriate wages based on an hourly rate—not a way around the law's requirements. In other words, the WHL does not sanction the use of barter arrangements as a general tool to avoid wage and hour requirements.

Limited exceptions to the WHL for summer camps, conferences, and retreats operated by nonprofit or religious groups do not apply here. *See* N.J.S.A. 34:11-56a4.1. Nor do exceptions for independent contractors and subcontractors, among others.[2] *See* N.J.S.A. 34:11-4.1(b) (WPL); N.J.A.C. 12:56-16.1 (WHL). In short, there is no broad-based exception to New Jersey's wage and hour laws for "barter arrangements." As a result, Marmic's provision of a rent-free apartment in this case is not proof that it properly compensated Lopez for his labor.

B.

In rejecting Lopez's claim for unpaid wages, the trial court and the Appellate Division faulted Lopez for not presenting adequate proof of when he worked. In doing so, the courts overlooked the legal obligation employers have to keep appropriate records.

Although the parties do not agree on how many hours Lopez worked, it is not disputed that he did, in fact, perform work for Marmic. The WPL and WHL therefore required that Marmic make and preserve

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[2] The "ABC" test, N.J.S.A. 43:21-19(i)(6)(A) to (C), "governs whether a plaintiff is an employee or independent contractor for purposes of resolving a wage-payment or wage-and-hour claim" under the WPL and WHL. *Hargrove*, 220 N.J. at 295. The test does not apply here because Marmic does not assert that Lopez was an independent contractor.

records of Lopez's hours and the wages paid to him. N.J.S.A. 34:11-4.6(e) (WPL); -56a20 (WHL).

In administrative wage collection cases, a rebuttable presumption applies against employers who fail to abide by that requirement:

> Upon an investigation of a wage claim initiated pursuant to this section or any of the other State wage and hours laws, if an employer fails to provide sufficient employee records, as required to be kept under any State wage and hour laws, there shall be a rebuttable presumption that the employee worked for the employer for the period of time and for the amount of wages as alleged in the wage claim.
>
> [N.J.S.A. 34:11-58(d) (section 58(d)).]

Marmic conceded at trial that it neither made nor kept records of the hours Lopez worked.

Section 58(d) is consistent with the standard articulated by the United States Supreme Court in *Mt. Clemens*. As the Court explained in that case, employees who seek relief under the FLSA for unpaid minimum wages or overtime have the burden to prove that they "performed work for which [they were] not properly compensated." 328 U.S. at 686-87. But "it is the employer who has the duty under . . . the Act to keep proper records of wages [and] hours" worked. *Id.* at 687.

If an "employer's records are inaccurate or inadequate . . . , [t]he solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work.” *Ibid.* In such cases, the Court held,

> an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.
>
> [*Id.* at 687-88.]

The Court underscored that “employer[s] cannot be heard to complain that the damages lack the exactness and precision” that could have been measured had they, the employers, kept the records the FLSA required. *Id.* at 688. The Court also stressed that the result of its holding did not run afoul of “the rule that precludes the recovery of uncertain and speculative damages. <u>That rule applies only</u> to situations where the <u>fact of damage</u> is itself uncertain.” *Ibid.* (emphases added). As the Court further explained, “assuming that the employee has proved that he has performed work” for which he was not properly paid under the FLSA, the fact of damage is itself “certain”; “[t]he uncertainty lies only in the <u>amount of damages</u>” due. *Ibid.* (emphasis added).

Here, the trial court did not follow the approach outlined in section 58(d) or *Mt. Clemens*. Instead of applying a rebuttable presumption in Lopez's favor once it was clear that he had performed work for Marmic, the court faulted Lopez for "not articulat[ing] to any specificity" "[t]he total number of hours worked." In dismissing his claim, the court declined to "speculate" on "what the hourly wages were . . . or the total number of hours worked."

The Appellate Division likewise observed that Lopez "failed to proffer any time sheets or other documents supporting the hours he worked." The court did not hold Marmic responsible for not producing records. The court mistakenly noted that a "burden-shifting analysis only applies where damages"—meaning the amount owed—"are certain." Under *Mt. Clemens*, however, damages are "certain"—and the burden shifts to the employer—when it is clear that money is owed in some amount. *See* 328 U.S. at 688.

Once again, the evidence in this case reveals that Lopez performed work for Marmic. He testified about his duties, and Ruane agreed he performed those tasks. Ruane disputed the hours Lopez claimed but testified he could not "be sure" how many hours Lopez worked. And the company had no records to support its position. As the Court observed in *Mt. Clemens*, "[i]n such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person.'" *Ibid.* (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

Under the circumstances, we remand to the trial court to determine the appropriate amount of damages. On remand, because Marmic "fail[ed] to provide sufficient employee records, . . . there shall be a rebuttable presumption that the employee worked for the employer for the period of time and for the amount of wages as alleged in the wage claim." N.J.S.A. 34:11-58(d). We defer to the court's discretion whether to reopen the evidentiary hearing and allow additional evidence on the amount of damages. The trial court should also determine whether Marmic is entitled to a credit for the fair value of the lodging it provided.

VI.

A.

We turn next to the trial judge's determination that Lopez was not credible. The court grounded its finding on Lopez's use of an invalid SSN.[3] It was error to dismiss his wage claim on that basis.

The trial court plainly stated its reasons for finding Lopez not "credible or believable":

*"He admitted that . . . when he . . . signed the W-4, he—he lied. He basically knew that he was required to tell the truth and required to put down a valid Social Security number. He knew at the time he wrote the Social Security number that it wasn't valid."

*Lopez "waffled . . . and attempted to not exactly answer the questions" on cross-examination "regarding his signature on the [W-4] form just below the paragraph indicating that if [his response] was knowingly false, it was perjury." The court found that

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[3] As noted in the previous section, the trial court also criticized Lopez for not being specific about the number of hours he worked.

exchange "a basis of [Lopez's] lack of truth and veracity in his statements."

Ultimately, the trial court stated, "I don't find in any way, shape or form that the plaintiff's testimony in this case is credible." The Appellate Division found no error in the decision to allow and consider testimony on Lopez's use of an invalid SSN. The court found no abuse of discretion under N.J.R.E. 401 and 607.

B.

We consider various rules of evidence to assess whether cross-examination about Lopez's use of an invalid SSN was appropriate in this case. To begin, Rule 401 defines "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action."

To establish a claim for wages and overtime pay, claimants must demonstrate that they were employees who performed work for which they were improperly compensated. 2 Employment Litigation in New Jersey § 16.12 (2026); *see also Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) (interpreting the FLSA). A person's immigration status is not relevant to determine those issues. Lopez therefore contends that "evidence of his undocumented status" was not relevant to his wage claims under Rule 401.

Yet Lopez's use of an invalid SSN was embedded in the narrative of this case. He completed a W-4 form to obtain employment with Marmic and provided an invalid SSN on the form. And Marmic changed its payment arrangement with Lopez when it learned the SSN was invalid.

Those facts do not answer the overall question of admissibility. With regard to Rule 401, though, Lopez was not questioned about an entirely collateral matter when he was asked about the form at the hearing.

The Appellate Division went on to consider Rule 607 briefly. Rule 607(a) states that, "[f]or 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)." Subsection (a)(1) notes "[t]his provision is subject to Rules 405 and 608."

Rule 405 relates to methods of proving a person's character and is not relevant here. Rule 608(c) states, in part, 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." Under that rule, had Lopez used an invalid SSN in an unrelated matter years before, the evidence could not be used to impeach him in a later wage claim case. *Cf. State v. Parker*, 216 N.J. 408, 422 (2014) (holding that cross-examination about a defendant's prior use of false names in an unrelated matter was barred under Rule 608). In other words, that type of extrinsic evidence could not be used to challenge his character for truthfulness.[4]

In this case, the evidence in question was linked to Lopez's employment with Marmic. He presented an

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[4] Subsection (b) of Rule 608 has limited exceptions that allow for impeachment based on particular, prior false statements. The exceptions apply to criminal, not civil, matters. *See* Biunno, Weissbard & Zegas, *N.J. Rules of Evidence*, cmt. 4 on N.J.R.E. 608(b).

invalid SSN on a W-4 form to get a job as a superintendent. If evidence like that were generally admissible in wage and hour cases, a factfinder might conclude as the trial judge did here: that a claimant who lied about their SSN cannot be believed and is therefore not entitled to relief.

Such an outcome would, in effect, foreclose relief to Lopez and others—individuals an employer hired knowing they lacked documents that authorized them to be employed. But the law enables those individuals to be paid for work they already performed, as discussed above. To find they are entitled to payment if they lack an SSN, but <u>not</u> if they try to conceal that fact, would deny them protections they are entitled to under the WHL and WPL.

C.

Those concerns elevate the importance of Rule 403 in our analysis. The rule provides, in 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." N.J.R.E. 403(a).

As we noted in *State v. Sanchez-Medina*, "evidence of a [person's] undocumented immigration status could appeal to prejudice, inflame certain jurors, and distract them from their proper role in the justice system: to evaluate relevant evidence fairly and objectively." 231 N.J. 452, 462-63 (2018).

Years before *Sanchez-Medina*, Judge Carchman made a similar observation in the context of wage claims:

> Credibility is the baseline in any litigation involving disputed issues of fact. My concern is that beyond credibility and unless directly relevant to the issues in dispute, inquiries into matters of immigration status, including employment issues, are so fraught with the potential for undue prejudice that little more will be heard or considered after . . . inquiry into such status.
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> [*Serrano*, 407 N.J. Super. at 286 (Carchman, P.J.A.D., concurring).]

Like inquiries into a person's immigration status, testimony about the use of an invalid SSN to obtain employment may inject undue prejudice into a case about wage and hour claims for this reason: such evidence can serve as a proxy for a person's immigration status. It is widely known that undocumented workers who were not lawfully admitted to the United States or permitted to work here cannot obtain a Social Security number. *See* 20 C.F.R. § 422.104(a) (listing categories of individuals eligible for an SSN). A person's immigration status and lack of an SSN are thus commonly intertwined.

Some courts have barred requests for discovery of a plaintiff's SSN in FLSA cases because of the evidence's minimal probative value, potential for prejudice, and capacity to undermine the effectiveness of remedial wage and hour laws. *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 530 F. Supp. 2d 746, 750 (D. Md. 2008); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-02 (W.D. Mich. 2005) (noting "[t]here is no question that the disputed discovery requests," including an attempt to discover SSNs and cards, "are designed to uncover Plaintiffs' immigration status," which "is not relevant for purposes of . . . damages"); *Flores*, 233 F. Supp. 2d at 464-65.

The trial court here properly barred direct questioning about Lopez's immigration status. Yet the court went on to rely heavily on Lopez's use of an invalid SSN to dismiss his lawsuit on credibility grounds. The court also faulted Lopez by finding, in part, that he was an "undocumented alien" who was not entitled to "be paid . . . wages legally." Under the circumstances, admitting evidence of Lopez's use of an invalid SSN led directly to the dismissal of his case—even though his employer conceded he had performed work without being paid wages for several years.

We do not foreclose the admission of evidence of the use of an invalid SSN to obtain employment in all wage and hour cases. Going forward, courts must carefully assess such evidence under Rule 403 prior to trial. If there is no legitimate purpose other than to provide a link to a person's immigration status, the evidence should be excluded. Courts should evaluate other reasons proffered to determine whether the probative value of the sensitive evidence is substantially outweighed by the risk of undue prejudice. N.J.R.E. 403(a).

In essence, a person's immigration status cannot directly or indirectly—through testimony about the use of an invalid SSN—form the basis to deny relief in the ordinary course of a wage and hour trial in which a person requests compensation for work already performed.

In the rare case when such evidence is admitted at a jury trial, trial courts must provide appropriate cautionary instructions, consistent with the above principles, as to how evidence of an invalid SSN may be used. In doing so, courts may not comment on a claimant's immigration status. For bench trials, courts should state on the record the basis for admitting the evidence. *See* Biunno, Weissbard & Zegas, *N.J. Rules of Evidence*, cmt. 2 on N.J.R.E. 403 (2026) ("N.J.R.E. 403 is applicable in nonjury cases as well as jury trials.").

Our ruling is limited to wage and hour cases. We do not address the admissibility of evidence in other settings.

* * *

As noted above, we remand this matter to the trial court to determine the appropriate amount of damages. Because the trial judge relied heavily on Lopez's use of an invalid SSN to make credibility findings against him, we remand to a different judge for further proceedings.

VII.

For the reasons stated above, we reverse the judgment of the Appellate Division and remand to the trial court for further proceedings consistent with this opinion.

JUSTICES PATTERSON, PIERRE-LOUIS, WAINER APTER, FASCIALE, NORIEGA, and HOFFMAN join in CHIEF JUSTICE RABNER's opinion.

OPINION,
SUPERIOR COURT OF NEW JERSEY
(JUNE 20, 2024)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SERGIO LOPEZ,

Plaintiff-Appellant,

v.

MARMIC LLC, and MIKE RUANE, individually,

Defendants-Respondents.

Docket No. A-2391-22

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6594-19

Before: FIRKO and VANEK, Judges.

PER CURIAM

Plaintiff Sergio Lopez appeals from a March 7, 2023 order dismissing his complaint seeking unpaid wages under the New Jersey Wage and Hour Law (WHL), N.J.S.A. 34:11-56(a) to-56(a)41, and New Jersey Wage and Payment Law (WPL), N.J.S.A. 34:1-4.1 to 4.15, following a bench trial. The trial judge found plaintiff knowingly provided a false Social Security number on a W-4 form to obtain part-time employment with defendants Marmic LLC (Marmic) and Mike Ruane as a superintendent and was barred from recovering any economic damages for unpaid wages under the WHL and the federal Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. §§ 1101 to 1507, because he was an undocumented non-citizen who did not have a valid Social Security number and could not produce a valid W-4 form. The trial judge also found plaintiff did not sustain his burden of proof on the issue of back pay. We affirm.

I.

Factual Background

We derive the following facts from the record and bench trial. On September 9, 2019, plaintiff filed a three-count complaint in the Law Division alleging unpaid overtime in violation of the WHL (count one); unpaid minimum wages in violation of the WHL (count two); and failure to pay wages owed in violation of the WPL (count three). Plaintiff alleged he worked for Marmic—a residential and commercial realty management company—and one of its owners—Ruane[1]—as a superintendent from June 15, 2015, to December 3, 2018, at two buildings located in Newark. Plaintiff alleged Ruane was his direct supervisor and was responsible for overseeing the day-to-day operations of the buildings and Marmic's employees. Ruane

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[1] The record refers to Michael Ruane and Michael Ruane, Jr. as members of Marmic. However, it appears Ruane, Jr. conducted all dealings with plaintiff. Thus, all references to "Ruane" in our opinion refer to Ruane, Jr.

was authorized to hire and fire employees, establish work schedules, and set pay rates.

In his complaint, plaintiff alleged each building has commercial tenants on the lower levels and residential units on the upper levels. There were a total of nine commercial units and eleven residential units. The commercial units included a laundromat owned by Ruane, a restaurant, and a barbershop. Plaintiff alleged he "was required to perform general maintenance tasks for the [b]uildings," such as cleaning the common areas, maintaining equipment, shoveling snow, clearing the parking lots during the winter, sidewalk cleanup, repairing the washing machines, providing "immediate assistance" to the tenants if an emergency repair was needed, and preparing the buildings for inspection.

According to plaintiff, he claimed defendants required him to work four days per week twice per month, and seven days per week for the other weeks at designated hours, which he fulfilled. Plaintiff also alleged he worked "outside of his normal scheduled hours" for defendants.

At the commencement of his employment, in exchange for his work, plaintiff alleged defendants agreed to provide him with an apartment in one of the buildings and to pay him $400 per week, regardless of the number of hours he worked. On June 15, 2015, plaintiff moved into his apartment.

For his work completed during the first two weeks of his employment, defendants paid plaintiff the stated salary. However, plaintiff alleged defendants failed to pay him any of his salary thereafter and "simply provided him with a free apartment." Plaintiff claims he made complaints to Ruane about not being paid wages, and Ruane responded he would pay plaintiff when he "fixed his documents." Plaintiff sought unpaid overtime compensation at the rate of pay under the WHL. He also sought pay under the WHL's minimum wage provisions, attorney's fees, and an order restraining defendants from retaliating against him for participating in this lawsuit.

Defendants filed an answer denying the allegations in plaintiff's complaint and asserted a counterclaim. In their counterclaim, defendants alleged in June 2015, plaintiff agreed to rent an apartment from them in Newark for $800 per month plus payment of utilities. Defendants alleged plaintiff "defaulted on the agreement to pay rent" in December 2018, and defendants filed a landlord tenant action[2] in the Essex County Special Civil Part (the landlord-tenant section).

In their counterclaim, defendants stated that plaintiff defaulted and a warrant of removal was entered by the court in the landlord-tenant action on March 12, 2019. Defendants sought damages from plaintiff for unpaid rent and utilities, dismissal of the complaint, and counsel fees. Following a period of discovery, defendants filed a motion for summary judgment, which was denied. On August 18, 2023, a one-day bench trial was conducted.

The Trial

Ruane testified at trial that in June 2015, he was looking for a superintendent for two buildings owned by Marmic. At his initial meeting with plaintiff, Ruane testified the position was for a part-time super-

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[2] Docket number LT-3049-19

intendent to perform minor repairs and maintenance of the buildings. Ruane advised plaintiff his salary would be $1,600 per month and that plaintiff would pay $800 per month for an apartment in the Marmic building, which plaintiff accepted. According to Ruane, plaintiff represented that he had a valid Social Security number.

Ruane testified a second meeting was held with plaintiff to fill out the W4 form to permit him to be legally paid by Marmic. Plaintiff presented a form of identification to Ruane, and according to plaintiff's testimony, he wrote in a Social Security number in the appropriate box on the W-4 form at Ruane's behest even though plaintiff "knew" he did not have a valid Social Security number. Plaintiff also testified that he read and understood he was signing the W-4 form "under penalties of perjury," even though it was not written in Spanish, and he could not read English.[3] Ruane testified that he relied upon the information provided by plaintiff in the W-4 form to issue a paycheck and that at no point during this meeting did plaintiff indicate that he did not have a valid Social Security number.

After Marmic paid plaintiff an initial paycheck for his first two weeks of work, Ruane discovered that the Social Security number provided by plaintiff on the W-4 form was invalid. Ruane met with plaintiff again, informed him the Social Security number was invalid, and that Marmic's payroll company could not legally pay him. Plaintiff admitted at trial Ruane told

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[3] Plaintiff testified at trial with the aid of a Spanish interpreter.

him that he could not be paid because the W-4 form was invalid.

Subsequently, Ruane offered plaintiff an alternative barter arrangement for his continued employ at the buildings because he did not have a valid Social Security number. Plaintiff was offered the apartment rent and utility free in exchange for his part-time services as a superintendent. Plaintiff confirmed in his testimony that he was aware there was a barter arrangement as stated. No lease or employment agreement was entered between the parties. Plaintiff was free to leave the apartment and cease performing superintendent services at any time without penalty.

Under the barter arrangement, plaintiff's duties essentially remained the same as before—taking out the garbage, mopping the floors, and responding to tenants' requests for minor repairs. Plaintiff testified he only had to perform work for tenants when they called him, which averaged one to two calls at night, or five to seven times per week. He set his own schedule. Plaintiff claimed Ruane asked him to perform tasks in the laundromat, including repairing and unclogging the machines. Ruane testified that there were no specific hours plaintiff had to work, and plaintiff was not required to be at the premises for any specified period of time. According to Ruane, the barter arrangement lasted from June 2015 through December 2018.

Plaintiff testified he either worked a "long week" or a "short week." A long week meant "around [sixty] hours," and a short week meant "around [thirty-seven] hours." He also claimed he worked "seven days each week" for defendants. At trial, plaintiff did not present any written documentation of the amount of hours he worked and did not introduce any evidence of any unpaid wages or damages allegedly due in support of the "long" and "short" weeks as he testified to in seeking payment for back wages. Plaintiff argued he was paid a "flat weekly salary of $400[], regardless of how many hours he worked in a week," plus an apartment and utilities.

Plaintiff testified that his work responsibilities for defendants increased over time and included inspecting the property for leaks, broken pipes, collecting and disposing of garbage, painting, and cleaning. Plaintiff claimed he was not required by defendants to "track" the hours he worked, and defendants did not maintain such records.

Throughout his part-time employment with Marmic, plaintiff testified that he performed work for individuals who did not reside in Marmic's buildings for cash and was paid $80 to $150 per job. At times, plaintiff performed these outside jobs five days per week. Plaintiff further testified that he discussed his off-site work with Ruane, who did not object.

Sometime in 2018, plaintiff filed a claim with the New Jersey Department of Labor (NJDOL) seeking unpaid wages from defendants. The record shows the NJDOL sent a letter dated July 9, 2018, to Ruane requesting time records, payroll records, employee records, payroll taxes, workers' compensation insurance, bank information, company ownership information, and employment certificates regarding this matter and scheduled a hearing for July 30, 2018. Approximately two weeks after the letter was sent by the NJDOL, Ruane responded in writing that he did not have any time records, payroll tax information, bank information, employee handbook, or employment certificates pertaining to plaintiff.

In his letter, Ruane explained that plaintiff was given an apartment "valued at $900, including gas, electric, heat, and hot water, amounting to approximately $250[,] which totals $1,150 in compensation per month in lieu of an actual hourly rate to perform part-time duties for the buildings." Ruane included the W-4 form that plaintiff filled out, which included his name, date of birth, and the fictitious Social Security number. Ruane also provided the Federal Identification number to the buildings, workers' compensation, and company ownership information.

On October 2, 2018, the NJDOL sent Ruane a letter concluding no wages were due to plaintiff. However, the NJDOL assessed a $750 penalty against Ruane as a member of Marmic and individually, for not providing records ($500) and unpaid wages/late payment ($250).

Ruane testified that following an investigation, the NJDOL determined that no wages were due plaintiff, no fee was assessed, and the $750 penalty assessed was ultimately reduced and settled for $250, as confirmed in a November 19, 2018 letter from the NJDOL. The November 19, 2018 letter also confirmed that no wages were due plaintiff, but plaintiff could request a wage hearing.

Ruane testified that he decided to terminate the barter arrangement with plaintiff in the latter part of 2018, which had lasted three-and-a-half years, due to problems with the work plaintiff was doing for the tenants and a decline in the quality of the work he performed. Ruane told plaintiff that he had to start paying rent after a thirty-day grace period. Following termination of the barter agreement, plaintiff continued to live in the apartment but refused to pay rent or vacate the apartment. Marmic filed an eviction action and sought a judgment of possession and warrant of removal. Ruane testified that plaintiff owed Marmic $4,000 in unpaid rent and utilities. Ultimately, plaintiff vacated the apartment after defendants obtained the warrant of removal. No other witnesses testified. Items were moved into evidence, including the W-4 form, and the NJDOL letter. The trial judge requested proposed findings of fact and conclusions of law from the parties and reserved decision.

The Trial Judge's Decision

On March 5, 2023, the trial judge rendered a comprehensive oral decision. The trial judge determined plaintiff did not sustain his burden of proof to "prove more likely than not" that he was owed back monies for work done for defendants from 2015 through 2018. The trial judge determined that plaintiff was not "credible or believable." The trial judge emphasized that "the [t]rial court is required to rely upon the veracity of . . . plaintiff to—make out the initial claim in this particular case." And I don't find . . . plaintiff to be "credible" "in any way, shape or form."

In particular, the trial judge found that plaintiff testified at trial he knew he did not have a valid Social Security number when he filled in the box on the W-4 form in order to obtain part-time employment with Marmic. Furthermore, the trial judge also observed that defendants relied upon plaintiff's representations on the W-4 form in order to issue him a paycheck, prior to discovering the Social Security number was invalid. The trial judge found plaintiff admitted he was told by

Ruane that he could not be paid "because the W-4 form was invalid." The trial judge determined plaintiff was offered an alternative arrangement—a barter arrangement—to continue to work at the buildings where he received an apartment, "rent and utility free," in exchange for his work at the buildings because he did not have a valid Social Security number. The trial judge noted there was no lease or employment agreement entered between the parties, and plaintiff was "free to leave the apartment and stop performing barter services at any time without penalty."

The trial judge found plaintiff's work consisted of mopping the floors, taking out the garbage, and responding to the tenants' requests for "minor repairs." The trial judge noted that plaintiff was "paid cash" for work he performed for other individuals. Regarding hours of work, the trial judge concluded defendants did not require plaintiff to "track or report" his hours. The trial court made no findings of fact with regard to the amount claimed by plaintiff because his proposed findings of fact "[did] not comport with the testimony" as presented at trial.

In support of his decision, the trial judge cited *Crespo v. Evergo Corp.*, 366 N.J. Super. 391, 394 (App. Div. 2004), where we held such "employee conduct"—presenting a false Social Security card—for the purpose of employment barred economic recovery for back pay. *Id.* at 401. The trial judge also cited to our Supreme Court's decision in *Cedeno v. Montclair State Univ.*, 163 N.J. 473 (2000), where our Court found plaintiff's economic damages claim was barred because plaintiff misrepresented his criminal record—a prior conviction for bribery—on the employment application, which statutorily prohibited him from holding a position in a public university.

The trial judge noted the *Cedeno* Court envisioned an extraordinary circumstance, such as a sexual harassment claim, where there was “a need to vindicate statutory policies” to compensate an aggrieved party who could be allowed to seek such compensation but found “there’s no extraordinary issue in this particular case” and concluded plaintiff is “statutorily barred” by federal law from seeking recovery. *Cedeno*, 163 N.J. at 476-77.

The trial judge also found plaintiff was statutorily barred from recovery under the IRCA because “it’s unlawful to employ an unauthorized alien,” and the employer “can be fined” as well as the employee. The trial judge relied on the United States Supreme Court’s holding in *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002), which construed the IRCA, and concluded an undocumented immigrant worker could not be awarded back pay because such a determination would “have unduly entranced upon the explicit statutory provisions critical to federal immigration policy expressed in the IRCA.” *Ibid*. The trial judge noted that plaintiff worked for defendants for “two-and-a-half years,” and he “never fixed the problem.”

As to plaintiff’s claim for damages, the trial judge found he was “left to entirely speculate, as a jury would be, if this were a jury case, as to what the hourly wages were at the time and/or the total number of hours worked.” The trial judge found plaintiff failed to carry the burden to prove he did the work. The trial judge determined “damages in this case are uncertain.” By way of example, the trial judge found plaintiff was "clearly less than exact" about the amount of time he worked.

As to the counterclaim, the trial judge found defendants failed to present proofs for unpaid rent and utilities. Therefore, the counterclaim was dismissed with prejudice. A memorializing order dismissing the matter with prejudice was entered. This appeal followed.

On appeal, plaintiff argues the trial judge erred by dismissing his complaint due to his undocumented status because the trial judge's determination was contrary to the IRCA and New Jersey law. Plaintiff also asserts the trial judge abused his discretion by allowing and considering testimony concerning plaintiff's Social Security number on the W-4 form and his undocumented status, making factual findings and conclusions of law resulting from plaintiff's admission, and impermissibly raising plaintiff's burden of proof by incorrectly applying the applicable burden-shifting framework to his wage claims. Plaintiff also contends the trial judge erred in finding he was subject to a barter arrangement with defendants and did not take judicial notice of the prevailing hourly wage at the time of trial.

II.

The trial court's findings of fact are "binding on appeal when supported by adequate, substantial, credible evidence." *Cesare v. Cesare*, 154 N.J. 394, 411-12 (1998); *see also Brunson v. Affinity Fed. Credit Union*, 199 N.J. 381, 397 (2009). A trial court's credibility determinations are also accorded deference because the court "'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" *City Council of Orange Twp. v. Edwards*, 455 N.J. Super. 261, 272 (App. Div. 2018) (quoting *Gnall v. Gnall*, 222 N.J. 414, 428 (2015)). "To the extent that the trial court interprets the law and the legal consequences that flow from established facts, we review its conclusions de novo." *Motorworld, Inc. v. Benkendorf*, 228 N.J. 311, 329 (2017) (first citing *D'Agostino v. Maldonado*, 216 N.J. 168, 182; then citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)).

A.

We first address plaintiff's argument the trial judge misconstrued the IRCA. In particular, the trial judge found § 1324a of the IRCA statutorily barred plaintiff's request for recovery for work performed for defendants and misapplied *Hoffman Plastic Compounds*.

The IRCA makes it unlawful for an employer to hire or continue to employ an unauthorized alien. 8 U.S.C. § 1324a(a)(1) and (2). The IRCA also describes the verification process that employers must complete to ensure their hires are authorized to work. 8 U.S.C. § 1324a(b).

In *Hoffman*, the United States Supreme Court found a National Labor Relations Board (NLRB) order awarding an undocumented alien backpay was foreclosed by the IRCA. *Hoffman*, 535 U.S. at 140. The Supreme Court described the IRCA as a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," and found it "'forcefully' made combating the employment of illegal aliens central to the 'policy of immigration law.'" *Id.* at 147.

The Supreme Court made the following note about this scheme:

> if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). . . . IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b) . . . .
>
> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

In *Hoffman*, an unauthorized alien worked at Hoffman Plastics and supported a union campaign. Hoffman Plastics laid off the unauthorized alien and others involved in that campaign. *Id.* at 140. Charges were filed with the NLRB, which found the termination violated the National Labor Relations Act and ordered the illegally fired workers be reinstated and awarded backpay. *Id.* at 140-41. But the Supreme Court reversed because the unfair labor practice claims under the NLRA were precluded by the IRCA, and the NLRB's "remedy trenches upon a federal statute or policy outside the [NLRB's] competence to administer, the [NLRB's] remedy may be required to yield"—specifically that the NLRA conflicted with the IRCA. *Id.* at 147.

As the trial judge correctly found, plaintiff is an undocumented alien expressly included within the statutory definition of the IRCA. Thus, there could be no employee-employer relationship between the parties. As we noted in *Crespo*, "*Hoffman* has not expanded beyond its specific focus. *See Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F.Supp.2d 191, 192-93 (S.D.N.Y. 2002) (Hoffman did not apply to preclude an illegal alien's claims under the federal Fair Labor Standards Act (FLSA) for work already performed.); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F.Supp.2d 1056, 1061-62 (N.D. Cal. 2002) (an illegal alien who was arrested and detained for fourteen months immediately following settlement of a FLSA suit against his employer could proceed with an FLSA retaliation claim against the employer); *Escobar v. Spartan Security Serv.*, 281 F.Supp.2d 896-98 (S.D. Tex. 2003) (plaintiff, who sued his former employer alleging workplace sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, was not entitled to back pay because he was an illegal alien at the time of the events but was not barred from his other remedies, including reinstatement and front pay, because he had subsequently attained his legal work status prior to trial)."

Here, the record supports the trial judge's determination that plaintiff "lied" when he completed and signed the W-4 form and knew he was "required to tell the truth." The trial judge properly concluded that plaintiff was not eligible to work for defendants under the IRCA and was barred from relief and was precluded from recovering damages. Plaintiff did not assert a claim for workplace harassment or other misconduct while he worked for defendants. Thus, the trial judge did not err in dismissing plaintiff's complaint with prejudice.

B.

Turning to the issue of damages for work already completed, plaintiff relies on *Serrano* for support that he is not barred from recovery under the IRCA. In *Serrano*, we held that the undocumented worker was permitted to recover for work performed. 407 N.J. Super. at 271; *see also Id.* at 469-70. Plaintiff also argues that he met his burden of proving damages but misplaces reliance on *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680 (1946). In *Anderson*, the United States Supreme Court held:

> that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount

> of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.
>
> [*Id.* at 687-88.]

But this burden-shifting analysis only applies where damages are certain. *Id.* at 688.

The trial judge considered this burden-shifting analysis in his decision and concluded that plaintiff failed to prove a cognizable damages claim. Specifically, the trial judge found plaintiff's claim that he worked thirty-seven or sixty hours per week "not credible" and noted "[t]here's no basis for the number of hours worked." Moreover, plaintiff failed to proffer any time sheets or other documents supporting the hours he worked. The trial judge concluded there was "no basis of the number of hours worked" and "no judicial notice of what the hourly wages would have been during that time frame." The credibility finding made by the trial judge here is relevant to the damages analysis, as the *Anderson* Court held. *Id.* at 689.

We also reject plaintiff's claim that he was "on call" because he was not required to remain on Marmic's premises, and the hours he was potentially waiting for a call should be taken into consideration. N.J.S.A. 12:56-5.6 describes when on-call time constitutes hours worked:

> (a) When employees are not required to remain on the employer's premises and are free to engage in their own pursuits, subject only to

> the understanding that they leave word at their home or with the employer where they may be reached, the hours shall not be considered hours worked. When an employee does go out on an on-call assignment, only the time actually spent in making the call shall be counted as hours worked.
>
> (b) If calls are so frequent or the "on-call" conditions so restrictive that the employees are not really free to use the intervening periods effectively for their own benefit, they may be considered as "engaged to wait" rather than "waiting to be engaged." In that event, the waiting time shall be counted as hours worked.

The record belies plaintiff's contention that he was "on call." In fact, contrary to his assertion, plaintiff testified that he made his own schedule and worked off-site, without any reservations by Ruane. Moreover, plaintiff had no minimum hours requirement, and he was not required to remain on Marmic's premises. Thus, plaintiff's reliance on N.J.S.A. 12:56-5.6 is misguided.

C.

Plaintiff maintains that the trial judge's findings that damages were not established contradicted the prior denial of defendants' motion for summary judgment, which he argues constitutes law of the case. Again, we disagree.

"The law-of-the-case doctrine is a non-binding rule intended to prevent relitigation of a previously resolved issue in the same case." *State v. K.P.S.*, 221 N.J. 266, 276 (2015) (quotations and citations omitted).

Ordinarily, the law-of-the-case doctrine "precludes a court from reexamining an issue previously decided by the same court, or a higher appellate court, in the same case." *State v. Reldan*, 100 N.J. 187, 208 (1985) (O'Hern, J., dissenting) (quoting *United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984)).

Importantly, "[a] hallmark of the law of the case doctrine is its discretionary nature, calling upon the deciding judge to balance the value of judicial deference for the rulings of a coordinate judge against those 'factors that bear on the pursuit of justice and, particularly, the search for truth.'" *Hart v. City of Jersey City*, 308 N.J. Super. 487, 498 (App. Div. 1998) (quoting *Reldan*, 100 N.J. at 205).

Our Supreme Court has recognized that "[u]nderlying the [law-of-the-case doctrine] are principles similar to collateral estoppel. . . . " *K.P.S.*, 221 N.J. at 277 (second alteration in original) (quoting *Reldan*, 100 N.J. at 209). Further,

> [b]oth collateral estoppel and law of the case are guided by the "fundamental legal principle . . . that once an issue has been fully and fairly litigated, it ordinarily is not subject to relitigation between the same parties either in the same or in subsequent litigation." However, whereas collateral estoppel may bar a party from relitigating an issue decided against it in a later and different case, law of the case may bar a party from relitigating the same issue during the pendency of the same case before a court of equal jurisdiction. One major distinction between the two doctrines is that law of the case, unlike collateral

> estoppel, is subject to the exercise of sound discretion.
>
> [*Ibid.* (second alteration in original) (citations omitted).]

"The trial judge has the inherent power to review, revise, reconsider and modify interlocutory orders at any time prior to the entry of final judgment." *C.P. v. Twp. of Piscataway Bd. of Educ.*, 293 N.J. Super. 421, 431 (App. Div.1996) (prior denials of defendant's motion for summary judgment did not become law of the case, precluding renewal at the time of trial). A denial of summary judgment is always interlocutory and never precludes the entry of judgment for the movant later in the case. *Hart v. City of Jersey City*, 308 N.J. Super. 487, 498 (App. Div. 1998). For these reasons, we reject plaintiff's argument that the prior denial of defendants' motion for summary judgment constituted law of the case.

D.

We next address plaintiff's argument that the judge impermissibly allowed and considered testimony regarding the fictitious Social Security number on the W-4 form and his undocumented status. Plaintiff also contends he met his burden of proving his damages claim. Again, we are unpersuaded.

The trial judge found plaintiff knew he was supposed to be truthful at the time he filled out the W-4 form and stated:

> And it is interesting to note that although he was—a lot of testimony was taken in this case with [an] interpreter when he was able

> to clearly and concisely articulate answers to all the questions.
>
> When it came to question by cross[-] examination by defense counsel regarding his signature on the form just below the paragraph indicating that if it was knowingly false, it was perjury. He waffled and—and—and attempted to not exactly answer the questions. Which the [c]ourt notes is—finding a basis for his lack of truth and veracity in his statements.

Moreover, on cross-examination we note defense counsel inquired whether plaintiff did not have a Social Security number because he lacked legal status in this country. An objection was immediately made, and the trial judge sustained the objection. Consequently, since there was no cross-examination about plaintiff's immigration status, his argument that the cross-examination was unduly prejudicial under N.J.R.E. 403 is devoid of merit.

Rule 403, which limits the admissibility of relevant evidence, provides "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of: (a) [u]ndue prejudice, confusion of issues, or misleading the jury . . . ." In *State v. Sanchez-Medina*, our Court considered the prejudicial effect of evidence concerning a person's immigration status, explaining that, "[a]s a general rule, that type of evidence should not be presented to a jury." 231 N.J. 452, 462 (2018).

Our Court found that "[i]n most cases, the immigration status of a witness or party is simply irrelevant, and a jury should not learn about it," *id.* at 463, because disclosure of a person's "'illegal status in this country is very likely to trigger negative sentiments in the minds of some jurors.'" *Id.* at 464 (quoting *Serrano v. Underground Utils. Corp.*, 407 N.J. Super. 253, 274 (App. Div. 2009)).

Here, a bench trial was conducted, and no jury was tainted. Plaintiff's reliance on non-precedential cases is of no moment.[4] And, plaintiff stipulated at the time of trial that he would not introduce any evidence regarding the validity of any tax identification number.

We also reject plaintiff's argument that cross-examination regarding his intentionally providing an invalid Social Security number on his W-4 form was irrelevant under Rule 401. Rule 401 defines "relevant evidence" as "evidence having a tendency in reason to prove or disprove any fact of consequences to the determination of the action." Plaintiff's uncontroverted deceit in furnishing a false Social Security number was probative of his fraud and saliently, served to impeach his credibility.

Moreover, under Rule 607, extrinsic evidence may be introduced if relevant to a witness's credibility. "Although extrinsic evidence may be admitted to impeach a witness . . . its probative value as impeachment evidence must be assessed independently of its potential value as substantive evidence." *Green v. N.J. Mfrs. Ins. Co.*, 160 N.J. 480-494 (1999). We conclude

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[4] Plaintiff relies in part on unpublished opinions to support his position, but such opinions have no precedential value. *See Brundage v. Estate of Carambio*, 195 N.J. 575, 592-93 (2008) (acknowledging that Rule 1:36-3 "provides that '[n]o unpublished opinion shall constitute precedent or be binding upon any court.'" (quoting R. 1:36-3)).

the trial judge did not abuse his discretion in admitting plaintiff's testimony on this issue.

E.

Finally, plaintiff contends the trial judge erred by finding there was a barter arrangement between the parties because he was simply an employee. On the contrary, the trial judge duly found that a barter arrangement was created after defendants discovered plaintiff provided a fictitious Social Security number. The trial judge stated:

> [P]laintiff admitted he was told by . . . Ruane that plaintiff could not be paid because the . . . W-4 form was invalid. . . .
>
> Subsequently, plaintiff was offered an alternative arrangement—a barter arrangement to continue to work at the buildings. As plaintiff could not be legally paid has he provided false [S]ocial [S]ecurity number and apparently he did not have a valid [S]ocial [S]ecurity number.
>
> Plaintiff was offered the apartment, rent and utility free in exchange for plaintiff's part[-]time services around the buildings. . . .
>
> Plaintiff confirmed his testimony that he was aware there was a barter arrangement where he received the apartment, rent and utility free in exchange for his work in the buildings. . . .
>
> There was no lease or employment agreement between plaintiff and Marmic. . . .

Plaintiff attempts to argue that an employer-employee relationship continued to exist after Marmic discovered plaintiff provided a fictitious Social Security Number and thus could not be paid wages. Plaintiff relies on the "ABC" test under N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), which provides:

> Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter [(N.J.S.A. 43:21-1 to-71)] unless and until it is shown to the satisfaction of the division that
>
> (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;
>
> (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession[,] or business.
>
> [*Ibid.*]

All three provisions must be satisfied under this test; an entity that fails to prove even one of the elements is considered an employer under the Unemployment Compensation Law, N.J.S.A. 43:21-1 to-24.4. *Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor*, 125 N.J. 567, 581 (1991); *William H. Goldberg & Co. v. Div. of Emp. Sec.*, 21 N.J. 107, 113 (1956); *Trauma*

Nurses, Inc. v. Bd. of Rev., 242 N.J. Super. 135, 143 (App. Div. 1990); *Bloom v. Div. of Emp't Sec., Dep't of Labor and Industry*, 69 N.J. Super. 175, 178-79 (App. Div. 1961).

The ABC test is used to determine whether a person is an employee or an independent contractor and governs "for purposes of resolving a wage-payment or wage-and-hour claim." *Hargrove v. Sleepy's, LLC*, 220 N.J. 289, 295 (2015). But the ABC test is inapplicable here because whether plaintiff was an employee of defendants or worked as an independent contractor is not at issue. Therefore, plaintiff's argument is rejected, and the trial judge did not err in concluding a barter arrangement was created between the parties.

In light of our decision, we need not address plaintiff's burden-shifting argument as to his wage claims. To the extent we have not addressed plaintiff's remaining arguments, we conclude they lack sufficient merit to warrant any further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

ORDER,
SUPERIOR COURT OF NEW JERSEY
(MARCH 7, 2023)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY

SERGIO LOPEZ,

Plaintiff,

v.

MARMIC LLC,

Defendant.

Docket No.: ESX-L-006594-19
Civil Action

Before: Hon. Robert H. GARDNER, J.S.C.

THE ABOVE MATTER having come before the Court for a Bench Trial and the Court having reviewed all submissions from the parties,

IT IS ON this 7th day of March 2023,

ORDERED that Plaintiff's complaint is DISMISSED for the reasons stated on the record on March 3, 2023; and it is

FURTHER ORDERED that Defendant's counter-complaint is DISMISSED for the reasons stated on the record on March 3, 2023; and it is

FURTHER ORDERED that a copy of this Order shall be served upon all parties/counsel of record within seven (7) days of the date hereof, per the Court Rules.

/s/ Hon. Robert H. Gardner, J.S.C.

TRANSCRIPT OF DECISION, SUPERIOR COURT OF NEW JERSEY (MARCH 3, 2023)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ESSEX COUNTY

SERGIO LOPEZ,

Plaintiff,

v.

MARMIC L.L.C. and MIKE RUANE,

Defendants.

Docket No.: ESX-L-006594-19

Before: Hon. Robert H. GARDNER, J.S.C.

[March 3, 2023 Transcript, p. 3]

THE COURT: All right. This is the opinion of the Court on *Sergio Lopez v Marmic L.L.C. and Mike Ruane*, R-U-A-N-E, L-5 — strike that — 6-5-9-4-19.

This is the opinion of the Court. This was a bench trial that occurred on August 18, 2022. These are the — the following findings and fact and conclusions of law.

This court finds that the plaintiff in this matter has not sustained their burden of proof to prove more likely than not that in fact they were owed back monies for work done for the defense — defendants from 2015 through 2018.

And the—also the counterclaim that was filed by the defendant against the plaintiff for the — four or five months of rent and/or utilities claimed as a counterclaim are also dismissed for failure to make the proofs. Paragraph.

Here are the proposed findings of fact. At least around 2015 to at least 2019 defendants owned the property located at 809-815 Sandford Avenue, Newark, New Jersey also Referred to as 68 Mountain View Place. Trial transcript 81:3-8, 114:13-15 — 115, page 122:12 through 123 and page 3.

Property had four commercial units and four residential units. Trial transcript 81:12-15. Marmic's property is adjoined with another building also owned by Sandford Street LLC located at 5 — strike that — 8-2-3 Sandford Street, Newark, New Jersey. Trial transcript 81:16-20. The Sandford Street property has five commercial units and seven residential units. Trial transcript 81:21-25.

At all times relevant to the action defendant Ruane owned — owned Marmic L.L.C. Trial transcript 114:118 through 115- — :4. Also page 80 line 17.

At all times relevant to the action defendant Ruane was Sandford Street LLC's owner. Trial transcript 115:116 — strike that — 16-17. Defendants' properties, commercial tenants included business such as a laundry mat, a restaurant and a barber shop. Trial transcript 20:7-9.

From 2004 through present Ruane managed Marmic reinstated the operations, had the power to hire and fire its employees, set employee pay rates and set employee work schedules. Trial transcript 114:6 through 115- — :12.

In June of 2015 Ruane intended to hire super-intendent — to hire for both Marmic and Sandford Street LLC properties. Trial transcript page 82 lines 10 through 12.

Ruane met with plaintiff and interviewed him for superintendent's position. Trial transcript 83:7-10. Mr. Ruane testified he had an initial meeting with plaintiff and advised that the position was part time superintendent entailed minor repairs and maintenance of the buildings. Trial transcript 83:14-20.

Plaintiff was advised he was going to be paid $1,600 and plaintiff would pay $800 for an apartment in the building which plaintiff accepted. Trial transcript 83:12-21 through 84-15 — :15.

Significantly at the initial meeting plaintiff represented to Mr. Ruane that plaintiff had a legitimate social security number. Trial transcript 83:19-22.

Mr. Ruane testified there was a second meeting where plaintiff had to fill out the W-4 form that would permit plaintiff wage — would be paid by Marmic. Trial transcript 87:3-8. Exhibit D-1.

Mr. Ruane testified he understood that a W-4 form was needed to legally provide a paycheck to plaintiff. Trial transcript 87:3-25 — 3-25. Mr. Ruane testified at the second meeting with plaintiff the W-4 form was presented to plaintiff to fill out and execute. Trial transcript 88:1-5. At that time, plaintiff presented a form of identification to Mr. Ruane. Trial transcript 88 — page — :6-8.

Significantly, at no point during the meeting did plaintiff indicate to Mr. Ruane that plaintiff did not have a valid social security number. Trial transcript 88:9-12.

Plaintiff testified he wrote his social security number in the appropriate box on the W-4 form. Trial transcript 45:25 through page 46:12. Significantly, plaintiff testified at trial he filed out the W-4 form, he knew he did not have a valid social security number. Trial transcript 47 page — lines 1 through 11.

Plaintiff testified he read and understood he was signing the W-4 form under penalties of perjury. Transcript 47:13- — 13 through line — page 48 line 1, exhibit D-1.

Finally, critically Mr. Ruane testified he relied upon information contained in the W-4 form to have Marmic issue plaintiff a paycheck. Transcript 89:5-9.

After Marmic paid plaintiff's initial paycheck, Mr. Ruane discovered the social security number provided by plaintiff on the W-4 form was invalid. Trial transcript 91:13-18. And Mr. Ruane testified at another meeting with plaintiff informing his social — social security number provided by plaintiff was invalid. And Marmic could not legally pay the plaintiff. Trial transcript 91-page 91:19- — through the 92:15.

The plaintiff admitted he was told by Mr. Ruane that plaintiff could not be paid because the W form was invalid — W-4 form was invalid. Transcript page 25 lines 4 through 7.

Subsequently, plaintiff was offered an alternative arrangement — a barter arrangement to continue to work at the buildings. As plaintiff could not be legally paid has he provided false social security number and apparently he did not have a valid social security number.

Plaintiff was offered the apartment, rent and utility free in exchange for plaintiff's part time services around the buildings. Trial transcript 90 — page 92 lines 19 through 93- — :6.

Plaintiff confirmed his testimony that he was aware there was a barter arrangement where he received the apartment, rent and utility free in exchange for his work in the buildings. Trial transcript 54:3 — lines 3 through 7.

There was no lease or employment agreement between plaintiff and Marmic. Trial — page 94:20 — lines 20 through 95:5. Plaintiff was free to leave the apartment and stop performing barter services any time without penalty. Transcript page 94:23 through 95 — line 1.

Plaintiff's duties essentially consisted of taking out garbage twice a week, mopping floors as needed, respond to tenants' requests for minor repairs. He — trial transcript 55:19-56:13. It took him about thirty minutes a — to take the garbage out once a week. Transcript 107 — page 107 lines 11 through 108 line 2.

Plaintiff testified he mopped the floor of the buildings two to three times a month. Transcript page 57 line 11 through 17. It should be noted that the floors that plaintiff had to mop were about sixty feet long. Transcript 108 — page 108 lines 3 through 11.

Plaintiff testified he received five to seven calls per week from tenants, making minor repairs on the units. Page—transcript page 26 lines 25 through 27-4 and 57 lines 23 through 58 line 1.

He might also receive calls at night from tenants for emergency purposes. Page 27 lines 5 through 9.

He confirmed he only had to work for the tenants when he was called by them. Page 58 lines 2 through 4. Plaintiff testified he set his own schedule. Mr. Ruane did not care about the schedule he set for himself. Transcript page 51 line 18 through 52-1.

Consistent with plaintiff's testimony, Mr. Ruane testified plaintiff had no specific number of hours plaintiff had to work where plaintiff was required — at any specified time. Page 91 lines 1 through 8.

Plaintiff did testified that he worked for certain long weeks and short weeks. Page — transcript page 30 line 16 through 19. And the hours were somewhere between 37 hours for a short week and 60 hours for a long week. Transcript 30 lines 10 through 15.

However this was disputed — it should be noted, this has been disputed by the plaintiff's submissions, trier of fact indicating a longer number of hours.

Plaintiff also did perform work for outside of the individuals who worked in the buildings. And he paid — was paid cash for this. Trial transcript 57 lines 23 through 38-4. By the way, Mr. Ruane did not object to that — him doing that kind of work. Page 39 lines 1 through 5.

Even after plaintiff was terminated from Marmic, he continued to perform all site cash work — work for cash. Page 64 lines 20 through 23.

Plaintiff did file a claim with New Jersey Department of labor for his unpaid wages. Page — transcript 59 lines 6 through 12. The department of labor did not — did not advise him that he was due any unpaid wages from the defendant. It should be noted at trial plaintiff was impeached — strike that. Unpaid wage from the defendant. Page 59:13- — page 62-25.

Apparently, Ruane was requested by the New Jersey Department of Labor to produce certain employment records. See Exhibit D-2. The — apparently Mr. Ruane responded to New Jersey Department of Labor's request from a letter of July 23, 2018. See exhibit D-2.

New Jersey — it should be noted that New Jersey Department of Labor determined that no lost wages were due only a penalty of $750 because the lack of a appropriate book — bookkeeping by Mr. Ruane. Transcript one — page 100 lines 11 through 14, exhibit D-3. Apparently the — the fine was ultimately resolved for $250. Trial transcript page 101 lines 19 through 23. Exhibit D-4.

In the later part of 2018, when Mr. Ruane made the decision to terminate the barter arrangement with the plaintiff. Transcript 103 page — line 19 through 23. In — with the tenant's work as well as the client — quality of the work. Page 103 lines 24 through 104-18.

You — apparently the plaintiff was relieved of his position in December of '18. Page 121 lines 11 through 14.

Mr. Ruane informed plaintiff he had to start paying rent after the thirty day grace period. Page 104 lines 23 through 105-6.

Apparently plaintiff continued to live at the apartment, refused to pay rent or vacate the apartment or pay for utilities. Trial transcript 64 lines 10 through 19.

Ultimately, Marmic filed a landlord/tenant matter to obtain an order — order for removal before plaintiff would agree to vacate the apartment. Page 64 lines 24 through 65 line 3. Exhibit D-5.

It should be noted that apparently — Ruane paid plaintiff at least part of his business — first two weeks of plaintiff's employment. Transcript 117 lines 25 through lines 18 through 1.

While working for the defendants, plaintiff did live in the apartment — basement apartment, at Ruane's 823 Sandford Street property. Transcript page 21 lines 13 through 22.

Plaintiff never reached any written agreement with Ruane considering the value of the apartment he was living in throughout his employment nor an employment contract. Never entered into a lease agreement to live in the apartment or that he had to pay utilities for the apartment while he was employed by defendants. Transcript 43 lines 19 through 23, and page 123 lines 21 through 24.

Defendant did pay the plaintiff $400 for the first two weeks of his employment. Trial transcript page 22 lines 22 through page 23 line 3, page 23 lines 8 through 10. Apparently, pay — payment was made by a check. Trial transcript page 23 lines 4 and 5.

Specifically, Ruane told plaintiff to write the June 15th on the W-4 form that he had provided. Although plaintiff claimed he filled out the form at a later date. Trial transcript page 65 lines 23 through 66-4.

Plaintiff — defendant — strike that. After the first two weeks — after the first pay — pay period of plaintiff's — plaintiff's employment, the plain- defendant, Ruane never asked plaintiff to stop performing any of his job duties. Page 30 lines 1 through 5.

Plaintiff never made any written agreement with Ruane dur — with regard to work for — he was doing for — with the plaintiff or any work being done for the defendants. Trial transcript page 37 lines 8 through 11.

Plaintiff repeatedly made complaint to Ruane about not being paid for his wages which Ruane responded he would pay plaintiff when plaintiff fixed his documents. Trial transcript 138 page — lines 25 through 139-2. Page 36 lines 22 through 37-2.

The Department of Labor investigation occurred because plaintiff complained about defendant's failure to pay wages. Trial transcript page 41 lines 6 through 10 and 17:3.

Plaintiff did not receive any compensation for his wages from the New Jersey Department of Labor. Transcript page 61-24 through 62-3 and 63- lines 18 to 25.

Ruane confirmed that all plaintiff's testimony at trial was accurate as far as — concerning work duties and responsibilities plaintiff performed throughout his employment. Page 129 lines 15 through 17.

Defendant did not require plaintiff to track or report his hours that he spent working. Trial transcript 20 through — lines 20 through 25 and page 52 lines 8 through 11. Nor did the defendant ever track the hours that the plaintiff worked. Page 133 lines 21 through 24.

Ruane did complete a document for the New Jersey Department of Labor verifying defendant did not maintain any time records for plaintiff's work, payroll records, employee records and he didn't pay any payroll taxes. Trial transcript 148 lines 2 through 13. Exhibit D-2.

The Court makes no findings of fact with regard to the amount claimed. Findings — findings of fact proposed by the plaintiff with regard to the work hours as they do not comport with the testimony — trial testimony before this Court as provided by plaintiff and/or defendant in this matter.

As far as conclusions of law, the Court notes the Immigration Reform and Control Act, the IRCA of 1986 8 U.S.C.A. 10 — 1101. That in fact it's ille — it's unlawful to employ an unauthorized alien under 8 U.S.C.A 13-24(a). An employer can be fined between $250 and a $1,000. An employee between a $100 and a $1,000 as well. For — also for falsifying the documents.

The Court notes there are very few cases that in fact have been con — construed the — the IRCA. Hoffman Plastic Compound v the National Labor Relations Board at 535 U.S. 137 (2002). Appears to be one of the few — few case — Supreme Court-U.S. Supreme Court cases that have been held on this particular ca — issue.

Hoffmann was an action for work not — plaintiff's word as to what work that had not yet been performed and terminated through his union activity. I have in the FLCA implied to un — undocumented aliens same as citizens took the benefit — any possible benefit that an employer could have regarding an employee — employing the undocumented alien/employee — employees.

The Court notes however there appears to be a distinction between those benefits that would be provided by law such as Worker's Compensation benefits versus benefits such as back — back or front pay that would be provided by the — by employer for work performed.

This — this is also noted in a case called Renteria (phonetic) v Italian Foods Inc., 102 496 a 2003 W.L. 2199B1909 at 6. And this would be a North District of Illinois case from 2003. Holding compensatory damages warrant undocumented aliens but not front or back pay which would underline the po — underline the policy of the IRCA which would forbid an employer from employing undocumented aliens.

There are — there are several other cases that construed the — the statute. I mentioned Hoff — Hoffman Plastics before. The Court held that the — was not allowed to award plaintiff back pay because plaintiff was an undocumented immigrant worker and awarded pack pay would "have unduly entranced upon the explicit statutory provisions critical to federal immigration policy expressed in the IRCA."

Hoffmann has not been overturned or received any negative treatment in Supreme Court since-since it was rendered in 2002.

There have been certain differentials including Hernandez v GBST and New York Inc, a U.S. — Southern District of New York case of 2006 holding that Hoffmann did not apply to the case because *Hernandez* was the plaintiff looking for recovery of medical expenses, not wages.

There's also a New Jersey — there's Crespo v Evergo Corp. which is 366 New Jersey Superior. 391 (Appellate Division 2004 case.

That — the Court held that because plaintiff was an undocumented immigrant who's employment was statutorily barred and because plaintiff's damages rose purely out of her termination from defendants employ and not out of poor treatment such as sexual — sexual harassment or something — something extra — extra ordinary. Plaintiff was barred from not — noneconomic damage recovery.

The Court relied on the holding in Cendo v Montclair State University at 7 — strike that — 319 New Jersey Superior 148 Appellate Division case of 1999 affirmed by the Supreme Court in 163 New Jersey 473, 2000.

Cendo — Montclair State University plaintiff was barred from recovery because it's primary — prior conviction for bribery statutorily precluded him from holding a position in public university.

This clearly — it's a close analogy to the case-in this particular matter where the plaintiff was statutorily barred by the IRSC from being employed. And the Supreme Court in *Cendo* that the — upheld the barring of the — of the payment being made for barring the recovery.

However in Cendo the Court noted it could conceive other circumstances such as aggravated sexual harassment, or some extraordinary basis where the need to vindicate statutory policies and to compensate a grieved party for tangible, physical, emotional harm, could mean that even a person who's absolutely disqualified but holding specific employment could be allowed to seek compensation for harm suffered during that employment. Crespo v Evergo Corp., 366 New Jersey Superior 391 at page 400. Appellate Division 200.

However, that — the — the — there's no extraordinary issue in this particular case before the Court. And the plaintiff is — was statutorily barred by the federal — by the federal law.

The Court also notes under Anderson v Mount Clemens Pottery Company, 328 U.S. 680 at 1996. That the employee has carried the burden to — if they proved in fact they did the work and they weren't paid for it. And they produced evidence to show the amount and extent of the work as a matter of adjust and reasonable inference.

The Burden then would shift to the defendant to come to — with evidence of the precise amount of work done and without that negative evidence to-to overcome the inference that in fact it could be drawn from the employee's evidence.

They didn't have — the court also did note the — the evidence with regard to the employee work does not have to be exact to have to — with specific exactitude but the measurement with the employee has to be kept within reasonable requests for the — for the requirements of the Fair Labor Standards Act section 11C.

The rule, however only applies where the damages are certain and where there — and other issues of fact the damages itself uncertain, this would not — this requirement of the employee or — employee requirements of requiring the employee records to be exact, would not apply.

The Court note — paragraph. The Court notes in this particular case damages in this case are uncertain. Test — there's testimony from the plaintiff was clearly less than exact with regard to when he worked, for what amount of time he worked and — and what days he worked.

He worked certain long work — days, he worked certain short days. He testified to a short week of 37 and a half hours and sixty hours as a long. But in fact, the proposed issues and findings of fact create a substantially longer periods of time.

Also and — and therefore the Court is required to rely upon the veracity of the plaintiff to — to make out the initial claim in this particular case. And I don't find the — that the plaintiff in this case to be credible or believable.

He admitted that in fact to — when he — when he signed on and to — and signed the W-4, he — he lied. He basically knew that he was required to tell the truth and required to put down a valid social security number. He knew at the time he wrote the social security number that it wasn't valid.

And it's interesting to note that although he was — a lot of testimony was taken in this case with in interpreter which he was able to clearly and concisely articulate answers to all of the questions.

When it came to questions by cross examination by defense counsel regarding his signature on the form just below the paragraph indicating that if it was knowingly false, it was perjury. He waffled and — and — and attempted to not exactly answer the questions. Which the Court notes is — finding a basis of his lack of truth and veracity in his statements.

The Court also notes that despite the Anderson case, that plaintiff ultimately has the burden of proof here to show more likely than not that he's entitled to recovery.

The number of hours of work, the number of weeks he worked and — were clearly a matter of complete speculation. And that this Court is left with no even reasonable inferences as to the number of weeks he worked long, the number of weeks he worked short, hours.

And also the Court notes for the record that the — that in fact if he had fixed the I9 problem he would have been entitled to payment from that date forward. And there's a case actually a case from California that would indicate that the issue was resolved he would be entitled to payments.

He apparently asked several times with regard to the — to being paid. And then he was — Mr. Ruane responded the same way. Which was — is that you're undocumented, you don't — you don't have a valid social security number if federal i.d. numbers. And if he fixes the problem he would get paid. Which he knew throughout the two and a half years he worked for Mr. Ruane and he never fixed the problem.

He now turns around and says he's titled to wages when he knows — knew full well he wasn't qualified to earn those — be paid those wages legally because he — he was an undocumented alien.

It's also — paragraph. This also segues into where the second issue is with regard to the number of hours and the calculation.

Sufficient evidence needed to — to meet the proof to show the amount and the extent of work as a matter of just and reasonable inference under NJL v. Pepsi Cola, which is a 2002 Appellate Division case from New Jersey, un — unreported.

The Court does not — takes that admitting that in fact it is an unreported case. But there has to be a reasonable inference here. The total number of hours worked, as I said, it was clearly not articulated to any specificity by the plaintiff.

No judicial notice was taken of — of the amount of the prevailing hourly wage to determine whether in fact any overtime and the amount of overtime costs would have been. Nor to the amount of — in fact the hourly wage would — would — there's no — would have been through the times that plaintiff worked in this barter system for the defense.

There's no basis of the number of hours worked. There's no basis with — no judicial notice of what the hourly wages would have been during that time frame. The Court is left to entirely speculate as a jury would be, if this were a jury case, as to what the hourly wages were at the time and/or the total number hours worked.

This is total and leaves — leaves the Court totally in — in the dark and required to speculate with no basis in fact, no basis of testimony as to what — what the number of — the — the hours would have been.

Also the Court notes for the record that in one of the answers to one of the plaintiff's questions, he does reference that in fact he had some information and some hours listed on his phone. But no body followed up with that. Certainly the plaintiff's attorney didn't — didn't elicit from the def — from the plaintiff what those-those records may or could have been.

Also a certain amount of those hours could have been reconstructed based on any kind of messages he might have had in his phone from that time period indicating whether the tenants had called him and so forth.

None of that information was provided to this Court. Therefore, the Court is left to totally speculate with regard to the total number of hours worked and at what rate. And I don't find based upon that that the credit — lack of credibility of the plaintiff, that in fact the plaintiff has made their burden of proof in this matter.

Also, the Court notes D-3 which is the Department of Labor letter of November 19, 2018 which is in evidence. That part of the reference there is that no wages are out — there's no — no wages are outstanding in that letter. This is after in fact apparently the Department of Labor did the investigation.

There's also a reference there that the — the plaintiff wanted more than thirty thousand — thirty thousand dollars in recovery since he retained private counsel. But there's clearly no indication as to whether in fact that's the case here.

Also the deposition of the plaintiff page 39 at the bottom says no wages were — he admits no wages were owed. And the trial transcript page 61 lines

24 and 62 through lines 25, no wage — he basically admits no wages were owed.

So, therefore the Court finds based upon that, that the — that the amount of wages owed — that's the basis of this particular claim by the plaintiff against the defense has no basis.

The Court had also noted under the Reich v Gateway Press case, 13 F.3d 685 Third Circuit (1999) case that the employer's testimony by itself is sufficient to establish work hours to meet the burden to — to shift the burden to the employer to produce the records.

However, the Court also notes the testimony of the employee has to be credible. And I don't find in any way, shape or form that the plaintiff's testimony in this case is credible.

Therefore, the Court does not find that the plaintiff has met the burden of proof in this particular matter and dismisses the plaintiff's complaint with prejudice for the — for the reasons stated. Paragraph.

As to the counterclaim with regard to the amount of monies owed by the — by the fact that after the plaintiff was terminated in December of 2018 while he was still living on the property, he's owed rent from — for the — and the utilities that were — that were expended and rent for amount of time when he was still living on the property. I don't find the defense has sustained its burden of proof either.

There's no lease written or oral in this particular case. No agreement to pay any monies by the plaintiff to the defendant. Also there's no agreement with regard to utilities.

And once the plaintiff stopped being — providing services to the defendant, the defendant rightfully had filed an ejectment action and/or landlord/tenant action. Apparently with the — the gentlemen under the order for removal was removed ultimately from the premises.

This was a basement apartment. Mr. Ruane testified that generally with regard to the other apartments that he had and the right remaining aspects of the building which obviously were on the second — the floors above the commercial floors had certain value.

There were no comparables offered in this matter — particular matter. There was no — it's his opinion as to what the — this basement apartment value would have been valued at for which there was — there was very little testimony. And there were practically no cross examination as to his opinions in that regard.

He was never established to be an actual expert I this case although he is a property manager. I don't find that the — that the amount was based on a one room apartment — basement apartment, that in any way, shape or form — the defense has met their burden of proof to show more likely than not that the value of the property in fact was $800 a month.

That being the Case, the Court find — does not find that testimony to be credible based upon the lack of foundation of the testimony by the — by the defense. And therefore the Court also enters an

— an order dismissing the counterclaim for failure to make the burden of proof.

So ordered.

(Hearing Concluded)

RELEVANT STATUTORY PROVISIONS

8 U.S.C. § 1324a: Unlawful Employment of Aliens

§1324a. Unlawful employment of aliens

(a) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity–

(A) 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 (as defined in subsection (h)(3)) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of title 29), to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b).

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) Defense

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) Use of labor through contract

For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after November 6, 1986, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

(5) Use of State employment agency documentation

For purposes of paragraphs (1)(B) and (3), a person or entity shall be deemed to have complied with the requirements of subsection (b) with respect to the hiring of an individual who was referred for such employment by a State employment agency (as defined by the Attorney General), if the person or entity has and retains (for the period and in the manner described in subsection (b)(3)) appropriate documentation of such referral by that agency, which documentation certifies that the agency has complied with the procedures specified in subsection (b) with respect to the individual's referral.

(6) Treatment of documentation for certain employees

(A) In general

For purposes of this section, if–

(i) an individual is a member of a collective-bargaining unit and is employed, under a collective bargaining agreement entered into between one or more employee organizations and an association of two or more employers, by an employer that is a member of such association, and

(ii) within the period specified in subparagraph (B), another employer that is a member of the association (or an agent of such association on behalf of the employer) has complied with the requirements of subsection (b) with respect to the employment of the individual, the subsequent employer shall be deemed to have complied with the requirements of subsection (b) with respect to the hiring of the employee and shall not be liable for civil penalties described in subsection (e)(5).

(B) Period

The period described in this subparagraph is 3 years, or, if less, the period of time that the individual is authorized to be employed in the United States.

(C) Liability

(i) In general

If any employer that is a member of an association hires for employment in the United States an individual and relies upon the provisions of subparagraph (A) to comply with the requirements of subsection (b) and the individual is an alien not authorized to work in the United States, then for the purposes of paragraph (1) (A), subject to clause (ii), the employer shall be presumed to have known at the time of hiring or afterward that the individual was an alien not authorized to work in the United States.

(ii) Rebuttal of presumption

The presumption established by clause (i) may be rebutted by the employer only through the presentation of clear and convincing evidence that the employer did not know (and could not reasonably have known) that the individual at the time of hiring or afterward was an alien not authorized to work in the United States.

(iii) Exception

Clause (i) shall not apply in any prosecution under subsection (f)(1).

(7) Application to Federal Government

For purposes of this section, the term "entity" includes an entity in any branch of the Federal Government.

(b) Employment verification system

The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) are, in the case of a person or other entity hiring, recruiting, or referring an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation

(A) In general

The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining–

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.

(B) Documents establishing both employment authorization and identity

A document described in this subparagraph is an individual's–

(i) United States passport;

(ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document–

(I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney

General finds, by regulation, sufficient for purposes of this subsection,

(II) is evidence of authorization of employment in the United States, and

(III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.

(C) Documents evidencing employment authorization

A document described in this subparagraph is an individual's–

(i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or

(ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.

(D) Documents establishing identity of individual

A document described in this subparagraph is an individual's–

(i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or

(ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification.

(E) Authority to prohibit use of certain documents

If the Attorney General finds, by regulation, that any document described in subparagraph (B), (C), or (D) as establishing employment authorization or identity does not reliably establish such authorization or identity or is being used fraudulently to an unacceptable degree, the Attorney General may prohibit or place conditions on its use for purposes of this subsection.

(2) Individual attestation of employment authorization

The individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment. Such attestation may be manifested by either a hand-written or an electronic signature.

(3) Retention of verification form

After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain a paper, microfiche, microfilm, or electronic version of the form and make it available for inspection by officers of the Service, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending–

(A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and

(B) in the case of the hiring of an individual–

(i) three years after the date of such hiring, or

(ii) one year after the date the individual's employment is terminated, whichever is later.

(4) Copying of documentation permitted

Notwithstanding any other provision of law, the person or entity may copy a document presented by an individual pursuant to this subsection and may retain the copy, but only (except as otherwise permitted under law) for the purpose of complying with the requirements of this subsection.

(5) Limitation on use of attestation form

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 chapter and sections 1001, 1028, 1546, and 1621 of title 18.

(6) Good faith compliance

(A) In general

Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.

(B) Exception if failure to correct after notice

Subparagraph (A) shall not apply if–

(i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,

(ii)the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and

(iii)the person or entity has not corrected the failure voluntarily within such period.

(C) Exception for pattern or practice violators

Subparagraph (A) shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2).

(c) No authorization of national identification cards

Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.

(d) Evaluation and changes in employment verification system

(1) Presidential monitoring and improvements in system

(A) Monitoring

The President shall provide for the monitoring and evaluation of the degree to which the employment verification system established under subsection (b) provides a secure system to determine employment eligibility in the United States and shall examine the suitability of existing Federal and State identification systems for use for this purpose.

(B) Improvements to establish secure system

To the extent that the system established under subsection (b) is found not to be a secure system to determine employment eligibility in the United States, the President shall, subject to paragraph (3) and taking into account the results of any demonstration projects conducted under paragraph (4), implement such changes in (including additions to) the requirements of subsection (b) as may be necessary to establish a secure system to determine employment eligibility in the United States. Such changes in the system may be implemented only if the changes conform to the requirements of paragraph (2).

(2) Restrictions on changes in system

Any change the President proposes to implement under paragraph (1) in the verification system must be designed in a manner so the verification system, as so changed, meets the following requirements:

(A) Reliable determination of identity

The system must be capable of reliably determining whether–

(i) a person with the identity claimed by an employee or prospective employee is eligible to work, and

(ii) the employee or prospective employee is claiming the identity of another individual.

(B) Using of counterfeit-resistant documents

If the system requires that a document be presented to or examined by an employer, the document must be in a form which is resistant to counterfeiting and tampering.

(C) Limited use of system

Any personal information utilized by the system may not be made available to Government agencies, employers, and other persons except to the extent necessary to verify that an individual is not an unauthorized alien.

(D) Privacy of information

The system must protect the privacy and security of personal information and identifiers utilized in the system.

(E) Limited denial of verification

A verification that an employee or prospective employee is eligible to be employed in the United States may not be withheld or revoked under the system for any reason other than that the employee or prospective employee is an unauthorized alien.

(F) Limited use for law enforcement purposes

The system may not be used for law enforcement purposes, other than for enforcement of this chapter or sections 1001, 1028, 1546, and 1621 of title 18.

(G) Restriction on use of new documents

If the system requires individuals to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral, then such document may not be required to be presented for any purpose other than under this chapter (or enforcement of sections 1001, 1028, 1546, and 1621 of title 18) nor to be carried on one's person.

(3) Notice to Congress before implementing changes

(A) In general

The President may not implement any change under paragraph (1) unless at least–

(i) 60 days,

(ii) one year, in the case of a major change described in subparagraph (D)(iii), or

(iii) two years, in the case of a major change described in clause (i) or (ii) of subparagraph (D),

before the date of implementation of the change, the President has prepared and transmitted to the Committee on the Judiciary of the House of Representatives and to the Committee on the Judiciary of the Senate a written report setting forth the proposed change. If the President proposes to make any change regarding social security account number cards, the President shall transmit to the Committee on Ways and Means of the House of Representatives and to the Committee on Finance of the Senate a written report setting forth the proposed change. The President promptly shall cause to have printed in the Federal Register the substance of any major change (described in subparagraph (D)) proposed and reported to Congress.

(B) Contents of report

In any report under subparagraph (A) the President shall include recommendations for the establishment of civil and criminal sanctions for unauthorized use or disclosure of the information or identifiers contained in such system.

(C) Congressional review of major changes

(i) Hearings and review

The Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of any major change described in subparagraph (D), shall hold hearings respecting the feasibility and desirability of implementing such a change, and, within the two year period before implementation, shall report to their respective Houses findings on whether or not such a change should be implemented.

(ii) Congressional action

No major change may be implemented unless the Congress specifically provides, in an appropriations or other Act, for funds for implementation of the change.

(D) Major changes defined

As used in this paragraph, the term "major change" means a change which would–

(i) require an individual to present a new card or other document (designed specifically for use for this purpose) at the time of hiring, recruitment, or referral,

(ii) provide for a telephone verification system under which an employer, recruiter, or referrer must transmit to a Federal official information concerning the immigration status of prospective employees and the official transmits to the person, and the person must record, a verification code, or

(iii)require any change in any card used for accounting purposes under the Social Security Act [42 U.S.C. 301 et seq.], including any change requiring that the only social security account number cards which may be presented in order to comply with subsection (b)(1)(C)(i) are such cards as are in a counterfeit-resistant form consistent with the second sentence of section 205(c)(2)(D) of the Social Security Act [42 U.S.C. 405(c) (2)(D)].

(E) General revenue funding of social security card changes

Any costs incurred in developing and implementing any change described in subparagraph (D)(iii) for purposes of this subsection shall not be paid for out of any trust fund established under the Social Security Act [42 U.S.C. 301 et seq.].

(4) Demonstration projects

(A) Authority

The President may undertake demonstration projects (consistent with paragraph (2)) of different changes in the requirements of subsection (b). No such project may extend over a period of longer than five years.

(B) Reports on projects

The President shall report to the Congress on the results of demonstration projects conducted under this paragraph.

(e) Compliance

(1) Complaints and investigations

The Attorney General shall establish procedures–

(A) for individuals and entities to file written, signed complaints respecting potential violations of subsection (a) or (g)(1),

(B) for the investigation of those complaints which, on their face, have a substantial probability of validity,

(C) for the investigation of such other violations of subsection (a) or (g)(1) as the Attorney General determines to be appropriate, and

(D) for the designation in the Service of a unit which has, as its primary duty, the prosecution of cases of violations of subsection (a) or (g)(1) under this subsection.

(2) Authority in investigations

In conducting investigations and hearings under this subsection–

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated,

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing, and

(C) immigration officers designated by the Commissioner may compel by subpoena the attendance of witnesses and the production of evidence at any designated place prior to the filing of a complaint in a case under paragraph (2).

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(3) Hearing

(A) In general

Before imposing an order described in paragraph (4), (5), or (6) against a person or entity under this subsection for a violation of subsection (a) or (g)(1), the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the

Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated subsection (a) or (g)(1), the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (4), (5), or (6).

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection–

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of–

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity–

(i) to comply with the requirements of subsection (b) (or subsection (d) if applicable) with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(5) Order for civil money penalty for paperwork violations

With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

(6) Order for prohibited indemnity bonds

With respect to a violation of subsection (g)(1), the order under this subsection may provide for the remedy described in subsection (g)(2).

(7) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless either (A) within 30 days, an official delegated by regulation to exercise review authority over the decision and order modifies or vacates the decision and order, or (B) within 30 days of the date of such a modification or vacation (or within 60 days of the date of decision and order of an administrative law judge if not so modified or vacated) the decision and order is referred to the Attorney General pursuant to regulations, in which case the decision and order of the Attorney General shall become the final agency decision and order under this subsection. The Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

(8) Judicial review

A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(9) Enforcement of orders

If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) Enjoining of pattern or practice violations

Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.

(g) Prohibition of indemnity bonds

(1) Prohibition

It is unlawful for a person or other entity, in the hiring, recruiting, or referring for employment of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring, recruiting, or referring of the individual.

(2) Civil penalty

Any person or entity which is determined, after notice and opportunity for an administrative hearing under subsection (e), to have violated paragraph (1) shall be subject to a civil penalty of $1,000 for each violation and to an administrative order requiring the return of any amounts received in violation of such paragraph to the employee or, if the employee cannot be located, to the general fund of the Treasury.

(h) Miscellaneous provisions

(1) Documentation

In providing documentation or endorsement of authorization of aliens (other than aliens lawfully admitted for permanent residence) authorized to be employed in the United States, the Attorney General shall provide that any limitations with respect to the period or type of employment or employer shall be conspicuously stated on the documentation or endorsement.

(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.

(3) Definition of unauthorized alien

As used in this section, the term “unauthorized alien” means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.

8 U.S.C. § 1324c: Penalties for Document Fraud

§1324c. Penalties for document fraud

(a) Activities prohibited

It is unlawful for any person or entity knowingly–

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this chapter,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this chapter, or

(4) to accept or receive or to provide any document lawfully issued to a person other than the possessor (including a deceased individual) for the purpose of complying with section 1324a(b) of this title.

(b) Exception

This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of title 18.

(c) Construction

Nothing in this section shall be construed to diminish or qualify any of the penalties available for activities prohibited by this section but proscribed as well in title 18.

(d) Enforcement

(1) Authority in investigations

In conducting investigations and hearings under this subsection–

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated, and

(B) administrative law judges, may, if necessary, compel by subpoena the attendance of witnesses and the production of evidence at any designated place or hearing.

In case of contumacy or refusal to obey a subpoena lawfully issued under this paragraph and upon application of the Attorney General, an appropriate district court of the United States may issue an order requiring compliance with such subpoena and any failure to obey such order may be punished by such court as a contempt thereof.

(2) Hearing

(A) In general

Before imposing an order described in paragraph (3) against a person or entity under this subsection for a violation of subsection (a) of this section, the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.

(B) Conduct of hearing

Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5. The hearing shall be held at the nearest practicable place to the place where the person or entity resides or of the place where the alleged violation occurred. If no hearing is so requested, the Attorney General's imposition of the order shall constitute a final and unappealable order.

(C) Issuance of orders

If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity has violated subsection (a) of this section, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (3).

(3) Cease and desist order with civil money penalty

With respect to a violation of subsection (a) of this section, the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of–

(A) not less than $250 and not more than $2,000 for each document used, accepted, or created and each instance of use, acceptance, or creation, or

(B) in the case of a person or entity previously subject to an order under this paragraph, not less than $2,000 and not more than $5,000 for each document used, accepted, or created and each instance of use, acceptance, or creation.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(4) Administrative appellate review

The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection.

(5) Judicial review

A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.

(6) Enforcement of orders

If a person or entity fails to comply with a final order issued under this section against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.