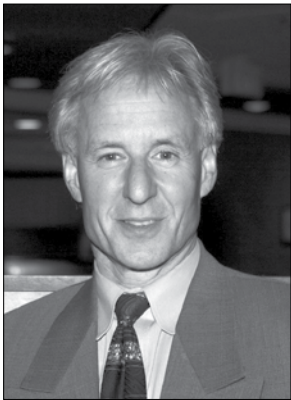


The Challenge of Undocumented Workers

by Jon Gice, CPCU, ARM



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Not an Incidental Exposure

Claim operations are confronted with the reality of an ever-growing number of claims involving undocumented workers. While it is a violation of federal law to hire an illegal alien, it is estimated that there are millions of undocumented workers currently employed in the United States. A significant number are often hired to perform dangerous tasks. During a recent five-year period, the rate of workplace fatalities for foreign-born workers increased 43 percent compared to a 5 percent decline among U.S. citizens. Undocumented workers are either poorly trained or not provided with any safety orientation, due to cultural or language barriers.

The Federal Immigration Reform & Control Act was enacted by Congress in 1986. The law made it illegal to hire a worker who is either unlawfully living in the United States or unlawfully authorized to work in the United States.

Employers are mandated under this law to verify the legal status of every hire by completing an I-9 form with the federal government. Employers face civil fines and may be subject to criminal prosecution if found guilty of failing to verify legal status or knowingly hiring an illegal alien.

But even for diligent employers, this process of verification isn't enough. It is estimated that millions of illegal immigrants have purchased some combination of a counterfeit Social Security card, driver's license, work visa, green card and/or birth certificate. These documents are very authentic looking, so only an expert review can identify them as counterfeit. Many of these documents

are acquired as part of the price paid to be smuggled into the U.S., or are easily acquired through vendors operating on the street and/or flea markets.

Other employers are not so diligent in their hiring efforts, either through lack of controls or deliberate avoidance of the law. These customers may fail to complete the I-9 form and, in the worst scenario, pay the worker cash rather than through a formal payroll process. Such customers are not only in violation of federal law, but are also potentially guilty of payroll fraud in the eyes of their workers compensation insurance carrier.

Despite the illegality, the hiring of undocumented workers continues unabated in many industries. One author has taken the position that the problem isn't illegal workers, the problem is illegal employers. *Fortune* magazine estimates that up to 40 percent of all new U.S. home construction is completed by illegal workers.¹ A recent study cited in that same article concluded that 36 percent of insulation workers, 29 percent of roofers and 28 percent of drywall workers are undocumented workers.

Beyond the difficulty of finding people to perform jobs that U.S. citizens may be unwilling to perform, another incentive for hiring undocumented workers is the opportunity to pay a lower wage to this worker. The lower labor cost provides a perverse economic reality. It has been suggested that the price of a new home in Florida would increase by as much as 40 percent if these lower-paid workers were eliminated from the home building industry.

Continued on page 2

The Challenge of Undocumented Workers

Continued from page 1

Challenges of Undocumented Workers

An undocumented worker is not likely to report a soft tissue injury for fear of losing his or her job. It is the undocumented worker who falls from a rooftop or is crushed by a piece of equipment whose claim is reported. It is common for a claim involving traumatic brain injury, a severe burn or a spinal cord injury to easily exceed \$1 million.

Attempts to deny these claims based on arguments that these workers are illegal have largely failed. For example, a key decision in Connecticut was rendered in *Dowling v Slotnik*, 712 A.2d 386, 409. The court held that the legislature intended to include illegal aliens in the group of persons who, in order to obtain compensation for work-related injuries, are not only eligible, but also requested to invoke the remedy provided by the Workers Compensation Act. When confronted with a claim that involves the issue of an illegal alien or undocumented worker, it is essential that the appropriate state or jurisdiction's laws, court decision, and rules are carefully considered in all claim decisions. There are several comprehensive documents available to member companies of the American Insurance Association (AIA), www.aiadc.org, and other organizations. But the law in this area is not static, and no one document should be relied on in considering our duties and obligations under the law or the benefits that are allowable under law. To that end, contact local defense counsel to assure compliance with the state's current law on these issues.

An undocumented worker who sustains a catastrophic injury presents additional costs that are only occasionally faced in claims involving U.S. citizens. Interpreter service is the most common and perhaps obvious additional cost, but the undocumented worker also presents the following potential additional claim costs:

- **Transportation.**
Family members, if they reside in the U.S., often do not hold a valid driver's

license or own a vehicle, so expensive medical transportation services become necessary.

- **Housing.**
Family members often do not reside in the U.S., resulting in the catastrophically injured worker having no viable U.S. residence to return to that can be modified to meet the worker's needs.
- **Agency attendant care.**
Family members often do not reside in the U.S., producing increased costs through the use of professional agencies in meeting the ongoing nursing and home care needs of the undocumented worker.
- **Return to work is not an option.**
Because the undocumented worker can not be legally reemployed, a return-to-work effort may be deemed a violation of the Federal Immigration Law.

Claim Handling Suggested Solutions

The following two actions are suggested to meet the challenges of each claim involving a known or suspected undocumented worker:

- **Social Security number.**
A claim where the injured worker can not produce a Social Security number is easy to identify as involving an undocumented worker. A claim where a Social Security number is presented is more complicated, as the number may be counterfeit. Any claim that is suspected to involve an illegal worker must be investigated to confirm legal status through contacting a local Social Security administration office. The Social Security office will require the employer's TIN number, so be prepared before making the call. If the employer refuses to participate in the investigation, this refusal may strongly suggest that the worker is undocumented. The Social Security office is the easiest way to verify the number, and there is no charge.
- **Benefit Limitations.**
Once it is found that the worker is



truly an undocumented worker, claim handling needs to focus on expediting maximum medical improvement. Additional care must be taken in the calculation of average weekly wage. For example, some states, such as Florida, define wages as: "... earned and reported for federal income tax purposes on the job where the employee is injured" Obtaining a wage statement from the employer is a critical step in the investigation of a claim involving an undocumented worker, as real wages, using the definition of what is reported for federal tax purposes, may total zero. Local law may permit or require only a minimum compensation rate be paid in such cases. State law may also limit the other benefits the claimant might otherwise be entitled to receive, such as vocational rehabilitation benefits, since rehiring the undocumented worker in any new position violates federal law!

Handling claims that involve an undocumented worker are challenging, and from all indications, these claims will only continue to grow in number. A claim handler needs to understand the challenge and find ways to best handle the claim to the most optimal conclusion. ■

Endnote

1. Birger, J. and Mero, J. "Immigration reform: Building costs could soar." *Fortune* 12 Jun. 06, Vol. 153, No. 11. Accessed 9/9/06: www.money.cnn.com.