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Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act

Before the Immigration Reform and Control Act of 1986 (IRCA), the Immigration and Nationality Act (INA) permitted employers to hire illegal aliens. Courts relied heavily on this fact when determining that the Fair Labor Standards Act (FLSA) and other labor laws applied to undocumented workers. Under the IRCA, however, hiring an illegal alien has become a crime. The employer sanctions established under the IRCA thus appear to conflict with extending FLSA protection to illegal aliens.

The courts have not resolved this apparent conflict. The United States Court of Appeals for the Fifth Circuit held recently that the FLSA still protects illegal aliens but gave little analytical support for its holding. In another recent decision, however, the District Court for the Northern District of Ala-

3. Although it was a crime to harbor an illegal alien, the statute explicitly stated that employing an illegal alien did not constitute harboring. 8 U.S.C. § 1324(a) (1982). Employers of illegal aliens faced no penalty under the INA, but aliens caught working illegally were deported. Id. § 1251(a)(2).
5. See infra notes 26-31 and accompanying text. Most cases concerning illegal aliens' rights under federal labor laws have dealt with the National Labor Relations Act (NLRA). 29 U.S.C. §§ 151-169 (1982). Because the NLRA and the FLSA both aim at improving conditions for American workers by protecting all workers in the labor force, the rationale for extending the NLRA to illegal aliens also justifies extending the FLSA. See infra notes 79-80 and accompanying text. For example, the leading case on this issue, Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), ruled on the NLRA but was cited as authority in subsequent decisions on the FLSA. See, e.g., Alvarez v. Sanchez, 105 A.D.2d 1114, 1115, 482 N.Y.S.2d 184, 185 (1984).
6. 8 U.S.C. § 1324(a) (Supp. IV 1986). Enacted November 6, 1986, the IRCA imposes civil and criminal sanctions on employers who knowingly hire illegal aliens. See infra notes 51-53 and accompanying text.
7. See In re Reyes, 814 F.2d 168 (5th Cir. 1987) (holding that illegal alien may sue under FLSA); see infra notes 59-63 and accompanying text.
bama disagreed with the Fifth Circuit, finding that Congress undercut the justification for protecting illegal aliens under the FLSA by making employment of illegal aliens a crime.\(^8\) Resolving this issue will affect the three to seven million immigrants living in this country illegally,\(^9\) most of whom have come here to work.\(^10\) As long as illegal aliens remain a part of the United States work force,\(^11\) the determination of the IRCA's effect on illegal aliens' rights under the FLSA will have a major impact

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Measuring the number of apprehensions is not a foolproof method of estimating the population of illegal aliens. Many aliens who are apprehended enter the U.S. later in the same year. V. BRIGGS, supra, at 133. The Immigration and Naturalization Service (INS) also concentrates its apprehension efforts on the U.S. southwestern border, although Mexico accounts for only 60% of the annual inflow of illegal immigrants. Id. In addition most illegal immigrants are never caught. Id. at 133-34. Nonetheless the General Accounting Office has concluded that apprehension statistics provide the most comprehensive data on illegal aliens currently available. Id. at 134 (citing U.S. GENERAL ACCOUNTING OFFICE, PROBLEMS AND OPTIONS IN ESTIMATING THE SIZE OF THE ILLEGAL ALIEN POPULATION 17 (1982)). The statistics show a marked increase in the illegal immigrant population. Id. at 131-37.

10. Jobs are the primary magnet that attract illegal immigrants to this country. V. BRIGGS, supra note 9, at 158; see Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 65 (1985) [hereinafter Hearings on H.R. 3080] (testimony of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO); 132 CONG. REC. H10,593 (daily ed. Oct. 15, 1986) (statement of Rep. Bryant). Illegal aliens usually succeed in finding work, although they are concentrated in unskilled (farm work, service work, nonfarm labor) and semiskilled (operative) occupations. V. BRIGGS, supra note 9, at 158-59.

11. Despite the new employer sanctions, it is doubtful that illegal aliens will disappear from the American work force unless the underlying causes of illegal immigration are destroyed. For example, one commentator suggests that “[t]he best hope of ending the large-scale illegal immigration from Mexico lies in rapid economic development and changes in the distribution of benefits in that country.” M. MORRIS & A. MAYIO, CURBING ILLEGAL IMMIGRATION 8 (1982). Economic conditions in Mexico are not likely to change in the near future; it is therefore unlikely that illegal immigration from Mexico will decrease significantly. See id. at 11; infra note 110 and accompanying text.
This Note examines the apparent conflict between the pre-IRCA rationale for protecting illegal aliens under the FLSA and the IRCA's new employer sanctions to determine if illegal aliens are still entitled to FLSA protection. Part I discusses the rights historically granted to illegal aliens, the reasons courts have protected illegal aliens under the federal labor laws, and the conflict that has emerged since the IRCA was enacted. Part II analyzes the continued relevance of principles previously used to determine illegal aliens' rights under federal labor laws and applies those principles to determine whether the IRCA has undercut the established rationale for protecting illegal aliens. The Note concludes that continuing to extend FLSA protection to illegal aliens is not only justified but will strengthen the impact of employer sanctions and promote the goals of the new immigration law.

I. ILLEGAL ALIENS' RIGHTS IN THE WORKPLACE

Courts have historically recognized some rights for illegal aliens in the American work force, including the right to bring suit under the FLSA. Before the IRCA, courts found that extending FLSA protection to illegal aliens did not conflict with

12. Employer sanctions are not likely to end litigation involving illegal aliens under the FLSA. Illegal aliens often contract to work more than eight hours a day for less than minimum wage, and even then employers do not pay what they had promised. In Donovan v. Burgett Greenhouses, for example, illegal aliens worked nine hours per day, six days per week and were supposed to receive seven dollars per day. 100 Lab. Cas. (CCH) ¶ 34,504 (D.N.M. 1983). The employer was found to have withheld thousands of dollars in unpaid wages from these illegal aliens. Id. In Brennan v. El San Trading Corp., illegal aliens were paid five dollars per day for working at least 12 hours per day, six days per week. 73 Lab. Cas. (CCH) ¶ 33,032 (W.D. Tex. 1973). The court found they were due $114,400 in unpaid minimum wages and overtime compensation. Id. In both of these cases the Secretary of Labor initiated the action after investigating the employer.

The Department of Labor (DOL) may initiate an investigation because it has received complaints about a particular company, because it is targeting a specific industry that may be prone to FLSA violations, or as part of the DOL's routine enforcement program. Telephone interview with Lawrence Peterson, Department of Labor Area Director (Nov. 4, 1987). If as the result of such an investigation an employer is found to owe back wages to its employees, the employer is requested to pay even if those employees are illegal aliens who have been deported. Id. In such situations the DOL requests the employer to send back wage checks directly to the deported employees in their home countries. Id. If the employer cannot locate the employees, the employer is directed to pay the DOL, which attempts to locate the employees through their consulates. Id.
federal immigration laws. Recent changes in the immigration laws, however, threaten to undermine this right.

A. LEGAL RIGHTS OF ILLEGAL ALIENS

Although illegal aliens do not enjoy the same privileges as United States citizens,\(^3\) they do have rights in this country.\(^4\) More than a century ago the United States Supreme Court held that due process and equal protection do not apply solely to United States citizens.\(^1\) More recently the Court affirmed that these rights apply even to aliens "whose presence in this country is unlawful, involuntary, or transitory."\(^2\) Illegal aliens are allowed to educate their children in public schools,\(^1\) to bring civil suits for negligence resulting in personal injury\(^1\) or for breach of contract,\(^1\) to receive state health benefits,\(^2\) and to sue under federal civil rights laws.\(^2\)

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14. Federal law has provided since 1870 that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.


15. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The Court stated that "[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." Id.

16. Mathews, 426 U.S. at 77 (citing Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950) and Wong Wing v. United States, 163 U.S. 228, 238 (1896)); see Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").


Illegal aliens’ rights also extend to the workplace.\textsuperscript{22} Illegal aliens are attractive to employers because their illegal status allows them to be exploited.\textsuperscript{23} This incentive for employers to hire illegal aliens exasperates any attempt to control illegal immigration or to stop illegal aliens from displacing United States workers and reducing wages in an already crowded labor market.\textsuperscript{24} Before the IRCA, however, courts attempted to min-

\begin{itemize}
  \item \textsuperscript{23}This point is recognized by policy makers, see Hearings on H.R. 3080, supra note 10, at 64 (testimony of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO) (“It is our firm belief that [employers] want [illegal aliens] now because they are exploitable.”); id. at 32 (statement of Alan C. Nelson, Commissioner, INS) (“All too frequently the reality is that U.S. employers intentionally hire illegal aliens thereby depriving citizens and lawful aliens of employment.”), and by scholars, see House Comm. on the Judiciary, 99th Cong., 1st Sess., Impact of Illegal Immigration and Background on Legalization Programs of Other Countries 12 (Comm. Print 1985) (hereinafter Impact of Illegal Immigration).
  \item Although illegal aliens are generally easy to intimidate and therefore work for low pay, some commentators suggest that an additional attraction for employers is that illegal aliens are more motivated and work harder than natives. Kutchins & Tweedy, No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers, 5 INDUS. REL. L.J. 339, 362 n.132 (1983). This attraction may be offset by the fact that most undocumented workers are poorly educated and speak little English. Id.
  \item Scholars differ on whether and to what extent such displacement occurs. Some argue that undocumented workers affect the economy negatively by accepting low-paying, low-status jobs, thereby displacing more demanding American workers and lowering wages and working conditions throughout the labor market. See, e.g., V. Briggs, supra note 9, at 164-65. Others argue that illegal aliens merely accept jobs that Americans would never take, and that because these jobs are an essential part of the American economy, illegal aliens have a positive effect. See, e.g., Flores, The Impact of Undocumented Migration on the U.S. Labor Market, 5 HOUS. J. Int’l L. 287, 305-07 (1983). Still others argue that these effects vary; that the wages of white American males do not decline when illegal immigrants enter the labor market; that the wages of black American men may increase; and that the wages of other illegal immigrants suffer the most severe adverse impact. See Borjas, Immigrants, Minorities and Labor Market Competition, 40 INDUS. & LAB. REL. REV. 382, 391 (1987).
  \item Researchers agree that there is insufficient data to estimate the extent to which illegal aliens displace American workers. For a comprehensive review of the literature, see Impact of Illegal Immigration, supra note 23, at 15-22.
  \item The Supreme Court tends to agree with those scholars who find a negative impact. In De Canas v. Bica it held: “Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of
imize this incentive\textsuperscript{25} by consistently recognizing illegal aliens’ right to sue their employers under the FLSA.\textsuperscript{26}

The FLSA, which establishes minimum wages and maximum hours for all workers employed in interstate commerce,\textsuperscript{27} does not specifically include illegal aliens in the scope of its protections. Since passage of the FLSA in 1938, however, courts have consistently found that its purpose is to protect the entire United States work force by ensuring that “the unprotected, unorganized and lowest paid of the nation’s working population” are not exploited.\textsuperscript{28} This segment of the work force includes illegal aliens, who tend to work in a secondary jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens.” 424 U.S. 351, 356-57 (1976).

\textsuperscript{25} There are reasons for protecting illegal aliens under the federal labor laws apart from safeguarding the economic interests of U.S. workers and curbing illegal immigration. For a discussion of the constitutional and human rights perspective on this issue, see Comment, A Human Rights Approach to the Labor Rights of Undocumented Workers, 74 CALIF. L. REV. 1715 (1986).

\textsuperscript{26} A New York state court, for example, held that an illegal alien may recover under the FLSA. See Alvarez v. Sanchez, 105 A.D.2d 1114, 1115, 482 N.Y.S.2d 184, 185 (1984). Other courts have applied the FLSA to illegal alien employees without raising the issue of their immigration status. See American Waste Removal Co. v. Donovan, 748 F.2d 1406 (10th Cir. 1984); Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983), cert. denied, 464 U.S. 850 (1984); Marshall v. Lancarte, 632 F.2d 1196 (5th Cir. 1980); Donovan v. Burgett Greenhouses, 100 Lab. Cas. (CCH) ¶ 34,504 (D.N.M. 1983), aff’d, 759 F.2d 1483, 34,689 (10th Cir. 1985); Marshall v. Presidio Valley Farms, 512 F. Supp. 1195 (W.D. Tex. 1981); Brennan v. El San Trading Corp., 73 Lab. Cas. (CCH) ¶ 33,032 (W.D. Tex. 1973).

\textsuperscript{27} In establishing the minimum wage and maximum hours standards of the FLSA, Congress found that poor labor conditions are self-perpetuating, and that the health, efficiency, and general well-being of workers declines as these conditions are allowed to continue. See 29 U.S.C. § 202 (1982). Congress also found that the prevalence of substandard working conditions burdens the free flow of commercial goods, constitutes unfair competition in commerce, leads to labor disputes and interferes with orderly and fair marketing. See id.

\textsuperscript{28} The FLSA was designed to correct these problems by creating a uniform minimum standard under the assumption that protecting workers from exploitation would create a healthy economy. Id.

28. Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 n.18 (1945). Exploitation of some workers ultimately harms them all. The FLSA attempts to prevent such exploitation. See id. at 706 (in passing FLSA, Congress intended “to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce”); International Ladies’ Garment Workers’ Union v. Donovan, 722 F.2d 795, 807-08 (D.C. Cir. 1983) (FLSA’s purpose is “to protect all covered employees and employers from the economic consequences of subminimum wages paid to a small sector of the labor force”); Wirtz v. Patelos Door Corp., 280 F. Supp. 212, 216 (E.D.N.C. 1968) (“[The FLSA] was meant to secure to certain members of the American labor force,
labor market characterized by low wages, unattractive working conditions, and minimal opportunities for advancement.\textsuperscript{29} To implement the FLSA fully, therefore, courts extended its coverage to illegal aliens.\textsuperscript{30} Because this extension was apparently never challenged,\textsuperscript{31} the same courts did not address the justifications for protecting illegal workers under the FLSA.

B. THE SURE-TAN DECISION

The leading case addressing federal labor law application to illegal aliens is \textit{Sure-Tan, Inc. v. National Labor Relations Board},\textsuperscript{32} a case interpreting the National Labor Relations Act (NLRA). In \textit{Sure-Tan} an employer reported some of its undocumented employees to the Immigration and Naturalization Service (INS) after they voted to join the Chicago Leather

who could not sufficiently protect themselves, relief from substandard wages and excessive hours."\textsuperscript{79}).

\textsuperscript{29} Kutchins & Tweedy, \textit{supra} note 23, at 344 (citing \textit{NATIONAL COMMISSION FOR MANPOWER POLICY, MANPOWER AND IMMIGRATION POLICIES IN THE UNITED STATES} 160 (1978)). One study found that, in every industrial division examined, nonsupervisory illegal aliens earned only 60\% of what their U.S. counterparts earned; the illegal aliens also worked longer hours than the U.S. workers. S. \textit{WEINTRAUB} \& S. \textit{ROSS}, \textit{"TEMPORARY" ALIEN WORKERS IN THE UNITED STATES: DESIGNING POLICY FROM FACT AND OPINION} 59 (1982) (citing D. \textit{NORTH} \& M. \textit{HOUSTOUN}, \textit{THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET: AN EXPLORATORY STUDY} 112-31 (1976)). The study also found that almost 24\% of illegal aliens earn less than the minimum wage, compared to only 6.2\% of U.S. workers. \textit{Id.} See cases cited \textit{supra} note 12 for details on hours worked and wages earned by illegal aliens.

\textsuperscript{30} In \textit{Donovan v. Burgett Greenhouses}, for example, the court applied FLSA standards to illegal alien employees and restrained their employer from withholding unpaid wages. 100 Lab. Cas. (CCH) \textsuperscript{f} 34,504, at 46,067 (D.N.M. 1983), \textit{aff'd}, 759 F.2d 1483, 103 Lab. Cas. (CCH) \textsuperscript{f} 34,689 (10th Cir. 1985). The court explained: "First, the restraint is meant to increase the effectiveness of the [FLSA] by depriving defendants of any gains accruing to them through their violations. Second, the restraint is meant to protect those employers who comply with the Act from having to compete with those employers who do not comply." \textit{Id.}

\textsuperscript{31} \textit{See} cases cited \textit{supra} note 26. In these cases, courts applied the FLSA to workers who happened to be illegal aliens, without any discussion of whether, as illegal aliens, those workers were entitled to the FLSA's protection. Because the courts always implicitly assumed that the FLSA protected illegal aliens, these early FLSA cases provide little analytical foundation to counter the current challenge against this policy. \textit{Alvarez v. Sanchez}, 105 A.D.2d 1114, 482 N.Y.S.2d 184 (App. Div. 1984), is the only pre-IRCA case that even touches upon this issue, and that court cited \textit{Sure-Tan, Inc. v. NLRB}, 467 U.S. 883 (1984), an NLRA case, as precedent. 105 A.D.2d at 1115, 482 N.Y.S.2d at 185; \textit{see infra} note 80 and accompanying text.

Workers Union. The National Labor Relations Board (NLRB) subsequently charged the aliens' former employer with unfair labor practices under the NLRA. The Supreme Court held that the NLRA applies to unfair labor practices committed against illegal aliens and that the employer had therefore engaged in an unfair labor practice by reporting its employees to the INS.

In deciding that the NLRA applied to illegal aliens, the Court in *Sure-Tan* focused on the NLRA's broad definition of employee and the possibility of conflict with the Immigration and Nationality Act (INA). The Court held that the term "em-

33. *Id.* at 886-87. The INS arrested the employees, who chose to leave the country rather than face deportation. *Id.* at 887.

34. *Id.* at 887. The NLRA protects the right of workers to engage in collective bargaining, 29 U.S.C. § 157 (1982), and makes it a crime to discharge employees, *id.* § 162, in retaliation for participating in union activities, *id.* § 158(a)(3). Under the Act, the NLRB is empowered to prevent any person from engaging in an unfair labor practice. *Id.* § 160(c). Once a charge has been filed with the NLRB, the Board has six months to issue a complaint to the accused, containing notice of a hearing before the NLRB or its designated agent. *Id.* § 160(b). The NLRB hears evidence and bases its decisions on a preponderance of the testimony. *Id.* § 160(c). If the NLRB finds that the person named in the complaint engaged in an unfair labor practice, it may issue a cease-and-desist order and order reinstatement with or without back pay. *Id.* § 160(a)-(c). The NLRB may petition a U.S. Court of Appeals to enforce its order. *Id.* § 160(e). A person aggrieved by an order may also obtain review in a U.S. Court of Appeals. *Id.* § 160(f).

*Sure-Tan* first came to the Seventh Circuit on a petition for enforcement. See NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978) (holding that illegal aliens are employees under NLRA and ordering enforcement). Four years later, the NLRB petitioned for enforcement again. See NLRB v. Sure-Tan, Inc., 672 F.2d 592 (7th Cir. 1982) (affirming NLRB's finding of unfair labor practice but modifying Board's remedy and again ordering enforcement). From there the case went to the Supreme Court. Sure-Tan, Inc. v. NLRB, 460 U.S. 1021 (1983) (granting certiorari).

35. 467 U.S. at 891-94.

36. *Id.* at 894-98. The NLRB had found that the employer's conduct constituted a "constructive discharge" of the employees in violation of the NLRA and ordered reinstatement with back pay. See *id.* at 887-89. The Seventh Circuit affirmed this finding, enforcing the NLRB's order but modifying it to require that the offers for reinstatement be written in Spanish and left open for four years so that the workers could make arrangements to enter the country legally. 672 F.2d at 606. The Seventh Circuit and the NLRB agreed on six months back pay for the discharged employees. *Id.*

The Supreme Court modified the circuit court's remedy, however, and determined that the workers could not receive back pay for the period during which they were "unavailable for work" because they were in Mexico and unable to enter the United States legally. 467 U.S. at 898-905. The Court also held that the circuit court exceeded its authority by modifying the NLRB's order regarding the reinstatement offer. *Id.* at 905-06.

37. 467 U.S. at 891-94.
ployee in section 2(3) of the NLRA includes undocumented aliens. To support its conclusion, the Court noted that the Act does not expressly exclude illegal aliens and that the NLRA's coverage of illegal aliens is consistent with the Act's purpose because it prevents formation of a subclass of workers which might undermine a union's strength.

The Court then found that applying the NLRA to illegal aliens did not conflict with the INA. The Court determined that a primary goal of the immigration laws is to preserve jobs for United States workers by controlling illegal immigration.

Uniform application of the NLRA promotes this INA goal by

38. The NLRA defines employee as follows:
   The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.


The Court noted that the task of defining employee belonged to the agency created to administer the Act and therefore gave "considerable deference" to the NLRB's interpretation. 467 U.S. at 891.

39. 467 U.S. at 891-92.

40. Id.

41. Id. at 892. The Court described the NLRA's purpose as "encouraging and protecting the collective-bargaining process." Id. For other case holdings on the purpose of the NLRA, see, for example, H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970) (NLRA's purpose is to promote free flow of commerce by ensuring employers and employees negotiate to resolve their disputes); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965) (primary purpose of Act is "to redress the perceived imbalance of economic power between labor and management"); Bishop v. NLRB, 502 F.2d 1024, 1027 (5th Cir. 1974) ("The underlying purpose of the Act is to maintain industrial peace.").

In Sure-Tan the Court found that refusing to extend NLRA protection to illegal aliens would undermine the Act's purpose. 467 U.S. at 892. Aliens employed under substandard conditions without NLRA protection would have little reason to participate in labor unions. Under such circumstances "there would be created a subclass of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining." Id.

42. 467 U.S. at 892-94.

43. Id. at 893.
staving off competition from illegal aliens: if employers must treat illegal and legal workers equally, they have less reason to prefer illegal aliens.\textsuperscript{44} As the number of available jobs declines, illegal aliens will have less reason to immigrate.\textsuperscript{45} The Court further noted that because the employment relationship between an employer and an undocumented alien was not illegal,\textsuperscript{46} protecting aliens under the NLRA did not conflict with the terms of the INA.\textsuperscript{47}

C. ILLEGAL ALIENS’ RIGHTS AFTER THE IRCA

After fifteen years of attempting to reform immigration laws,\textsuperscript{48} Congress passed the Immigration Reform and Control

\textsuperscript{44} Id. at 893-94.
\textsuperscript{45} The Court stated:
Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. \textit{Id.} at 893-94.

Other courts, both before and after \textit{Sure-Tan}, adopted this line of reasoning. \textit{See} \textit{Local 512, Warehouse & Office Workers’ Union v. NLRB, 795 F.2d 705, 719 (9th Cir. 1986); NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183 (9th Cir. 1979); see also Note, Immigration Reform: Solving the “Problem” of the Illegal Alien in the American Workforce, 7 CARDOZO L. REV. 223, 244-45 (1985) (enforcing labor laws is more effective than employer sanctions at controlling illegal immigration).}

\textsuperscript{46} 467 U.S. at 893. \textit{Sure-Tan} was decided before the IRCA criminalized the hiring of illegal aliens. The Court found that the INA evinced only a “peripheral concern” with the employment of illegal aliens; its central concern was admitting aliens to this country and subsequent treatment of those lawfully here. \textit{Id.} at 892 (citing De Canas v. Bica, 424 U.S. 351, 359 (1976)).

\textsuperscript{47} 467 U.S. at 893.
\textsuperscript{48} H.R. REP. No. 682(I), 99th Cong., 2d Sess. 51, \textit{reprinted} in 1986 U.S. CODE CONG. & ADMIN. NEWS 5655 [hereinafter REP. No. 682(I)]. Congress had struggled since the early 1970s to reform the immigration laws and impose employer sanctions.

In 1971 the House Judiciary Committee subcommittee with special jurisdiction over immigration, then chaired by Rep. Peter W. Rodino, began hearings on the problem of undocumented aliens. \textit{Id.} at 52, \textit{reprinted} in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5555. The Subcommittee concluded in 1975 that “the adverse impact of illegal aliens was substantial, and warranted legislation both to protect U.S. labor and the economy, and to assure the orderly entry of immigrants into this country.” \textit{Id. As Congress examined the problem, bills prohibiting knowing employment of illegal aliens were continuously introduced; but throughout the Nixon, Ford and Carter administrations, legis-
Act of 1986. A response to the growing perception that illegal aliens were threatening the national integrity and flooding the job market, the IRCA amends the INA by imposing civil and criminal sanctions on employers who knowingly hire illegal aliens. These employer sanctions supplement the visa reg- lators failed to enact any of the proposed legislation. Id. at 52-53, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5656-57.

In 1981, Sen. Alan Simpson and Rep. Romano Mazzoli, respective Chairs of the Senate Judiciary Subcommittee on Immigration and Refugee Policy and the House Judiciary Subcommittee on Immigration, Refugees and International Law, held the first joint hearings on immigration since the 1951 hearings that preceded adoption of the INA. Id. at 54, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5658. Joint hearings later that year culminated in the Simpson-Mazzoli bill (Immigration Reform and Control Act of 1982: Joint Hearings Before the Subcomm. on Immigration, Refugees and International Law and Senate Judiciary Comm. Subcomm. on Immigration and Refugee Policy to Consider H.R. 5572, 97th Cong., 2d Sess. 4-81 (1982) (text of Simpson-Mazzoli bill)). Id. The bill was designed to reform unworkable provisions in the current immigration law and gain control of the United States’s borders. Id. It included employer sanctions. Id.


50. See 132 CONG. REC. H10,587 (daily ed. Oct. 15, 1986) (statement of Rep. Fish). Our integrity as a nation is threatened by this flood of illegal immigration, according to Attorney General Edwin Meese III, who said: “We cannot fairly speak of ourselves as a sovereign nation if we cannot responsibly decide who may cross our borders.” Hearings, supra note 10, at 4; see REP. No. 682(I), supra note 48, at 46, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5650 (“[L]egislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.”) (emphasis added).

51. The IRCA imposes civil fines from $250 to $10,000 for each illegally employed alien, depending on the number of previous violations. 8 U.S.C. § 1324a(e)(4)(A) (Supp. IV 1986).

52. Criminal penalties include a fine of up to $3000 for each illegally employed alien and imprisonment for up to six months for repeated violations. Id. § 1324a(f)(1).

53. The Act states: “It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—(A) an alien knowing the alien is an unauthorized alien . . . or (B) an individual without complying with the requirements of subsection (b) of this section. Id. § 1324a(a)(1). Subsection (b) outlines the system by which employers are required to verify the citizenship or immigration status of their employees. See id. § 1324a(b).

In addition to the employer sanctions, the IRCA prohibits discrimination in employment based on national origin or, in the case of “citizens and in-
quirements and deportation provisions already in place to control immigration. Along with appropriations for increased enforcement of the immigration laws, the employer sanctions are the chief means by which the architects of the IRCA hope to discourage illegal entries.

The employer sanctions imposed by the IRCA raise the issue whether illegal aliens are still protected by federal labor laws. Unfortunately, neither the terms of the IRCA or its legislative history indicate that Congress specifically addressed the IRCA’s effect on the FLSA’s coverage of illegal aliens. Never-

tending citizens," based on the individual’s citizenship status. Id. § 1324b(a)(1). The IRCA establishes amnesty for some illegal aliens. Id. § 1255a; see infra note 55. The IRCA also makes several changes in the system for legal immigration, most notably establishing a special procedure for admitting H-2 seasonal workers in agriculture. 8 U.S.C. §§ 1160-1161 (Supp. IV 1986).

54. See 8 U.S.C. § 1201 (1982). No immigrant may enter the United States without a valid immigrant visa. Id. § 1181(a)(1). United States consular officers may issue immigrant visas. Id. § 1201(a)(1) (Supp. IV 1986). The number of immigrant visas they may issue, however, is limited by a numerical quota system based on country of origin and other special classifications, for example, relatives of U.S. citizens. See id. § 1151 (1982).

55. See id. §§ 1251-1254. An alien who “entered the United States without inspection . . . or is in the United States in violation of this chapter or in violation of any other law of the United States” shall be deported. Id. § 1251(a)(2).

56. In addition to any other authorized amounts, Congress authorized $422 million for fiscal year 1987 and $419 million for fiscal year 1988 to be paid to the Department of Justice to carry out the IRCA. Id. § 1101 note (Supp. IV 1986). Of these amounts, Congress required that sufficient funds be available to increase the number of INS border patrol personnel in agriculture. 136 CONG. REC. S16,880 (daily ed. Oct. 17, 1986). Representative Rodino referred to employer sanctions as one of the “fundamental twin components of immigration reform.” 132 CONG. REC. H10,584 (daily ed. Oct. 15, 1986).


58. Although Congress did not specifically address the IRCA’s impact on the FLSA, the House Judiciary Committee did state that it in no way intended for the IRCA’s employer sanctions to minimize illegal aliens’ protection under
theless, by criminalizing employment of illegal aliens, the IRCA appears to have destroyed one of the foundations of Sure-Tan’s analysis: because it is now a crime to hire undocumented workers, protecting them under federal labor laws may conflict with the terms of the newly amended INA. As a result post-IRCA courts might deny FLSA protection to illegal aliens.

The only two courts to consider the post-IRCA application of the FLSA reached opposite conclusions. In In re Reyes, the United States Court of Appeals for the Fifth Circuit upheld the FLSA’s coverage of illegal aliens. Specifically, the Fifth Circuit held that inquiry into the documentation of alien petitioners was irrelevant for purposes of determining whether they were covered by the FLSA. The circuit court did not, however, federal labor laws. REP. NO. 682(I), supra note 48, at 58, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS at 5662. The Committee made explicit reference to the NLRA and cited the Court’s finding in Sure-Tan that applying the NLRA to illegal aliens helps maintain a standard for legally employed workers by preventing competition from an exploited subclass of workers. See id. The Committee probably focused its attention on the NLRA because illegal aliens’ rights under that Act had been litigated, whereas their rights under the FLSA had not. See supra notes 30-31 and accompanying text.

59. 814 F.2d 168 (5th Cir. 1987). In Reyes migrant farm workers, with the help of Texas Rural Legal Aid, brought suit under the FLSA and the Agricultural Worker Protection Act (AWPA) seeking a writ of mandamus directing the district court to withdraw a discovery order that forced them to answer questions about their citizenship and immigration status. Id. at 169-70.

60. Id. at 170.

61. Id. The district court’s discovery order directed the petitioners to answer the following questions:

    Are you a citizen of the United States? If so, were you born in the United States? If so, please state where you were born and your birthdate. If you are a naturalized citizen of the United States, please state when and where you became a citizen of the United States. If you are not a citizen of the United States, please state your immigration status.

Id.

The district court had granted discovery because defendants asserted that a legal services corporation is not entitled to represent undocumented aliens and because of the question of illegal aliens’ coverage under the federal labor laws. Id. With regard to the first claim, the Fifth Circuit held that the question of representation under the Legal Services Corporations Act cannot be considered in any proceeding in which a person is represented by legal services. Id. The inquiry into petitioners’ immigration status was therefore irrelevant to this issue, as it was to the FLSA question. Id.

The circuit court also noted that, although a discovery order is generally not appealable, in this case the information sought was not only irrelevant but could also harm the petitioners if they were forced to respond. Id. The fear of “collateral wholly unrelated consequences” if the farm workers revealed their immigration status could “inhibit [them] in pursuing their rights in the case” and bring “embarrassment and inquiry into their private lives which was not justified.” Id. The writ of mandamus was therefore appropriate. Id.
ever, refer to the IRCA or Sure-Tan in its analysis. Instead, it simply noted that "it is well established that the . . . Fair Labor Standards Act [applies] to citizens and aliens alike." To support this assertion the circuit court relied solely on the FLSA's broad definition of employees covered by the Act.

In Patel v. Sumani Corp., the Federal District Court for the Northern District of Alabama refused to follow Reyes. The district court recognized that illegal aliens do have some rights under the United States Constitution, but it rejected

62. Id. Judge Edith H. Jones disagreed with this finding and in her dissent noted that "previously, no court has explicitly permitted an undocumented alien to recover the damages and penalties provided for in this statute." Id. at 171. Judge Jones apparently disregarded, or was unaware of, Alvarez v. Sanchez, 105 A.D.2d 1114, 482 N.Y.S.2d 184 (1984). See supra note 26. Judge Jones also noted that the AWPA's goal of setting minimum standards for American farm workers and discouraging illegal immigration is undercut by allowing undocumented workers to sue and recover benefits on a par with legally employed workers. 814 F.2d at 172 (Jones, J., dissenting).


With regard to illegal aliens' rights under the AWPA the circuit court noted that that Act covers any "individual" employed in agricultural work, except H-2 workers as defined under 8 U.S.C. § 1101(a)(15)(H)(ii) (1982). Because the issue whether petitioners were H-2 workers had not been raised, the court concluded that they were protected by the AWPA. 814 F.2d at 170.

64. 660 F. Supp. 1528 (N.D. Ala. 1987), appeal docketed, No. 87-7411 (11th Cir. March 28, 1988). Rajni Patel was a lawyer from India who came to the United States in 1982 on a visitor's visa and stayed after it expired. Id. at 1528. In 1983 he left New Orleans for Birmingham, Alabama, ostensibly to work for defendants Manibhai and Dilip Patel (no relation to petitioner). Id. They claimed that he was never employed by them, or by Sumani Corp., which managed the Quality Inn where Rajni stayed. Id. at 1528-29. Rajni did perform some work for Sumani while he stayed at the hotel, but Sumani claimed to have paid him as an independent contractor. Id. at 1529. Rajni left Birmingham in 1985 to return to New Orleans. Id. He filed suit against Sumani almost a year later. Id.

65. 660 F. Supp. at 1529. The district court found that Reyes was completely without precedent. Id. at 1529 (citing Reyes, 814 F.2d at 171 (Jones, J., dissenting)). The court, like Judge Jones, apparently ignored Alvarez v. Sanchez, 105 A.D.2d 1114, 482 N.Y.S.2d 184 (1984). See supra note 26. It also ignored cases in which illegal aliens were treated without comment as any other employees owed back wages. See American Waste Removal Co. v. Donovan, 748 F.2d 1406, 1409 n.1 (10th Cir. 1984) (suit brought under Service Contract Act, applying "logic and reasoning" underlying FLSA); Marshall v. Lancarte, 632 F.2d 1196, 1197 (5th Cir. 1980) (suit brought under FLSA). These cases were made known to the court in a position paper from the Department of Labor, filed with the court on April 7, 1987. See 660 F. Supp. at 1529.

66. 660 F. Supp. at 1530. For a discussion of aliens' rights under the Constitution, see supra notes 13-21 and accompanying text. Congress may nonetheless pass laws which distinguish between citizens and aliens in their
the notion set forth in *Reyes* that because illegal aliens are employees within the FLSA's definition they may sue their employers for violating the Act. Construing the FLSA to avoid a conflict with the IRCA, the district court held that interpreting FLSA protection to apply to illegal aliens would "so obviously conflict" with the IRCA that it would "fly in the face of what Congress has attempted to do."

In reaching its conclusion, the district court suggested that *Sure-Tan*’s reasoning no longer applied. The court noted that the amended INA significantly concerns itself with the employment of illegal aliens. Because of this concern, which the INA did not evidence at the time of *Sure-Tan*, the district court in *Patel* held that "the application of the . . . FLSA to illegal aliens conflicts with the terms of the INA." The district court then found that denying illegal aliens application. 660 F. Supp. at 1531 (citing Mathews v. Diaz, 426 U.S. 67, 78 n.12 (1976)); see supra note 13.

67. "The fact that the FLSA defines an employee as 'any individual employed by an employer' does not mean that an illegal alien employed by an employer automatically falls within the purview of the FLSA." 660 F. Supp. at 1531 (emphasis in original).

68. See id. at 1529. In attempting to construe the FLSA, the court did as *Sure-Tan* suggested and turned to the agency charged with enforcing the law, asking the DOL for its position on whether the FLSA included illegal aliens. Id. at 1529; see *Sure-Tan*, Inc. v. NLRB, 467 U.S. 883, 891 (1984). The DOL replied that "the right of an illegal alien, who is otherwise an 'employee,' to maintain an action under this statute seems clear." Secretary of Labor's Statement of Position, April 7, 1987, p. 3 [hereinafter Statement]. The court disregarded the DOL's position, claiming that the DOL "cite[d] no case and no legislative history in support of its position." 660 F. Supp. at 1529; cf. cases cited supra note 65.

69. 660 F. Supp. at 1531. The district court granted summary judgment in favor of defendants, who claimed that plaintiff Rajni Patel could not bring suit under the FLSA because he was an illegal alien. Id. at 1536.

70. See id. at 1532-33.

71. Id. at 1533 (emphasis in original). The court noted not only the criminal and civil sanctions against employers who knowingly hire or recruit illegal aliens, but also the penalties for continuing to employ an alien who has become illegal and for trying to circumvent the sanctions by hiring illegal aliens as independent contractors. Id. The IRCA prohibits any employment of an illegal alien based on "contract, subcontract, or exchange." 8 U.S.C. § 1324a(a)(4) (Supp. IV 1986).

The district court in *Patel* further noted that the antidiscrimination provisions of the IRCA specifically exclude illegal aliens from coverage. 660 F. Supp. at 1533. The court concluded that under these amendments, employing an illegal alien is illegal. Id.

72. Id. The Supreme Court in *Sure-Tan* had found no conflict between the terms of the original INA and applying the NLRA to illegal aliens. 467 U.S. at 892-94. See supra notes 42-43 and accompanying text.
FLSA protection was consistent with the goals of the IRCA. According to the court, enforcing minimum wage and hour provisions for illegal aliens encourages them to enter illegally to work, while denying enforcement furthers the INA goal of discouraging illegal immigration and has no adverse impact on legally employed workers. The court concluded that protecting illegal aliens under the FLSA would "effectively repudiate the policy and purpose behind the recent amendments to the INA."

II. THE IRCA'S EFFECT ON ILLEGAL ALIENS' RIGHTS UNDER THE FLSA

The conflict between Reyes and Patel highlights the need to consider a variety of factors before determining the impact of the IRCA on illegal aliens' rights under the FLSA. This Note contends that the Patel court incorrectly characterized the IRCA's goals and failed to analyze completely the factors that motivate illegal immigration. The paucity of analysis in the Reyes decision provides a weak base from which to attack Patel. The inadequacy of Reyes, however, does not mean that other courts should adopt the reasoning of Patel. The continued presence of undocumented workers in the United States economy and the continuing need to maintain jobs and working conditions for individuals authorized to work demands that the courts continue to protect illegal aliens under the FLSA. This Section applies the principles established in Sure-Tan to demonstrate that protecting illegal aliens under federal labor laws is consistent with the goals and policy of the IRCA.

73. The IRCA's goal, as defined in Patel, was to remove an economic incentive for illegal immigration and "to correct a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country." 660 F. Supp. at 1534. On this last point the court has misinterpreted congressional intent. See infra notes 107-08 and accompanying text.

74. 660 F. Supp. at 1534. Although foreign nationals may indeed be encouraged to seek employment in a nation that enforces wage and hour standards for all workers, such enforcement will discourage prospective employers. See supra note 45 and accompanying text.

75. 660 F. Supp. at 1534. Courts generally have held that denying labor law protection to illegal aliens has an adverse impact on legally employed workers. See cases cited supra note 28 and accompanying text.

76. 660 F. Supp. at 1535.

77. The Fifth Circuit provided no legal or policy analysis supporting its conclusion that illegal aliens could sue under the FLSA. 814 F.2d 168, 170 (1987); see supra notes 62-63 and accompanying text.
A. THE RELEVANCY OF SURE-TAN’S PRINCIPLES

By refusing to use Sure-Tan as precedent for extending FLSA protection to illegal aliens, the district court in Patel has challenged Sure-Tan’s relevance to a post-IRCA assessment of illegal aliens’ rights under the FLSA. Sure-Tan’s principles, however, remain fully relevant.

Although Sure-Tan dealt with the NLRA rather than the FLSA, general principles underlying Sure-Tan’s analysis are relevant to determining illegal aliens’ rights under the FLSA because the NLRA and the FLSA share common goals. Both the NLRA and the FLSA aim to maintain adequate working conditions throughout the United States labor market to ensure a healthy national economy. The NLRA employs collective bargaining to achieve this goal, while the FLSA relies on legislatively imposed standards. Despite this difference, both laws logically require that their standards apply uniformly to all workers to avoid creating an economic subclass that would undermine the labor laws’ ultimate goals. Recognizing this common central concern, courts have adopted the Sure-Tan rationale used to extend NLRA protection to illegal aliens to justify granting illegal aliens rights under the FLSA as well.

In addition, the underlying policy considerations that guided the Supreme Court in Sure-Tan are as relevant today as

79. With regard to the NLRA, Congress found that “protection by law of the right of employees to organize and bargain collectively safeguards commerce” and that denying this right aggravates business depressions by “depressing wage rates and the purchasing power of wage earners.” 29 U.S.C. § 151 (1982). With regard to the FLSA, Congress found similarly that standard working conditions weaken the national economy. Id. § 202; see supra note 27.
80. See Alvarez v. Sanchez, 105 A.D.2d 1114, 1115, 482 N.Y.S.2d 184, 185 (App. Div. 1984) (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), as authority for extending FLSA protection to illegal aliens). The Patel court claimed that there was no precedent in Reyes for application of Sure-Tan to the FLSA. Patel, 660 F. Supp. at 1529. The district court in Patel, nonetheless, applied the analytical principles set forth in Sure-Tan and concluded that, according to those principles, FLSA protection could not be extended to illegal aliens. Id. at 1534.

Analytically, the Supreme Court in Sure-Tan relied on two major principles: whether the labor law includes illegal aliens among its protected employees and whether such inclusion conflicts with the goals and policies of the immigration law. See Sure-Tan v. NLRB, 467 U.S. 883, 891-94 (1984). The Patel court’s step-by-step refutation of these principles, see 660 F. Supp. at 1531-35; supra notes 68-72 and accompanying text, implies that the principles relied on in Sure-Tan were relevant to the issue before the court in Patel—whether the FLSA still protects illegal aliens.
they were in 1984 when Justice O'Connor wrote the majority opinion. Debate in Congress over the IRCA focused on many of the factors raised in Sure-Tan: what motivates workers to enter this country illegally, what motivates employers to hire illegal aliens, and how the United States can best gain control of its borders. The Supreme Court in Sure-Tan addressed similar questions and found that employers will be less likely to hire illegal aliens if the law enforces equal rights for documented and undocumented workers. If employers stop hiring, the Court reasoned, illegal aliens will stop immigrating. Passage of the IRCA’s employer sanctions has not changed the basic factors that the Court recognized as motivating illegal aliens and their employers. Thus the Supreme Court’s analysis of the interplay between the labor laws and the immigration laws provides the appropriate approach to a determination of illegal aliens’ post-IRCA rights under the FLSA.

B. RECONCILING THE IRCA AND THE PROTECTION OF ILLEGAL ALIENS UNDER THE FLSA

The analytical principles and policy considerations in the Sure-Tan decision are, as noted, relevant to the question of whether the IRCA’s employer sanctions now preclude FLSA protection of illegal aliens. Applying these principles will demonstrate that protecting illegal aliens under the FLSA is not only consistent with the IRCA, but reinforces the goals and policies of that Act.

1. Illegal Aliens and the FLSA’s Definition of Employee

Before the IRCA most courts applied the FLSA to illegal aliens without discussing whether illegal aliens were employees under the FLSA, assuming implicitly that the FLSA protected illegal aliens. In Patel v. Sumani, however, a district court challenged that assumption. Because of the challenge raised

81. See infra notes 103, 106 and accompanying text. Congress also addressed the role of the federal labor laws in light of immigration reform. See infra notes 107-08 and accompanying text.
82. See 467 U.S. at 892-94.
83. See id. at 893-94; supra note 45 and accompanying text.
85. The court stated: The fact that the FLSA defines an “employee” as “any individual employed by an employer” does not mean that an illegal alien employed by an employer automatically falls within the purview of the
by Patel, it is necessary to return to the principles of Sure-Tan to determine whether illegal aliens are employees as defined by the FLSA.

The Supreme Court in Sure-Tan examined the NLRA's definition of employee, the construction given the term by the agency assigned to administer the Act, and the consistency of that construction with the goals and policies of the NLRA. Like the NLRA, the FLSA defines employee broadly. Nothing in either act's statutory language excludes illegal aliens. Following Sure-Tan, a court should apply the FLSA to illegal aliens unless the Department of Labor (DOL), the agency that administers the FLSA, interprets the Act differently or the inclusion of illegal aliens conflicts with the purposes of the Act.

In its position paper to the district court in Patel, the DOL noted that under the FLSA, "the term 'employee' had been given the 'broadest definition that has ever been included in one act.'" The DOL concluded that the FLSA covers all

**FLSA.** An illegal alien may be a "person" guaranteed equal protection and due process of law by the Fifth and Fourteenth Amendments; however, he may not be an "individual" protected by the . . . FLSA.


86. See 467 U.S. at 891-92; supra notes 39-41 and accompanying text. When the Supreme Court had occasion to consider the NLRA's definition of employee more than 40 years ago, its analysis included not merely common law principles for defining employees, but rather relied primarily on "the history, terms and purposes of the legislation" at issue. NLRB v. Hearst Publications, 322 U.S. 111, 120-24 (1944). The Court held that the "term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." Id. at 129 (footnote omitted). The task of defining employee "has been assigned primarily to the agency created by Congress to administer the Act." Id. at 130. The Court's subsequent analysis of the same term in Sure-Tan reflects these principles.

87. See 29 U.S.C. § 203(e)(1) (1982); supra note 63. Exceptions exist for workers employed by public agencies and for those who work on family farms. 29 U.S.C. § 203(e)(2)-(3) (1982). This definition is as broad as the definition of employee under the NLRA. Cf. supra note 38 and accompanying text.

88. The Court in Sure-Tan deferred to the NLRB's construction of employee in the NLRA. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984). The district court in Patel must have agreed initially that it should defer to the DOL's interpretation. On March 24, 1987 the court issued an order requesting the DOL to answer the question of whether an illegal alien has standing to bring suit under the FLSA. When the DOL responded that aliens could bring suit, the court dropped its deference and disregarded the DOL's position. Patel, 660 F. Supp. at 1529.

89. See Statement, supra note 68, at 3 (quoting United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945)).
workers, including illegal aliens, even in light of the employer sanctions. The DOL's position, therefore, supports inclusion of illegal aliens as employees.

Moreover, the DOL's construction of the term employee does not conflict with, but rather promotes, the FLSA's goals. As noted, the FLSA is designed to promote a strong economy and protect the health, efficiency, and general well-being of workers by preventing employers from exploiting powerless subclasses. Illegal aliens are exactly the type of subclass the FLSA was designed to protect. To prevent their exploitation, and indeed to maintain conditions for all United States workers, courts should find that illegal aliens are employees covered by the Act.

2. Consistency of the IRCA with FLSA Protection of Illegal Aliens

Although illegal aliens are included within the definition of employee under the FLSA, a court may still deny protection if FLSA coverage of illegal aliens would conflict with the new immigration law. The IRCA significantly changes several aspects of United States immigration law. It does not, however, summarily negate precedent and policy justifications for protecting illegal aliens under the FLSA. An analysis of the rela-

90. Id. The DOL stated that the FLSA has “no citizenship, legal status, or other such prerequisites,” and that “the right of an illegal alien, who is otherwise an ‘employee,’ to maintain an action under this statute seems clear.” Id.

The DOL noted that the law distinguishes between aliens seeking entry and those who have entered illegally, granting “additional rights and privileges” to those who have entered this country. Id. at 5 (citing Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984)); see infra note 132. Any illegally employed alien would qualify for these additional rights, according to the DOL, because “virtually any employment in the United States to which the Fair Labor Standards Act applies would constitute sufficient evidence of an ‘entry.’” Statement, supra note 68, at 5.

91. 29 U.S.C. § 202 (1982); see supra note 27.

92. See supra note 28 and accompanying text.

93. See supra note 29 and accompanying text.

94. Examining the potential conflict between applying the labor law to illegal aliens and the requirements of existing immigration laws is the second analytical principle used in Sure-Tan. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-94 (1984).

95. See supra notes 51-57 and accompanying text.

96. For a discussion of whether and to what extent the NLRA protects illegal aliens after the passage of the IRCA, see Note, Remedies for Undocumented Workers Following a Retaliatory Discharge, 24 SAN DIEGO L. REV. 573 (1987).
tionship between the FLSA protection of illegal aliens and the goals of the new immigration law will demonstrate that protecting illegal aliens under the FLSA does not conflict with the IRCA.

a. Defining the IRCA’s Goal

In assessing the IRCA’s impact on illegal aliens’ rights under the FLSA, courts must first define the IRCA’s goals accurately. This definition depends initially on distinguishing between the IRCA’s goal and its method. Courts might incorrectly assume that Congress imposed sanctions merely to end the allegedly irrational policy of extending federal labor law protection to illegal aliens. In Patel, for example, the district court misconstrued the IRCA’s goal in this way because

97. Defining the IRCA’s goal is a principle used in the Sure-Tan analysis. See 467 U.S. at 892-93; supra notes 41-43 and accompanying text. Even apart from the Sure-Tan test, courts must define the goal of the new immigration law correctly before they can determine whether it conflicts with any other laws.

98. See infra note 103 and accompanying text (goal is controlling illegal immigration).

99. See infra note 103 (employer sanctions are a means of controlling illegal immigration). The district court in Patel found a conflict between enforcing the FLSA for illegal aliens and the IRCA’s employer sanctions. Patel v. Sumani Corp., 660 F. Supp. 1528, 1533-34 (N.D. Ala. 1987), appeal docketed, No. 87-7411 (11th Cir. March 28, 1988). The court, however, did not define the IRCA’s goals correctly. Id.; see infra notes 102-06 and accompanying text.

100. In Patel, for example, the district court wrongly held that the IRCA’s goal was to “correct a policy . . . of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country.” 660 F. Supp. at 1534.

101. The Supreme Court has recognized the apparent gap in logic of trying to prevent foreign citizens from working here illegally, yet affording them protection of our labor laws should they enter illegally and find employment. Justice O’Connor, writing for the majority in Sure-Tan, conceded that such a policy seems “counterintuitive.” She found no conflict, however, between applying the NLRA to undocumented aliens and the mandate of the immigration laws. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-93 (1984).

The legislative history of the IRCA gives scant support for interpretation of the IRCA’s goal, although the legality of hiring an illegal alien struck some Senators as irrational. Senator Simpson commented that: “the law of the United States is the most bizarre of any law in the country. It simply means that it is legal to hire an illegal, but it is illegal for the illegal to work. . . . And is that not absurd?” 132 CONG. REC. S16,880 (daily ed. Oct. 17, 1986). Senator Simpson was not alone in his view: “Even Charles Dickens’ character Mr. Bumble, famed for his outraged judgment that ‘the law is a [sic] ass!, would be dismayed by a law that permits employers to hire legally workers who are illegal by their presence in the Nation. We should share his dismay and change our law.” Id. at S16,896 (statement of Sen. Wilson).

Despite the Senators’ comments, the IRCA’s goal was not simply to ra-
it looked only at the sanctions themselves, not at the reasons for imposing them.102

In contrast to the court's conclusion in Patel, the IRCA imposes the method of employer sanctions to achieve the broader goal of controlling illegal immigration103 and thus maintain jobs and working conditions for United States citizens and legally employed aliens.104 Limiting immigration to protect United States workers has long been a fundamental goal of the INA.105 Rather than alter this goal, the employer sanctions introduced by the IRCA are simply a means to control immigration and thereby protect United States workers. The threat of the new sanctions will deter employers from hiring undocumented workers, weakening the "jobs magnet" that attracts illegal im-


103. Upon signing the IRCA into law, President Ronald Reagan noted that its purpose was "to increase enforcement of the immigration laws . . . . The employer sanctions program is the keystone and a major element. It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here." 22 WEEKLY COMP. PRES. DOC. 1534 (November 10, 1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5856-1. Lawmakers generally echoed the President's interpretation of the IRCA's goal. See, e.g., REP. No. 682(I), supra note 48, at 46, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5650 ("Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment."); 132 CONG. REC. H10,587 (daily ed. Oct. 15, 1986) (statement of Rep. Fish) ("I am hopeful that enactment of this legislation will help us regain control of our borders . . . ."). Alan Nelson, Commissioner of the INS, spoke of employer sanctions as "appropriate and necessary as a means of controlling illegal immigration." Hearings on H.R. 3080, supra note 10, at 32.

104. The Judiciary Committee noted that with unemployment at 7%, the United States cannot absorb large numbers of undocumented workers into its economy and population. REP. No. 682(I), supra note 48, at 47, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5651. Moreover, unemployment is higher among minority groups, with whom illegal aliens compete most directly for jobs. Id. But see Borjas, supra note 24, at 387 ("[E]ven if some immigrant groups compete with the nativity-born in the labor market, the numerical impact of this competition is trivial.").

105. See, e.g., Karnuth v. United States, 279 U.S. 231, 243 (1929) (history of restricting immigration "points clearly to the conclusion that one of [the law's] great purposes was to protect American labor against the influx of foreign labor"); Silva v. Secretary of Labor, 518 F.2d 301, 310 (1st Cir. 1975) (immigration statute "has a major, perhaps even dominant, purpose to protect American workers"); Witt v. Secretary of Labor, 397 F. Supp. 673, 677 (D. Me. 1975) (protecting American labor market was one of Congress's primary goals in enacting immigration controls).
migrants. Thus criminalizing employment of illegal aliens is not a goal of immigration reform but rather a method. Courts therefore should not conclude shortsightedly that the IRCA ends all federal labor law protection of illegal aliens.

The IRCA's legislative history reinforces the conclusion that Congress did not intend the Act to eliminate illegal aliens' rights under federal labor laws. Quoting the Sure-Tan rationale for protecting illegal aliens under federal labor laws, the House Judiciary Committee explicitly stated that the IRCA's employer sanctions provisions should not be used "to undermine or diminish in any way labor protections in existing law" for undocumented workers. The IRCA also specifically authorizes appropriations to the DOL's Wage and Hour Division and other enforcement branches to remove the economic incentive for employers to exploit and use such aliens. Given this clear expression of legislative intent, eliminating FLSA protec-

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Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

Id.; see also 132 Cong. Rec. H10,593 (daily ed. Oct. 15, 1986) (statement of Rep. Bryant) ("[S]trong employer sanctions are absolutely essential to turn off the jobs magnet that encourages people to enter the United States illegaly.").


It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended [sic] to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in Sure-Tan, Inc. v. NLRB, application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of alien employees who are not subject to the standard terms of employment."


tions for illegal aliens could not be a goal, much less an intended result, of the IRCA.

b. Increasing the IRCA’s Effectiveness Through FLSA Protection

Rather than undermining the IRCA, applying the FLSA to illegal aliens will help meet the IRCA’s goal of controlling illegal immigration. Courts might assume, as did the district court in Patel, that the right to sue under the FLSA encourages illegal aliens’ entry into the United States and that without that right they will be far less likely to immigrate. This assumption is unfounded. The most dire economic and political necessity compels most illegal immigration. Merely taking away FLSA protection will not change that motivation because workers will still immigrate, even to take low-paying, substandard jobs. Illegal immigration will end only when there are no jobs, not when the jobs are merely unprotected by labor laws.

109. 660 F. Supp. at 1534-35. The court also claimed that since the FLSA was adopted, no lawyer has ever filed suit on behalf of an illegal alien. Id. at 1530. It interprets this alleged fact as further proof that the FLSA cannot apply to illegal aliens, otherwise the “multitalented and hungry legal profession” would surely have taken advantage of another opportunity to litigate. Id. The court ignores the cases in which illegal aliens sued successfully under the FLSA. See cases cited supra note 26.

This finding also contradicts the court’s theory that FLSA protection encourages illegal immigration. If, as the court claimed, “no illegal alien ever entertained the thought that he was entitled to invoke the FLSA,” then that right could not have encouraged many aliens to immigrate illegally. See 660 F. Supp. at 1530.

110. In 1970, 41% of Mexican families lived in “dire poverty,” and the economic gap between the middle-to-upper classes and the “marginalized” population of “subsistence farmers, landless farm workers, and an urban underclass of unemployed and underemployed persons” is growing. M. Morris & A. Mays, supra note 11, at 8-9. This economic imbalance is pushing many Mexicans to cross the border illegally. See Comment, supra note 25, at 1718 (“Undocumented workers are better characterized as economic refugees, rather than opportunists.”).

111. Even with increased enforcement at the border, it is not likely that the INS will be able to stop illegal immigration. One commentator suggests:

Most countries have immigration controls at their borders. Most countries, however, do not have a 2,000 mile permeable border with the very country from which temporary workers come. How many persons would be needed for the U.S. border patrol to control clandestine entry . . . . Would a thousand persons, even assisted by sending devices, be effective? Probably not.

S. Weintraub & S. Ross, supra note 29, at 92; see Comment, supra note 25, at 1742 (“Declining to enforce employment standards for illegal aliens simply does not reduce illegal immigration.”).

112. See supra note 29.
Courts may also assume that jobs can be eliminated simply by imposing employer sanctions. This assumption is equally unfounded. Because of potential problems in enforcing the IRCA, the threat of penalty under employer sanctions may not outweigh the advantages to employers of hiring undocumented workers on substandard terms. Employers who are

113. In Patel the district court reached such a conclusion, finding that 
"[g]iven the criminal and civil sanctions imposed on employers under the IRCA, there is no advantage or incentive for employers to prefer illegal aliens over legal resident workers." Patel v. Sumani Corp., 660 F. Supp. 1528, 1535 (N.D. Ala. 1987), appeal docketed, No. 87-7411 (11th Cir. March 28, 1988) (emphasis added).

114. Twelve states, including California, have passed employer sanctions, but they appear reluctant to enforce them. V. Briggs, supra note 9, at 170-71. There have been no successful prosecutions under California's sanctions law. K. Calavita, California's "Employer Sanctions": The Case of the Disappearing Law 4 (Research Report Series No. 39, 1982).

The American Bar Association (ABA) has said that employer sanctions are an "unworkable, ineffective, expensive and discriminatory" way to control illegal immigration. Immigration Reform and Control Act: Hearings Before the Subcomm. on Immigration and Refugee Policy, Senate Judiciary Comm., 98th Cong., 1st Sess. 302-03 (1983) [hereinafter Immigration Hearings] (statement of David Carliner, representing ABA). Noting that the employer sanctions would require the INS to monitor every employer to investigate, detect and apprehend violators, and also noting the INS' inability to enforce existing immigration laws with its current budget, the ABA doubted whether Congress would ever appropriate enough funds to enable the INS to enforce the sanctions effectively. Id.

Other countries with large populations of illegal immigrant workers have found that employer sanctions do not effectively deter employment of illegal aliens. U.S. Government Accounting Office, Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries 2 (1982). They cite two main reasons:

First, employers either were able to evade responsibility for illegal employment or, once apprehended, were penalized too little to deter such acts. Second, the laws generally were not being effectively enforced because of strict legal constraints on investigations, noncommunication between government agencies, lack of enforcement resolve, and lack of personnel.


The INS has not truly begun enforcing the IRCA's employer sanctions. After the IRCA was enacted on November 6, 1986, a six-month public information period ensued during which the Attorney General was authorized to disseminate information about the sanctions but not to enforce them. 8 U.S.C. § 1324a(i)(1) (Supp. IV 1986). A twelve-month first citation period began May 7, 1987. During this time—until May 6, 1988—the Attorney General may issue citations to persons who violate the employer sanctions but may not "conduct any proceeding, nor issue any order" concerning alleged violations. Id. § 1324a(i)(2). It will be difficult to analyze the enforceability of the new sanctions until the INS begins an all-out enforcement effort.

115. Kutchins and Tweedy, supra note 23, at 366 (without FLSA's sanc-
willing to break the law will therefore continue to hire illegal aliens because they are easy to exploit and because the risk of prosecution under the IRCA may be remote. If courts deny illegal aliens FLSA protection, exploiting illegal aliens will become even easier and employers will have an added incentive to hire them. In contrast, by forcing employers to pay illegal aliens the same wages they pay documented workers, the FLSA reduces that incentive and, as a result, illegal immigration.  

Protecting illegal aliens under the FLSA also promotes the IRCA's goal of maintaining jobs and standards for United States workers. Since Congress passed the FLSA almost fifty years ago, lawmakers have recognized that workers benefit most when they all are protected by wage and hour standards. Once undocumented workers are part of the workforce, the IRCA's goals are best achieved by applying FLSA standards to those illegally employed individuals.

c. Simultaneous Enforcement of FLSA Protection and the IRCA's Employer Sanctions

Although the IRCA and the FLSA share the goal of protecting American workers, their methods appear to conflict: the IRCA makes it illegal to hire undocumented workers, yet the FLSA mandates enforcement of the wage and hour standards even for workers employed illegally. The Sure-Tan decision anticipated this apparent conflict but did not resolve it. Indeed, Sure-Tan implied that federal labor laws may no longer apply to illegal aliens if Congress were to pass legislation making it illegal to hire illegal aliens. Negating Sure-Tan's implications, employers who currently pay undocumented employees minimum wage may start paying them less, and incentive to hire illegal aliens would increase.  

116. The courts have consistently adopted this line of reasoning. See cases cited supra note 45 and accompanying text. The district court in Patel, focusing on a narrow and unsupported definition of the IRCA's goal, apparently did not. See 660 F. Supp. at 1533-34; supra notes 99-100.  
117. See supra note 28 and accompanying text.  
118. See supra notes 27-31 and accompanying text.  
120. Comment, Employment Rights of Undocumented Aliens: Will Congress Clarify or Confuse an Already Troublesome Issue?, 14 CAP. U.L. REV. 431, 452-53 (1985). The Supreme Court in Sure-Tan admitted that its findings were "counterintuitive," and noted that it could not explain why Congress had not criminalized employing illegal aliens. 467 U.S. at 892-93. These statements may have indicated that the Court was not satisfied with its result and that it might have found differently had employer sanctions been in force at the time. Id. Comment, supra, at 452-53.
cation, however, Congress stated plainly that it did not intend for the IRCA to limit the scope of federal labor laws;\textsuperscript{121} the IRCA even includes appropriations to enforce the FLSA.\textsuperscript{122}

Employer sanctions and uniform application of the FLSA therefore can and should be enforced simultaneously. Because both laws direct their penalties toward employer, not employee, activity,\textsuperscript{123} their simultaneous enforcement produces no conflict. Under the IRCA, employers bear the burden of verifying each employee's status.\textsuperscript{124} If they fail to meet this burden, civil fines are imposed.\textsuperscript{125} If they engage in a pattern or practice of hiring unauthorized aliens, they suffer criminal penalties.\textsuperscript{126} The ability of the INS to enforce these provisions logically bears no relation to the ability of the DOL to enforce employer sanctions under the FLSA.

Nor does the illegal status of an alien interfere with enforcing the FLSA. Not only do the FLSA's terms fail to distinguish between legal and illegal employees,\textsuperscript{127} nothing in the language of the IRCA or its legislative history prevents uniform application of the FLSA's wage and hour provisions and awards of back pay to aggrieved workers.\textsuperscript{128} Moreover, inquiry into a worker's citizenship or immigration status is irrelevant to en-

\textsuperscript{121} See supra note 107 and accompanying text.
\textsuperscript{122} See supra note 108 and accompanying text.
\textsuperscript{123} In attempting to control the employers' behavior, Congress implemented a realistic policy. Congress cannot change the harsh economic and political conditions overseas that motivate most illegal immigration. See supra note 11. All it can do is make the United States a less attractive destination. Although the IRCA does not penalize illegal aliens for working, aliens caught working in violation of their immigration status are, of course, subject to deportation. 8 U.S.C. § 1251(a)(2) (1982).
\textsuperscript{124} Id. § 1324a(b) (Supp. IV 1985).
\textsuperscript{125} Id. § 1324a(e)(4).
\textsuperscript{126} Id. § 1324a(f)(1).
\textsuperscript{127} See supra note 61; cases cited supra note 26. In these cases, the courts focused on the amount of time the employees worked and what they were paid. Id. In some cases the courts addressed whether the employer was an "employer" as defined by the FLSA. See, e.g., Donovan v. Burgett Greenhouse's, 100 Lab. Cas. (CCH) ¶ 34,504, at 46,063, 46,066 (D.N.M. 1983). The immigration status of the employees was not an issue.

Similarly, if an employee calls the DOL with a complaint, the DOL will inquire about the number of employees being underpaid, the existence of records, and similar factors. Telephone interview with Lawrence Peterson, Department of Labor Area Director (Nov. 4, 1987). The DOL will not ask the employee his or her immigration status. Id.

\textsuperscript{128} One commentator has drawn a similar conclusion with regard to enforcing the NLRA: "Backpay could be justified because nothing in the committee report or in IRCA directly speaks to the issue of remedies for retaliatory discharges." Note, supra note 96, at 587. The IRCA does truncate
forcing the FLSA. The DOL may initiate investigations against employers, prosecute FLSA violations, and win back pay for workers, even if those workers have been deported. Although in passing the IRCA Congress has "implemented a policy of discouraging the entry and employment in this country of illegal aliens," that policy is not designed to deny illegal aliens rights once they are in this country and working.

Subjecting an employer to dual liability under both the IRCA and the FLSA also doubles the disincentive to hire illegal aliens. Employers would not only face fines and possibly imprisonment for hiring illegal aliens, but they would have to compensate the workers according to FLSA standards.

the NLRA's remedy of reinstatement, however, because it expressly prohibits knowingly hiring an undocumented worker. Id. at 588.

In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (FLSA protections applicable to citizens and aliens whether documented or undocumented).

See supra note 12.

Pitel, 660 F. Supp. at 1531.

Courts recognize a distinction between the rights of excludable and deportable aliens—between those who have not yet entered the country and those who have entered illegally:

[Our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely "on the threshold of initial entry."


Even if illegal aliens are deported, they will still be able to bring suit in federal court on any employment contract they entered into while in the United States. See, e.g., Roberto v. Hartford Fire Ins. Co., 177 F.2d 811, 814 (7th Cir. 1949) (alien legally in United States who had been deported had right to sue in federal court on insurance contract entered into while deportation order was on appeal), cert. denied sub nom. Hartford Fire Ins. Co. v. Roberto, 339 U.S. 940 (1950). Furthermore, if the DOL successfully maintains an action against an illegal alien's employer, that individual may receive back wages even after he or she is deported. See supra note 12.

The FLSA requires any employer who violates its wage and hour provisions, §§ 206 and 207, to pay unpaid minimum wages or overtime compensation, plus an additional equal amount as liquidated damages. 29 U.S.C. § 216(b) (1982). Employees may sue in federal or state court to recover on such a judgment, and the court may award attorney's fees to the plaintiffs. Id. The FLSA also provides for reinstatement in case of retaliatory discharge, id., and imposes civil money penalties for violations of its child labor provisions, 29 U.S.C. § 216(e) (1982).

The FLSA does not extend to independent contractors. See Brock v. Lauritzen, 624 F. Supp. 966, 970 (E.D. Wis. 1985) (holding that migrant farm workers are not independent contractors excluded from FSLA's protection), aff'd sub nom. Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987); Men-
Such circumstances would eviscerate employers’ preference for hiring illegal aliens far more effectively than if employers were subject only to the IRCA sanctions, and with that change would come a corresponding drop in illegal immigration.

Even after the IRCA, analysis of the issues raised in Sure Tan shows that extending FLSA protections to illegal aliens does not conflict with imposing employer sanctions. Instead, the two policies complement each other. Consequently, allowing illegal aliens to bring suit under the FLSA is not only still justified by the Sure-Tan principles but is a humane and effective means of controlling immigration and maintaining standards for all individuals employed in the United States work force.

Conclusion

By imposing civil and criminal sanctions on the knowing employment of illegal aliens, the IRCA appears to have undercut the justification for allowing illegal aliens to bring suit under the FLSA. Despite a Fifth Circuit decision holding that the FLSA still protects illegal aliens, a district court held recently that such protection conflicts with the IRCA. Applying the principles for extending federal labor law protection to illegal aliens established in Sure-Tan, Inc. v. NLRB, however, a court should conclude that continued FLSA protection of illegal aliens does not conflict with the new employer sanctions.

The IRCA’s goal is not merely to criminalize employment of illegal aliens. Rather, it uses sanctions as a method to achieve the broader goal of controlling immigration and protecting jobs and working conditions for United States workers. Simultaneous enforcement of the immigration and labor laws promotes these goals. Enforcing the FLSA makes it more difficult for employers to exploit illegal aliens and therefore weakens employers’ incentive to hire them. This in turn reduces job opportunities for illegal aliens and minimizes their incentive to immigrate. Imposing uniform standards throughout the labor market also prevents competition from an underpaid and ex-
exploited subclass of workers and thereby helps maintain standards for all workers. Continued application of the FLSA to illegal aliens, therefore, augments rather than conflicts with the new immigration law by helping to control immigration and protect jobs and working conditions in the United States labor market.

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